

September 19, 2018

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Ms. Teresa Moran, Manager of Hearings
San Francisco MTA Hearing Section
San Francisco Municipal Transportation Agency
11 South Van Ness Avenue
San Francisco, California 94103

Re: Statement of Appeal and Request for Hearing; Neutron Holdings, Inc., dba Lime
Powered Scooter Share Permit Pilot Program Application—Notice of Permit Denial

Dear Ms. Moran:

Morrison & Foerster LLP represents Neutron Holdings, Inc. dba Lime (“Lime”), in connection with its application for a Powered Scooter Share Permit (the “Permit Application”) under the City of San Francisco’s (“City”) Power Scooter Share Pilot Program (“Pilot Program”). The San Francisco Municipal Transportation Agency (“SFMTA”) issued a Notice of Denial to Lime on August 30, 2018. Because the SFMTA procedures failed to meet constitutional due process requirements, Lime requests a hearing and review of the decision pursuant to Section 916(e)(1) of the Transportation Code (the “Code”).

SFMTA’s denial of Lime’s Permit Application was improper for the following reasons:

- (1) Significant bias on the part of the SFMTA and its Director of Transportation precluded a neutral decision-making process;
- (2) Applicants were not given notice of the evaluation criteria prior to the application deadline, which were developed without public input and are impermissibly vague, thus making it impossible to carry out a fair and transparent competitive process;

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- (3) Unclear and inconsistent application of evaluation criteria led to arbitrary and inexplicable results, including evaluation ratings that directly contradicted application materials and baseless judgments that disfavored Lime and similarly-situated companies; and
- (4) The evaluation criteria do not align with the requirements of the Code that created the Pilot Program, and therefore are contrary to law.

As set forth below, the Pilot Program application and evaluation process were fundamentally flawed. Any neutral review of the SFMTA process will lead to the unavoidable conclusion that the Notice of Denial of Lime's permit application is unsupported by the evidence in the record, and the SFMTA failed to proceed in the manner required by law.

Lime wishes to be a collaborative partner with the SFMTA and the City as a participant in the Pilot Program. To that end, Lime requests a fair and neutral review of its permit application pursuant to the permit appeals process.

I. Factual Background

Founded by two UC Berkeley graduates in 2017, Lime is a San Francisco-based smart mobility provider, offering a fleet of shared bikes, electric bikes, and electric scooters that complement existing public transportation. Lime serves over 90 markets across six countries, and provides services to more than ten markets in the Bay Area, including Oakland, San Jose, Burlingame, and Walnut Creek. Drawing from its deep experience in multiple regions and markets, Lime has worked hard to establish a reputation as a nimble and responsive actor in working with communities and local governments.

In March 2018, Lime partnered with community groups to host shared scooter popup events in San Francisco. Prior to each of the events, Lime consulted with the Supervisors of each District where the events were held. The goal of the popups was to gauge users' reaction, as well as to begin a community outreach program in well-known "transit deserts." Lime expanded its service beyond popups in April, as its competitors began large scale operations. Lime was compelled to do so in light of the competitive landscape in the micro-mobility space, and Lime's desire to serve the residents of its hometown. Despite Lime's good faith efforts to educate users and the public about safe and responsible riding, some users parked scooters inappropriately in the public right-of-way. In addition, nonusers vandalized, moved, or stole Lime's scooters and deposited them in various areas throughout the City. When Lime scooters were retrieved by the Department of Public Works, Lime declined to raise its legal defenses and paid the related assessments in order to preserve a collaborative relationship with the City.

