BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online Enabled Transportation Services.	Rulemaking 12-12-011 (Filed December 20, 2012)

MOTION OF HOPSKIPDRIVE, INC., LYFT, INC., UBER TECHNOLOGIES, INC., AND ZUM SERVICES, INC. FOR CLARIFICATION OF SECOND AMENDED PHASE III. C. SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER

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June 30, 2020

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Pursuant to Rule 11.1 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure ("RPP" or "Rules"), HopSkipDrive, Inc. ("HopSkipDrive"), Lyft, Inc. ("Lyft"), Uber Technologies, Inc. ("Uber"), and Zum Services, Inc. ("Zum") (collectively, "Moving TNCs") move for clarification of the June 9, 2020 *Second Amended Phase III. C. Scoping Memo and Ruling of Assigned Commissioner* ("Scoping Memo"). The Moving TNCs seek clarification that the Scoping Memo's statement that drivers who use TNC platforms "are presumed to be employees" does not reflect any determination that AB 5 applies to drivers that use the TNCs' platforms. Under controlling law, no such finding was or could be made by the Assigned Commissioner, or even by the full Commission. Nor does any such presumption exists in AB 5. Unless the Commission issues the requested clarification, there is a substantial risk that the Scoping Memo will be misinterpreted, and that the ultimate decision in this proceeding will be based on an erroneous legal foundation.[1]

I. INTRODUCTION

The Scoping Memo acknowledges the significant dispute and uncertainty regarding the applicability of AB 5 to TNCs, including a pending lawsuit against Lyft and Uber brought by the Attorney General and certain City Attorneys—the entities the Legislature authorized to enforce the statute—alleging that drivers who use Lyft and Uber platforms are employees under AB 5.

[1] The Moving TNCs reserve all rights to file and serve comments by the applicable deadlines set forth in the Scoping Memo.

Lyft and Uber strongly contest that allegation. There are also serious questions concerning the constitutionality of AB 5, which are being litigated in multiple federal courts. And in November 2020, voters will consider a ballot measure that would "exclude all app-based drivers from AB 5" while guaranteeing those drivers numerous benefits and protections.[2]

The Scoping Memo, nonetheless, asserts:

> "As a matter of California constitutional law, the Commission is tasked with enforcing *those laws applicable to the entities* subject to its jurisdiction until such time as a higher court, the legislature, or the public through their right to vote, determine otherwise. Thus, *for now, TNC drivers are presumed to be employees*."

Scoping Memo at 5 (emphases added). The Commission should clarify that this statement is not a determination that drivers who use the TNCs' platforms are employees or that they may be presumed to be employees. Such a determination would be legal error for many reasons.

First, the test laid out for employment classification in AB 5 (the "ABC test")—and its burden-shifting presumption—does not even apply until a finding has been made that the purported employer is a "hiring entity" that is obtaining services *from* workers—a finding that has never been made in this proceeding or any other with respect to the Moving TNCs. If that issue were litigated, each of the Moving TNCs would present substantial evidence that it is not a "hiring entity." The Moving TNCs provide a service *to* drivers, not vice versa. Drivers are *users of* the Moving TNCs' platforms, not *workers for TNCs*. Moreover, even if it were found that TNCs are hiring entities with respect to drivers who use their platforms, AB 5's "presumption" would then shift the *burden of proof* to TNCs to prove that drivers are not employees—a burden that they would address in a specific challenge to the employment status of specific workers associated with a specific company. The statute does not permit the Commission or any other agency to simply assume that every company is the "employer" of any person with whom it does business or to take action on that basis. AB 5 merely shifts the burden of proof in any enforcement proceeding once a company is shown to be a hiring entity.

Second, AB 5 does not charge the Commission with the authority to make any "decision" or "finding" regarding the applicability of AB 5 to TNCs or the employment status of a driver

[2] Scoping Memo at pp. 4-5. The *Protect App-Based Drivers & Services Act* would create a new framework for app-based drivers that protects the right to work independently and requires app-based rideshare and delivery network companies to offer new protections and benefits for drivers.

under AB 5. That authority is given to courts of competent jurisdiction in actions brought by the Attorney General and identified city attorneys. And even for matters that are within the Commission's jurisdiction, a *single* Commissioner cannot resolve a disputed issue of substantive law.