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In late March 2018, despite Lime's good faith efforts and prior collaboration with community leaders, SFMTA Director Reiskin accused Lime of "violating [SFMTA's] understanding" regarding Lime's operations, and demonstrating "bad faith." Lime responded to SFMTA's concerns in writing. In April 2018, City Attorney Dennis Herrera sought information from Lime regarding plans to stem the user and nonuser conduct that his office viewed as a public nuisance. Mr. Herrera provided multiple recommendations to Lime and two other operators on operational changes that he believed would minimize interference with the public right-of-way and improve user compliance. Lime responded to this letter and advised that many of Mr. Herrera's recommendations were already in place; Lime agreed to implement several of his other recommendations and explore the feasibility of others. Apparently satisfied with Lime's good faith actions in response to his letter, Mr. Herrera informed Lime that he would take no further action with respect to Lime's operations. During the SFMTA hearings on the proposed Pilot Program, Lime publicly voiced its support for shared mobility regulation, as it has done in the many markets in which it operates. Following the enactment of the Pilot Program regulation in early May 2018, Lime ceased all operations in San Francisco, and submitted its application for the Pilot Program on June 7, 2018.

Lime's application described an innovative, field-tested program tailored to the SFMTA's stated application criteria. As part of its efforts to provide alternative mobility solutions to underserved communities, Lime submitted the only application supported by a transportation engineering study. Lime's study, from the firm Sam Schwartz Engineering DPC, identified the most effective deployment and rebalancing approach, as well as a 500-user study of parking and riding behavior. Lime's low-income program, already successfully implemented in multiple markets across the country, allows low-income individuals, including those without smart phones and without banks (*i.e.*, without debit or credit cards) to access the service. Lime's application further described authentic community engagement and culturally and linguistically-appropriate outreach, including its ongoing partnerships with established community organizations for workforce development, helmet distribution, and rider education. Lime reaffirmed its commitment to working with City leadership, including SFMTA, on every aspect of the Pilot Program. As set out in its application, Lime remains willing to partner with the City on a locking-tethering mechanism, enhanced user incentives for non-compliance, further development of 311 alerts to enhance response time on parking and rider issues, photo-verified parking monitoring, and emerging technology on terrain-specific rider alerts (*e.g.*, automated alerts if users are on sidewalks).

SFMTA denied Lime's application on August 30, 2018. SFMTA based its denial on unfounded conclusions, including claims that Lime demonstrated insufficient commitment to free helmet distribution and did not provide sufficient information about planned user noncompliance penalties. Despite Lime's inclusion of a low-income and geographic

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redistribution program that was far more developed than any other applicant, SFMTA claimed that the application did not provide enough detail regarding equitable access.

Inexplicably, SFMTA also deemed Lime's community outreach plans insufficient, despite application materials showing a robust and established outreach plan. SFMTA's conclusion on this point is particularly undeserved. Lime has a deep commitment to working collaboratively with the communities it serves, and has more historical outreach activity than any other applicant. SFMTA wholly ignored the fact that Lime's application was one of only two applicants to include letters of support from numerous community partners. SFMTA assessed Lime's community engagement approach as merely "Fair," despite acknowledging that Lime's plans went "beyond what many applicants propose."

SFMTA awarded a permit to Scoot, a company who has never operated a shared scooter service. In fact, Scoot's application proposed pricing that is double Lime's and included *no* discounts for low-income customers as required by the Code. This fact alone should have disqualified Scoot from the outset. Scoot's proposal further acknowledged that it was not currently compliant with the Code's requirements regarding insurance, privacy policies, and its user agreement. SFMTA avoided evaluation of each these factors.

SFMTA also awarded a permit to Skip, a company who, at the time of the application, had operated a shared scooter service in only one other North American city for just four months, and who admittedly fails to meet the Code's requirements for insurance, multilingual accessibility, and privacy policies. Skip had only asked SFMTA for a permit to operate 350-500 scooters, but was inexplicably granted a permit to operate 625 scooters during the first six months of the Pilot Program. SFMTA's issuance of a permit in excess of Skip's request suggests a motive to exclude other qualified operators such as Lime.

Lime now seeks to remedy SFMTA's arbitrary and capricious denial of Lime's Pilot Program application through this appeal.

II. Unlawful Bias Jeopardized the Pilot Program Process From the Outset.

Lime was unfairly labeled as a "bad actor" by SFMTA Director and Board Members before this process began. That unmistakable bias continued through the permit process, and the evidence establishes that the SFMTA sought to punish Lime by ensuring that it did not receive a Pilot Program permit.