Third, even if the Commission were empowered to consider employment issues, the employment status of drivers is not within the scope of this proceeding as defined in D.13-09-045. The full Commission confirmed, in fact, that employment status is outside the scope of these proceedings. Thus, the Commission's rules, as well as due process, require at a minimum that TNCs be given notice and an opportunity to submit evidence on the applicability of AB 5 to each TNC in an appropriately scoped fact-finding proceeding. Such fact-finding has not occurred (and will not occur) in this quasi-legislative proceeding. To the extent that the Commission premises further action on any purported presumption or determination of drivers' employment status, such action would be procedurally and substantively invalid.

Section 3 of the Scoping Memo identifies two AB 5-related questions for further comments under the heading "Application of AB 5 to TNCs."[3] To the extent that these questions are based on the erroneous presumption that AB 5 applies to all TNCs and drivers who use their platforms, these questions rest on an improper legal foundation. For example, the questions referring to workers' compensation[4] could be misconstrued to assume a determination that TNCs must provide workers' compensation coverage for drivers.[5] Again, this cannot be correct for all the reasons stated above.

The assigned Commissioner should clarify that the Scoping Memo did not, and could not, make any finding regarding whether drivers are employees. Clarification is warranted also to avoid any confusion created by a June 2 letter from the Director of Consumer Protection and Enforcement Division ("CPED") reminding TNCs that "AB-5 becomes effective for workers' compensation requirements effective July 1." Finally, clarification would correct erroneous

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[3] Scoping Memo § 3.2.

[4] Scoping Memo § 3.2(A).

[5] *See, e.g.,* "California regulators say Uber, Lyft drivers are employees," S.F. Chronicle (June 10, 2010), *available at* https://www.sfchronicle.com/business/article/California-regulators-say-Uber-Lyft-drivers-are-15330779.php ("The one practical change due to reclassification the order discussed is that the companies must provide drivers with workers' compensation coverage, either from a third-party insurer or by self-insuring.").

reports by the press and the public that the Scoping Memo constitutes a "decision" or "finding" of the Commission that drivers who use TNC platforms are employees.[6]

Accordingly, the Moving TNCs respectfully request that the assigned Commissioner issue the following clarifications regarding the Scoping Memo:

1. That the Scoping Memo is not a decision or ruling that AB 5 applies to TNCs or drivers who use their platforms;

2. That the scope of this quasi-legislative proceeding does not include the employment status of drivers using TNCs' platforms;

3. That any determination that TNC drivers are presumed to be employees would be in error because there are no pending proceedings at the Commission in which the burden of proof needs to be assigned and there has been no determination or finding that any TNC, much less all TNCs, are hiring entities;

4. That the rulemaking questions in Sections 3.2(A) and 3.2(B) of the Scoping Memo are not within the scope of this proceeding, to the extent they are based on a presumption that all TNC drivers are employees; and

5. That the Scoping Memo does not reach any decision or finding that any individual TNC is obligated to provide workers' compensation coverage for drivers.

II. ANY "PRESUMPTION" REGARDING EMPLOYMENT STATUS IS LEGAL ERROR

The Scoping Memo states that "for now, TNC drivers are presumed to be employees."[7] The Moving TNCs ask the Commission to clarify this statement does not mean that drivers who use one or more of the Moving TNCs' platforms are employees until proven otherwise. Such a determination would be legally erroneous for several reasons.

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[6] *See, e.g.,* "Uber, Lyft Drivers Are Employees, Says California Regulator," N.Y. Times (June 11, 2020), *available at* https://www.nytimes.com/reuters/2020/06/11/business/11reuters-california-economy.html (referring to Scoping Memo as "decision" by Commission, "determining that drivers . . . would be considered employees going forward"); "California PUC rules that Uber, Lyft drivers are employees," Sacramento Business Journal (June 11, 2020), *available at* https://www.bizjournals.com/sacramento/news/2020/06/11/california-puc-uber-lyft-drivers-employees.html (referring to "decision" and "order"); "Uber and Lyft drivers are employees, California regulatory agency finds," NBC News (June 10, 2020), *available at* https://www.nbcnews.com/tech/tech-news/uber-lyft-drivers-are-employees-california-regulatory-agency-finds-n1229616.

[7] Scoping Memo at p. 5.

First, the predicate for applying the ABC test has not been established. AB 5 provides that "a person *providing labor or services* for remuneration shall be considered an employee rather than an independent contractor unless the *hiring entity* demonstrates" that each of the ABC test's conditions are satisfied.[8] Thus, AB 5's test applies only after it is proven that the worker provides labor or services to a company that has hired him or her to do so.[9] But no finding has been made in these proceedings—or any other—that drivers are providing labor services *to TNCs* and that any TNC is acting as a "hiring entity" for purposes of AB 5.

When the question of whether a particular TNC is a hiring entity is litigated in one or more of the numerous pending cases raising the classification issue, the TNCs will present substantial evidence to prove that they provide a service *to* drivers, not vice versa. Drivers are users of the match-making service that TNCs provide, and drivers provide transportation services *to riders*, not to TNCs. For example, Lyft's Terms of Service explain the nature of drivers' relationship with Lyft: "Drivers and Riders are collectively referred to herein as 'Users,' and the driving services provided by Drivers to Riders shall be referred to herein as 'Rideshare Services.'"[10] Similarly, HopSkipDrive's Terms of Use provide that "HopSkipDrive is a marketplace platform which enables Users to connect, arrange for, and schedule rides for minors and other eligible riders, and provide Services directly to other Users."[11] Finally, Zum's Terms of Service state that "the service is merely a technology platform," and "Zumers are not employees of Zum but rather provide the transportation or care giving services … directly to you."[12]

Notably, labor and employment agencies who have considered the question have generally supported the Moving TNCs' position. As one labor regulator concluded, a driver is "a user of the technology developed and provided by Lyft, for which he [or she] pays a fee."[13] A driver "does

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[8] Lab. Code § 2750.3(a)(1) (emphasis added).

[9] *See Brashear v. Magnet Media, Inc.,* 2018 WL 6242169, at *4 (C.D. Cal. Sept. 19, 2018) (noting that "the 'ABC test' applies to the relationship between 'the hiring entity' and the worker" and finding that the plaintiff failed to "show that [the defendant] was the hiring entity"); *see also Sebago v. Boston Cab Dispatch, Inc*., 471 Mass. 321, 329 (2015) (explaining, under similar Massachusetts law, that the "threshold question" is whether workers "provide[] services" to alleged employer).

[10] https://www.lyft.com/terms.

[11] https://www.hopskipdrive.com/terms-of-use.

[12] https://www.ridezum.com/terms-condition.html.

[13] *Ebenhoe v. Lyft, Inc*., Hearing No. 16002409MD (Wisc. Labor and Indus. Rev. Comm'n Jan. 20, 2017).

not perform services for Lyft"; rather, "Lyft simply provides a technology platform for drivers and passengers to use to connect with each other."[14] The U.S. Department of Labor explained in another proceeding that a virtual platform like the Moving TNCs "does not receive services from service providers [drivers], but empowers service providers [drivers] to provide services to end-market consumers [riders]."[15]

Economic evidence would support a similar finding as to drivers who use one or more of the Moving TNCs' platforms. The consensus of economists studying platform business like TNCs is that individuals who find work on a platform are users *of* the platform's service rather than workers *for* the platform.[16] After all, TNCs' platforms are broadly available to any driver who satisfies the eligibility criteria. And drivers have the flexibility to drive when, where, and how they want. These features are consistent with treating drivers as customers who use TNCs' services rather than workers who provide services to TNCs. Businesses generally accept an unlimited number of *customers* and give them the freedom to shop when they like. Businesses don't invite unlimited numbers of *employees* to show up if and when it works for them.[17]

Second, even where it applies, the ABC test does not mean that the Commission can demand that all TNCs treat drivers who use their platforms as employees without a specific evidentiary fact-finding process. The ABC test merely assigns the *burden of proof* in a dispute in a judicial or other adjudicatory-type proceeding where employment status is at issue.[18] The statute

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[14] *Id.*

[15] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter at 7 (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf.

[16] *See, e.g.,* Marshall W. Van Alstyne, et al., "Pipelines, Platforms, and the New Rules of Strategy," Harvard Business Review, April 2016, *available at* https://hbr.org/2016/04/pipelines-platforms-and-the-new-rules-of-strategy (last visited Mar. 27, 2020) ("Pipeline firms organize their internal labor and resources to create value by optimizing an entire chain of product activities, from materials sourcing to sales and service. Platforms create value by facilitating interactions between external producers and consumers.").