Under California law, a decision maker, such as the SFMTA Director of Transportation, is disqualified from participating in a quasi-judicial proceeding where (s)he has demonstrated an "unacceptable probability of actual bias" or prejudgment of adjudicative facts. (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1022). The entity challenging the biased decision need not prove actual bias—an unacceptable probability of

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bias results in a violation of the due process right to fair procedure. Allowing a biased decision-maker to participate in the decision is enough to invalidate the decision. *Id.*

The evidence establishing SFMTA's bias against Lime is indisputable. The current Director of Transportation, Edward Reiskin, has stated his bias against Lime in writing—falsely accusing the Company of “bad faith” and of “violating” an “understanding” with the SFMTA in late March. That bias was compounded by negative comments made by members of the SFMTA Board of Directors at a public hearing, well before SFMTA unfairly rejected Lime's application, and indeed before the permit application form was developed.

At the May 1, 2018 SFMTA Board of Directors' meeting when the Board considered Resolution No. 180619-093 (later adopted on June 19, 2018), which amended the Code and established the Pilot Program, the Board discussed whether the SFMTA could amend the Code to punish Lime and two other powered scooter operators that operated within the City prior to the City's adoption of any governing regulations by excluding such operators from the process. Notably, there was no local law or regulation in effect at that time that prohibited Lime's scooter sharing services. California law expressly allowed electric scooters, and Lime followed that law—the only law that governed scooters when Lime first placed its scooters on the streets of San Francisco.

Director Reiskin sought input from the Board “on changes to fine amounts [and] on explicit consideration of past behavior.” (May 1, 2018 Hearing Recording of SFMTA's Board of Director's Meeting (“Hearing Recording”) (testimony provided at 1:47:35 of the video recording.) Yet, Lime's past conduct was entirely legal, and City officials knew it.

SFMTA Board Member Art Torres made his bias clear: “Well these people are bad actors, number one... So, I guess it goes back to what we said earlier in terms of past bad behavior. ***We ought not to be rewarding people who have stuck their fingers at us*** when dealing with cease and desist orders. Those of us on this panel, I know, believe in the rule of law. What are we going to do to that...?” (Hearing Recording at 1:51:33-1:52:09.).

In addition, in an email from SFMTA Board Member Lee Hsu to Board Secretary Roberta Boomer dated May 2, 2018, Member Hsu states, in part, “I wanted to convey my opinion that it'd ***send a compelling message if the first permit for e-scooters is granted to a company that did not jump the gun*** after being explicitly asked not to...as I see it, the three that deployed early already overplayed their hand out of a desire to gain a first-mover advantage, so ***it's up to us now to set a precedent for future purposes that the best-mover advantage is to work with us*** and not ignore us.”

That same e-mail states that Member Hsu “found this statement from [winning applicant Skip] persuasive: ‘As you know, [Skip] is the only company that has respected the

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rules][...].”¹ (May 2, 2018 email from L. Hsu to R. Boomer Re: FW: Object to Proposed SFMTA Amendment to e-Scooter Share Permit Plan.) At Board Member Hsu’s direction, that e-mail was forwarded to Director Reiskin, Tom MacGuire and Miriam Sorrell. Mr. MacGuire and Ms. Sorrell report to Director Reiskin and served on the application review committee. The message the staff received from the Board was clear.

The SFMTA Board reaffirmed Director Reiskin’s existing bias and drove the SFMTA toward a predetermined outcome in violation of basic principles of fairness. SFMTA staff reports to a Director who is appointed by the SFMTA Board. The SFMTA staff decision-making process was deliberately infected by these negative public comments by Board Members and the Director concerning Lime’s application, which sent the message that Lime’s efforts to work with the City in response to Mr. Herrera’s letter were to be ignored, and Lime should be punished for being an early operator. As a result, the permit application process was biased from its inception.

The SFMTA Director and its staff (including the Director of Transportation) must be precluded from issuing any decision on the permit application, now or in the future. That bias also prevents any SFMTA staff from serving as the hearing officer in this matter. (*See Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750 [disapproving review by a hearing officer appointed by the same department of the City that issued the citation in dispute].)