[17] Even if any court finds that one or more of the Moving TNCs is a hiring entity, the ABC test only applies if AB 5 is constitutional. As mentioned above, the constitutionality of AB 5 is being litigated in federal court. *See Olson v. Becerra*, No. 2:19-cv-10956-DMG-RAO (C.D. Cal.); *Olson v. State of California*, No. 20-55267 (9th Cir.). Moreover, the ABC test does not apply if any one of a number of exemptions is met. For example, one exemption applies to "the relationship between a referral agency and a service provider." Cal. Lab. Code § 2750.3(g). Another exempts a business entity engaging in a "bona fide business-to-business contracting relationship." *Id*. § 2750.3(e). Each of these involves numerous factors that require evidence to adjudicate.

[18] *Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289, 313 (2018).

"places the *burden* on the hirer to establish that the worker is an independent contractor by showing each of parts A, B, and C."[19] In other words, the ABC test does not mean that a regulator can simply presume that every company is the employer of anyone who provides services to the company, much less impose obligations on an entire industry based on such a presumption. The question of employment status still has to be litigated on a company-by-company basis.

The Scoping Memo's reference to the "presumption" of employment in AB 5 is thus a fundamental legal error. The ABC test merely shifts the burden of proof in a proceeding alleging that a group of workers are employees of a specific company—and, even then, only after it is first proven that the workers are "providing labor or services" to the company as a "hiring entity."[20] No such proceeding has been commenced here, and no such finding has been made anywhere. Accordingly, there is no basis for the Commission to presume that all TNC drivers are employees.

III. THE SCOPING MEMO DOES NOT AND CANNOT INCLUDE A RULING THAT DRIVERS ARE EMPLOYEES OF TNCS

A. The Scoping Memo Does Not And Cannot Make Findings of Fact or Conclusions of Law

On its face, the Scoping Memo does nothing more than expand the set of issues to be considered in this proceeding. The Scoping Memo adds two new AB 5-related questions to the scope of issues and invites comments on those questions.[21] The Scoping Memo does not and cannot—under the Public Utilities Code and the Rules of Practice and Procedure[22]—contain a finding or determination that drivers are presumptively employees of TNCs. To the extent that the Commission premises further action on any such purported finding or determination, such action would be procedurally invalid.

First, the Scoping Memo was issued by the Assigned Commissioner, who may issue *recommendations* to the full Commission but lacks the authority to *resolve* a contested issue of substantive law. The Public Utilities Code gives the Commission, as a collective body, the power

[19] *Garcia v. Border Transportation Grp., LLC*, 28 Cal. App. 5th 558, 572 (2018) (emphasis added) (internal quotation marks omitted).

[20] Lab. Code § 2750.3(a)(1).

[21] *See* Scoping Memo §§ 3.2(A)-(B) & 4.

[22] RPP 1.3(g) & 7.3.

to regulate utilities;[23] a single Commissioner's authority is limited to administering oaths, certifying official acts, and issuing subpoenas,[24] as well as issuing rulings governing procedure, such as a scoping memo.[25] The determination of whether AB 5 applies to drivers who use one or more of the Moving TNCs' platforms is not a procedural issue, but a matter of substantive law that could be decided only by the full Commission, and only in a decision that includes the required findings of fact and conclusions of law—if addressed within the Commission's process at all.[26]

Second, the point of a scoping memo is to define the issues *to be* decided, not to resolve them.[27] Indeed, the "Rulings" section of the Scoping Memo addresses the scope of the issues to be considered prospectively, as well as other matters addressed in Pub. Util. Code § 1701.4(b) and Article 8 of the Rules. With respect to scope, the "Rulings" section simply states that "[t]he scope of the issues for Phase III. C. of this proceeding is as stated in Section [3] [sic]."[28]

Third, this quasi-legislative proceeding[29] is not suited to making the factual determinations that would be required to reach a conclusion on whether AB 5 applies to drivers who use an individual TNC's platform. A quasi-legislative proceeding "establish[es] policy or rules … affecting *a class of regulated entities*."[30] Quasi-legislative proceedings involve only informal *legislative* fact finding, typically through comments, workshops, and the like. As the Commission has itself recognized, "the California Supreme Court has stated '… the "facts" "found" [in quasi-legislative proceedings] must themselves be viewed as quasi-legislative in nature.'"[31] The Commission has thus concluded that "[l]egislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and

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[23] Pub. Util. Code § 310.