III. The Permit Application and Evaluation Process Was Unfair and Arbitrary.

This inherent bias is also reflected in the permit application through which SFMTA required permit applicants to compete for the available permits. The permit application includes a series of questions for applicants to address, but SFMTA included neither evaluation criteria nor instructions as to the weighting of any criteria. Applicants had no way of knowing at the time they prepared their applications what the ground rules were for evaluation. This was the first step in unfair process that—unsurprisingly—led to an arbitrary result. (*See Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 221 [stating the truism that governmental agencies must evaluate proposals in a reasonable way on the basis of specified criteria timely made known to all proposers and the public].)

SFMTA staff, faced with an unclear permit application form, applied new evaluation criteria, unknown to any applicant and unrelated to either the original questions posed by the application or the legal requirements set forth in the Code.² The memorandum dated August

¹ Skip also set itself apart on the second page of its permit application by offering a \$500,000 donation to “specific capital projects” and advocacy groups with a promise to “engage with SFMTA and District Supervisors, and street safety advocates to best allocate these funds[.]”

² Lime believes that SFMTA has failed to provide records in response to Public Records Act requests, and that a more complete record may reveal additional criteria currently unknown to Lime or any other applicant. Lime

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28, 2018 from Director Reiskin to Powered Scooter Share Program Staff and Interested Parties (the “Policy Directive”), released two days before the permit decisions, lists the apparent criteria on which SFMTA based its rejection of Lime’s application.

The Policy Directive describes six principles SFMTA used in evaluating applications: (1) Safety; (2) Disabled Access; (3) Equitable Access; (4) Collaboration; (5) Labor; and (6) Sustainability. The Policy Directive further states that in addition to these six, the SFMTA considered an applicant’s experience in operating and maintaining shared mobility systems, as well as the applicant’s history (and the history of their scooter users) in complying with local government regulations.

The Policy Directive purports to align with San Francisco’s Guiding Principles for Emerging Mobility Services and Technology, but SFMTA’s Policy Directive notably ignores three critical elements of those principles: Accountability (*e.g.*, data sharing capability), Congestion (*e.g.*, impacts on congestion and reliability), and Financial Impact (*e.g.*, capacity to generate a positive financial impact). More importantly, the “Guiding Principles” bear little resemblance to the Code, which sets forth thirteen specific criteria that a permit applicant must meet in order to be granted a permit. Code § 916(a)(2).

The Policy Directive does not include *any* criteria that would enable the evaluation committee to assess the following Code requirements for all permit applicants:

- Evidence of scooter capability to provide real-time location data to the SFMTA.
- Evidence of adequate insurance as determined by the City’s Risk Manager.
- Payment of a public property repair and maintenance endowment of \$10,000.
- Reimbursement to the City for any costs incurred to address or abate any violations of the Program requirements.
- Submission of a maintenance, operations, cleaning, disposal, and repair plan for the Powered Scooters subject to approval the SFMTA and Public Works.
- Submission of a low-income user plan that waives any applicable scooter deposit and offers an affordable and discounted cash payment option to any user with an income level at or below 200% of the federal poverty guidelines.
- Provision of a multilingual website, 311 call center, and mobile application customer interface, available 24 hours a day, seven days a week.

also believes that these withheld records contain further evidence of a biased and flawed process, as described in detail below.

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- Submission on of a Privacy Policy consistent with guidelines issued by the Director of Transportation that safeguards users' personal, financial, and travel information and usage.
- Submission of aggregated (anonymous) user demographic data to the SFMTA on at least a monthly basis.
- Evidence of an electronic payment system that is compliant with the Payment Card Industry Data Security Standards (PCI DSS).

These omissions are significant. The arbitrary evaluation criteria benefitted Skip and Scoot and harmed Lime. As just one example, by improperly omitting price as an evaluation factor, the process ignored the fact that Scoot's price is *twice* that of other applicants, including Lime, and that Scoot has simply declined to offer any discounted cash payment option to low-income users, as required by law.

SFMTA's rejection of Lime's permit was arbitrary, as it was based on a set of evaluation criteria that were developed in secret, unavailable to applicants, unrelated to stated application questions, and misaligned with the legal criteria set forth in the Code.

IV. SFMTA's Bias Influenced the Arbitrary, Inconsistent Application of Evaluation Criteria.

As set forth below, SFMTA has failed to provide a full response to Lime's Public Records Act and Sunshine Ordinance requests for documents related to the Pilot Program process. But based on information available to date, SFMTA's application scoring was either arbitrary, or biased against Lime, or both. The following subsections provide a nonexhaustive demonstration of SFMTA scoring bias.

1. Safety

The stated evaluation criteria in the category of "Safety" include "Strategies to promote and distribute helmets should result in helmet use by riders." The permit application did not include any request for applicants to describe strategies for ensuring or encouraging helmet use.

- Scoot received the highest "Strong" rating in this category, despite Scoot's statement that its scooters "may not feature these [helmet lockbox] components." Rather, it stated that it was "working with our production partners" to try and develop this feature. SFMTA's favorable rating was based on a tentative promise to develop a product feature at some point in the future.

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- Skip received a “Fair” rating in this category, despite SFMTA’s acknowledgment that the yet-to-be-developed program to provide helmets and caribiners “may not reach all users.”
- Lime received a “Poor” rating in this category, despite the fact that it offers the exact same helmet give-away program as Skip, as well as field staff that provide helmets to users. SFMTA’s valuation rankings rewarded Scoot and Skip for a promise of what they may or may not do in the future, and gave Lime no credit for its current helmet distribution program in multiple markets.

With respect to education and training strategies, the criteria stated that “strategies to educate and train users should result in safe operations of scooters by riders. Lime received a “Poor” ranking in this category apparently because SFMTA concluded that Lime decided “not to require a driver’s license.” That is false. As stated in its application, Lime’s in-app enrollment process expressly requires users to affirm that they have a valid driver’s license before a scooter can be unlocked.

2. Disabled Access

A stated evaluation criterion in the category of Disabled Access emphasizes the importance of locking or tethering technology to prevent scooters from blocking sidewalks.

- All of the proposals rated as “Strong” included a “lock-to” component, although Skip and Scoot acknowledge that they are currently exploring options and looking at a “prototype.”
- Lime’s proposal received only a “Fair” rating despite it also including a “lock-to” component and willingness to implement a component at the City’s request on the same timeline as other applicants. Again, applicants who received “Strong” ratings only simply included an unverified commitment to implementing such a technology.

3. Equitable Access

A stated evaluation criteria in the category of Equitable Access focuses on pricing mechanisms that provide service to low-income residents.

- Skip received a “Strong” rating, presumably because of its promise to provide a 50% discount to CalFresh, CARE, and Lifeline recipients, as well as its offer of cash payment at pop-up events and distribution centers. However, Skip’s website fails to inform its users of its cash payment options.

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- Scoot received a “Poor” rating, although it should have been disqualified for ignoring the legally-required low-income discount requirement. Further, Scoot’s pricing is twice that of Lime’s. Despite the fact that Scoot’s application states that its cash payment system remains under development, SFMTA praised Scoot for its cash option and detailed description of the mechanism for participation.
- Lime received a “Poor” rating. Lime’s proposal demonstrates *identical* features as Skip—it provides 50% discount to CalFresh, CARE, and Lifeline recipients. Lime’s proposal also offers cash payment at 30 identifiable physical locations, as well as options for users without smartphones. The only difference between Lime and Skip’s proposal in this area is that Lime can provide evidence of successful low-income programs with these features in other markets, while Skip only offers an aspirational statement.
- In addition to the evaluation of helmet distribution and “lock-to” technology, the SFMTA evaluation of low-income pricing is yet another instance where the operators receiving permits indicated only their promise to take further action, compared to Lime’s similar commitments or proven efforts.