[24] Pub. Util. Code § 311(a).

[25] RPP 7.3. Other provisions of the RPP address additional procedural matters that can be resolved by the assigned Commissioner.

[26] Pub. Util. Code § 311(d).

[27] Pub. Util. Code § 1701.1(c); *see also* RPP 1.3(g) & 7.3.

[28] Scoping Memo at p. 18. We assume that the Scoping Memo meant to refer to Section 2.

[29] *See* Scoping Memo at 15.

[30] RPP 1.3(e) (emphasis added).

[31] Order Modifying and Denying Applications for Rehearing of Decision 98-10-057, D.99-07-047, 1999 WL 703040, at *8 (Cal. P.U.C. July 22, 1999) (quoting *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 278 n.12 (1994)).

discretion."[32] This proceeding should not be used to make the kind of evidentiary fact-finding about a specific company that would be required to determine how AB 5 applies to a TNC's business.

For these reasons, the assigned Commissioner should clarify that the Scoping Memo is not a proposed or final decision, ruling, or determination on AB 5's application to TNC drivers.

B. Employment Issues Are Not Within the Scope of This Proceeding Per Decision 13-09-045

In addition, any action premised on a purported finding or determination in the Scoping Memo that drivers are employees of TNCs would be invalid because it is beyond the scope of the proceeding.

Consistent with the scope of its mandate and its longstanding policy, the Commission decided, in Decision 13-09-045, that this rulemaking would not address driver classification issues. In April 2013, the then-assigned Commissioner and the assigned ALJ raised the question of whether the relationship between drivers and TNCs should be included in the scope of the proceeding.[33] After interested parties had an opportunity to comment, the full Commission decided that the employment question should not be part of the proceeding: "We will not, however, meddle into their business model by forcing TNCs to designate each driver an employee or contractor. Again, our role is to protect public safety, not to dictate the business models of these companies."[34] This was entirely consistent with the Commission's approach to this issue for decades.[35]

The scope of this proceeding has, thus, excluded employment issues for more than six years. Notably, the Amended Phase III. C. Scoping Memo issued in October 2019—after the

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[32] *Id*.

[33] Assigned Commissioner and Administrative Law Judge's Scoping Memo and Ruling, § 5.1(d) (April 2, 2013).

[34] Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, D.13-09-045, at p. 63 (Cal. P.U.C. Sept. 19, 2013) (hereinafter D.13-09-045).

[35] *See Prime Time Shuttle*, 67 CPUC 2d 437 (Aug. 2, 1996) (explaining that the Commission does not regulate a company's "preference for employee or nonemployee drivers" and that it would permit the courts or agencies responsible for labor law issues to decide the classification of drivers); Amended Brief Amicus Curiae of the Public Utilities Commission of the State of California, *Kairy v. Supershuttle Int'l., Inc*., No. 10-16150 (9th Cir. Dec. 30, 2010), ECF. No. 29-2 ("CPUC Amicus Br.") ("Labor laws . . . are not administered by the Commission and therefore, whether or not a driver is an employee or independent-contractor is not a matter addressed by the Commission.").

passage of AB 5—did not seek to include the applicability of AB 5 or the employment status of drivers within the scope of issues. The December 19, 2019 ALJ Ruling sought comments from TNCs relating to AB 5 merely "[i]n order that the Commission be fully informed."[36] The ALJ Ruling on its face did not change the scope of Phase III. C, and in any event, the ALJ is not authorized to change the scope of the proceeding.[37]

Hence, on June 9, 2020, when the Scoping Memo was issued, the applicability of AB 5 to drivers who use TNCs' platforms was not within the scope of this proceeding. As such, the Scoping Memo could not resolve that issue.[38] The Scoping Memo itself acknowledges that even the two limited AB 5-related questions mentioned are *new*, and the Memo sets forth July 24 and August 7 deadlines for opening and reply comments on those issues.[39]

Because TNCs have never been put on notice that the employment status of drivers is within the scope of the proceeding, the Commission's rules and fundamental principles of due process preclude any potential determination of the employment status of drivers. TNCs have a right to notice and an opportunity to be heard—the process that applies in an adjudicatory proceeding—before any such determination is made.[40] Indeed, the Commission's own rules require an adjudicatory proceeding before finding a regulated entity in violation of the law.[41]

The Moving TNCs also respectfully submit that the assigned Commissioner lacks authority to add employment-related issues to the scope of this proceeding even prospectively, as that would

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[36] ALJ Ruling at p. 2.

[37] *See* RPP 7.3 (scoping memo is issued by assigned commissioner).

[38] *See*, *e.g*., Decision Denying TURN's Petition for Modification of Decision 19-02-019, D.20-02-008, 2020 WL 823375, at p. 8-9 (Cal. P.U.C. Feb. 6, 2020) (because "the issue of Diablo Canyon license renewal was not in the scope of this proceeding … the Commission did not consider, discuss, or 'decide' this issue.").

[39] Scoping Memo § 3.2 & 4.

[40] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (explaining the "root requirement" of the Due Process Clause); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–29 (1982) (due process prevents States from denying potential litigants the use of established adjudicatory procedures when it results in the denial of their opportunity to be heard).

[41] *See Pac. Gas & Elec. Co. v. Pub. Utilities Com.*, 237 Cal. App. 4th 812, 859 (2015); Rule 1.3(a) (defining "adjudicatory" proceedings to be those that investigate "possible violations of any provision of statutory law or order or rule of the Commission"); *Saleeby v. State Bar*, 39 Cal. 3d 547, 560 (1985) (agency exercises adjudicatory function when its "action affecting an individual is determined by facts peculiar to the individual case").

contradict the structure of AB 5 and the full Commission's decision in D.13-09-045.[42] Even the full Commission could not do so without, at a minimum, issuing a new preliminary scoping memo that would allow interested parties, among other things, an opportunity to comment and object to any proposal to expand the scope of a proceeding.[43] But, as explained below, it would be inappropriate for the Commission to wade into these complex issues so far outside its expertise and mandate.

C. AB 5 Does Not Charge the CPUC With Authority to Adjudicate Drivers' Classification

The Moving TNCs respectfully submit that consideration of employment matters by the Commission would be inappropriate because AB 5's enforcement mechanism does not charge the Commission with the authority to adjudicate drivers' classification. The Legislature instead gave the Attorney General and certain local officials responsibility for enforcing AB 5. Cal. Lab. Code § 2750.3(j). And those officials *are* currently seeking to enforce the statute against Lyft and Uber in a pending action. *See State of California v. Uber Technologies, Inc. and Lyft, Inc.*, No. CGC-20-584402 (Cal. Super. Ct.). Notably, even these agencies are not merely "presuming" that drivers are employees—they are asking a court to make that determination on a factual record. The only agency to which AB 5 refers is the Industrial Welfare Commission; the statute does not mention any role for this Commission.

While the Commission has authority to adjudicate whether a TNC has complied with the Public Utilities Code, it does not have general authority to adjudicate whether a TNC is in compliance with any and all other laws. That distinction is particularly important in the context of AB 5, which, as noted, expressly establishes a judicial process to determine the applicability of AB 5. To be sure, if a court were to determine that a TNC has violated the law, and if the Commission determines that such violation is relevant to its regulation of the TNC, the Commission can take appropriate action. But the employment status of drivers who use TNCs' platforms would not be such a matter, even if the courts were to conclusively determine that AB 5 applies. The Commission's mission is "to protect consumers and ensure the provision of safe,

[42] Pub. Util. Code § 1708 (authorizing only the Commission to "rescind, alter, or amend any order or decision by it").

[43] *Cf.* RPP 5.2, 6.2 (permitting parties to object to the preliminary scope of proceeding as set forth in an order instituting investigation or rulemaking).

reliable utility service and infrastructure at reasonable rates, with a commitment to environmental enhancement and a healthy California economy."[44] The Commission's TNC regulations focus on the Commission's mandate: consumer protection, safety and protection of the environment.[45] That mission does not turn on whether drivers are classified as employees or independent contractors. On the contrary, the Code and Commission rules include provisions governing TNCs that apply regardless of whether the "driver is an employee or an independent contractor of the transportation network company."[46] It would thus be inappropriate for the Commission to expand the scope of these proceedings to consider the employment status of drivers.