4. Experience and Qualification

Finally, and as a result of the bias discussed in Part II of this letter, SFMTA purported to evaluate applications based on the criteria of “Experience and Qualification.” The stated factors considered were (1) experience in operating scooters in San Francisco and elsewhere; (2) history by applicant and its users of compliance with City regulations; and (3) demonstration of ability to comply with terms of the scooter share permit. These stated factors were not applied as written, and were instead used improperly to punish Lime.

- Scoot received a “Strong” rating. Yet it has never operated a shared scooter service and has no previous experience with the type of scooter contemplated by the Pilot Program.
- Skip also received a “Strong” rating. Its proposal provided its experience in Washington DC alone. SFMTA stated the ranking was based on Skip’s experience “operating a permitted shared scooter service within a North American City.”
- Lime received a “Poor” rating. SFMTA stated that “SFMTA negatively evaluates [Lime’s] history of violations, which indicates that past strategies have been insufficient to ensure user compliance with laws.” Unlike Skip, Lime received no credit for its successful and collaborative operations in other markets. Lime operates in over 90 markets in six countries. The flawed evaluation also failed to acknowledge that

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Lime documented and (confidentially) shared user compliance data to SFMTA, providing survey information on parking compliance and sidewalk riding.

SFMTA's reached an unsubstantiated conclusion that "[Lime's] history of violations ... indicates that past strategies have been insufficient to ensure user compliance with laws." SFMTA did not describe any evidence of user behavior on which it based its evaluation. Rather, as shown by SFMTA Director and Board comments noted in Part II of this letter, SFMTA is punishing Lime for its earlier operation in San Francisco, despite the compliance of those operations with California law.

V. SFMTA Has Refused to Produce Records that Are Essential to Lime's Appeal.

Lime has requested copies of individual scoresheets, scoring notes, due diligence materials, application drafts, and evaluation comments, as well as other internal SFMTA records available under the Sunshine Ordinance and Public Records Act, to explore the potential bias of the SFMTA Board, Director, and evaluation committee. Incredibly, the City has stated that no such records exist and that the only scoresheet is the "SFMTA Application Assessment" that shows the composite scoring in tabular form. This is difficult to imagine. If true, SFMTA's response suggests either that the records were (improperly) destroyed, or that the entire process was conducted orally. If the process was conducted purely orally, without any written deliberations, it would reflect a highly atypical administrative process and suggests a motive to mask preexisting bias.

Lime demands access to all records of the scoring process sufficiently in advance of any hearing on its appeal, and reserves the right to augment any aspect of this appeal to include information derived from responses to the public records requests the City is so far refusing to provide.

Lime intends to pursue its rights under San Francisco's Sunshine Ordinance and the California Public Records Act on an expedited basis in parallel to this appeal, as Lime's rights to an appeal have been hindered by SFMTA's refusal to provide records that likely will support Lime's claims. Under established Supreme Court precedent, denying interested parties an opportunity to scrutinize government actions and protest them prior to final action is a violation of the California Public Records Act. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1073–1074).

VI. Conclusion

All Pilot Program applicants have the right to compete on a level playing field. SFMTA's process denied Lime this right. The permit application process was unclear and internally inconsistent with the legal requirements governing the Pilot Program. As a result, the

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evaluation committee was vested with nearly unlimited discretion and did not have the tools to conduct a fair process. The results were both biased and arbitrary.

This appeals process provides an opportunity to right this wrong. Lime has established its qualifications to participate in the Pilot Program. As described in this letter, the SFMTA evaluation committee improperly denied Lime its chance to serve the people of San Francisco.

We request that this appeal be set for hearing before an unbiased hearing officer, and request a decision finding Lime met all legal requirements for the issuance of a Pilot Program permit. Alternatively, we request that the hearing officer invalidate the Pilot Program application and evaluation process, and order the SFMTA to develop a process that meets all legal requirements.

Sincerely,

Morrison & Foerster LLP



Zane O. Gresham



William F. Tarantino

cc: SFMTA Board of Directors
Dennis Herrera, City Attorney