IV. AB 5-RELATED RULEMAKING QUESTIONS

The Scoping Memo adds two new rulemaking questions regarding the "Application of AB 5 to TNCs" to the scope of issues and invites comments on those questions:

> "A. In addition to the certificate of workers' compensation coverage issued by an admitted insurer or a certification of consent to self-insure issued by the Director of Industrial Relations, what additional requirements should the Commission impose on TNCs?
>
> B. Should the Commission amend General Order 157-E in light of the enactment of AB 5 and the modification of the Labor Code?"[47]

While the Moving TNCs reserve their right to submit comments on these questions, they respectfully request clarification of the questions because they can be read as premised on an erroneous presumption that drivers are employees. For the reasons discussed above, such a

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[44] https://www.cpuc.ca.gov/aboutus.

[45] *See*, *e.g.*, Pub. Util. Code § 5433 (imposing minimum insurance requirements); Pub. Util. Code § 5437 (prohibiting disclosure of a passenger's personal information); Pub. Util. Code § 5440(c) (directing the commission to initiate regulations to prevent discrimination against persons with disabilities); Pub. Util. Code §§ 5440(g) and (j) (establishing an intent to make California a national leader in the availability of transportation options for the disabled and specifically the wheelchair-bound); Pub. Util. Code § 5445.1 (requiring specific information regarding the TNC driver to be made available to the passengers through the TNC's online-enabled application/platform); Pub. Util. Code § 5445.2 (requiring TNC drivers to undergo background check and barring individuals with certain criminal records from providing services as a TNC driver); Pub. Util. Code § 5450 (establishing a program to promote and incentivize environmentally-friendly options).

[46] Pub. Util. Code §§ 5444, 5445.2(c)(1); *accord, e.g.*, General Order 157-E, Rule 11.03-2 ("A TNC may not contract with, employ, or retain drivers currently registered on the Department of Justice National Sex Offender Public Web site; or convicted of … a violent felony"); Rule 11.03-3 ("A TNC may not contract with, employ, or retain persons convicted of any of the following offenses within the previous seven years").

[47] *See* Scoping Memo §§ 3.2(A)-(B) & 4.

presumption would be legally incorrect. Further, no decision or finding that drivers are employees has been made and any proceedings premised on such a finding would be procedurally and substantively invalid.

Thus, to the extent the questions in Sections 3.2(A) and 3.2(B) of the Scoping Memo are based on a presumption that all drivers who use TNCs' platforms are employees, they rest on an improper legal foundation. Accordingly, there is no basis for including these questions within the scope of this proceeding.

V. WORKER'S COMPENSATION INSURANCE

As noted above, one of the rulemaking questions in the Scoping Memo makes a reference to potential workers' compensation insurance for drivers.[48] The assigned Commissioner should clarify that she did not reach—nor is authorized to reach—any decision or finding that all TNCs are obligated to provide workers' compensation insurance for drivers. As already noted, there has been no finding by anyone that drivers who use a TNC's platform are employees, a scoping memo cannot make such a finding, and the scope of this proceeding has long excluded such questions. There is no applicable presumption here that drivers are employees of the Moving TNCs because there has been no finding that any of these TNCs is a hiring entity that is obtaining services *from* drivers and this is not the kind of proceeding in which a presumption shifting the burden of proof would apply. There is thus no basis for any suggestion that TNCs have to provide workers' compensation insurance for drivers.

VI. REQUESTED CLARIFICATION

In light of the harm that would result from the legal errors in the Scoping Memo, the Moving TNCs respectfully request the assigned Commissioner to clarify that she has not reached any decision or finding that AB 5 applies to TNCs' relationships with drivers. Specifically, the Moving TNCs respectfully request that the assigned Commissioner issue a ruling clarifying the following issues:

1. That the Scoping Memo is not a decision or ruling that AB 5 applies to TNCs or drivers who use their platforms;

[48] *See* Scoping Memo § 3.2(A).

2. That the scope of this quasi-legislative proceeding does not include the employment status of drivers using TNCs' platforms;

3. That a determination that drivers are presumed to be employees would be in error because there are no pending proceedings at the Commission in which the burden of proof needs to be assigned and there has been no determination or finding that any TNC, much less all TNCs, are hiring entities;

4. That the rulemaking questions in Sections 3.2(A) and 3.2(B) of the Scoping Memo are not within the scope of this proceeding, to the extent they are based on a presumption that all TNC drivers are employees; and

5. That the Scoping Memo does not reach any decision or finding that any individual TNC is obligated to provide workers' compensation coverage for drivers.

DATED: June 30, 2020

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