BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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

RASIER-CA, LLC'S APPEAL OF THE PRESIDING OFFICER'S DECISION FINDING RASIER-CA, LLC, IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, AND THAT RASIER-CA, LLC'S, LICENSE TO OPERATE SHOULD BE SUSPENDED FOR FAILURE TO COMPLY WITH COMMISSION DECISION 13-09-045

Robert Maguire
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: *robmaguire@dwt.com*

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Attorneys for Rasier-CA, LLC

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I. INTRODUCTION

On August 13, 2015, Rasier-CA, LLC ("Rasier-CA") produced all remaining data described by the July 15, 2015 Presiding Officer's Decision ("POD").[1] Although Rasier-CA believes it raised legitimate concerns over the reporting requirements and disagrees with the POD's determination, the Presiding Officer has ruled and Rasier-CA has complied.[2] Rasier-CA will cooperate with the Commission and the Safety and Enforcement Division ("SED") to resolve this issue and ensure the Commission has data useful to fulfilling its regulatory mission.

Throughout this dispute, Rasier-CA has sought to protect its lawful rights while balancing the Commission's lawful regulatory interests. It is important for all permit-holders to have the ability to raise legitimate concerns and defenses, particularly where public safety is not involved, without fear of punishment for doing so. To that end, although Rasier-CA has strictly

[1] Rulemaking ("R.") 12-12-011, Presiding Officer's Decision Finding Rasier-CA, LLC, in Contempt, in Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, and that Rasier-CA, LLC's License to Operate Should be Suspended for Failure to Comply with Commission Decision 13-09-045 ("POD"), July 15, 2015, at 55.

[2] A declaration reflecting Rasier-CA's strict compliance is attached to this Appeal. *See* August 14, 2015 Declaration of Krishna Juvvadi in Support of Rasier-CA, LLC's Appeal of the POD. The POD is silent on the means by which Rasier-CA should notify the Presiding Officer it has complied, or the preferred mechanism for making its strict compliance part of the record. If the Presiding Officer or Commission prefers, Rasier-CA is amenable to filing a motion to set aside submission and reopen the record to demonstrate strict compliance.

complied, it files this appeal ("Appeal") of the POD to correct factual and legal errors, to protect its due process rights, and to address the penalties imposed.

As set forth in detail below, the POD erred by:

- Relying on a criminal statute to impose fines when the Commission has acknowledged it lacks jurisdiction to prosecute criminal matters;[3]
- Holding Rasier-CA in contempt and fining it more than $1.42 million (with continuing daily fines of $5,000) for never having producing certain trip-level data when the record clearly establishes that the data has already been produced;[4]
- Taking judicial notice of a variety of documents, accepting the truth of arguments contained in those documents, months after the evidentiary hearing and post-hearing briefing ended and without providing Rasier-CA meaningful notice and opportunity to respond, and drawing erroneous and incomplete conclusions from those documents;[5]
- Adopting a new and erroneous interpretation of the reporting requirement seeking the number and percentage of "requests for accessible vehicles," by expanding the requirement to include allegations of "requests for any vehicle" by an individual with a disability;[6]
- Improperly piercing the corporate veil between Rasier-CA and its parent when the issue was never raised in the proceedings and relying on hearsay and improper judicial notice of newspaper articles and other documents to do so;[7]
- Relying on erroneous arguments and documents that were introduced through improper judicial notice months after the evidentiary hearing and briefing

[3] *See* Section IV(E)(2) discussing Public Utility Code Section 5411.
[4] *See* Section IV(B)(2) discussing Reporting Requirement (j) and the March 6, 2015 production of the "correct concomitant data."
[5] *See* Sections IV(A)(1) and IV(A)(2) discussing improper judicial notice and erroneous conclusions.
[6] *See* Section IV(B)(1) discussing Reporting Requirement (g).
[7] *See* Section IV(E)(3)(c)(2) discussing alter ego and corporate veil issues.

ended to conclude that Rasier-CA's data is not entitled to trade secret protection when the issue was undisputed during throughout the proceedings;[8]

- Precluding Rasier-CA from building a full factual record demonstrating good faith and substantial compliance, recognized defenses in these proceedings, by denying Rasier-CA's right to cross-examination that would have tested whether Rasier-CA's substantial earlier productions were sufficient to allow the Commission to receive meaningful reports satisfying its policy needs;[9]
- Failing to recognize Rasier-CA's assertion of legal arguments well-grounded in the law, including in long-standing Commission precedent, cannot constitute violations of Rule 1.1 merely because the Presiding Officer disagreed with Rasier-CA's analysis;[10] and
- Imposing a disproportionate fine more than 240 times greater than the fine approved by the Commission in settling Lyft, Inc.'s parallel Order to Show Cause proceedings.[11]

In light of Rasier-CA's strict compliance, and based on the POD's errors of law and fact as set forth in more detail below, Rasier-CA respectfully requests the Commission set aside the POD and the penalties imposed.

II. BACKGROUND

A. The TNC Decision's Data Production Requirements Are Evolving and Productions May Be Subject to Public Disclosure

The background of this matter demonstrates that Rasier-CA acted in good faith. The TNC data requirements at issue have evolved over time and Rasier-CA has tried to comply with those requirements in a manner that would be helpful to the Commission.

[8] *See* Section IV(C)(1)(a) discussing Rasier-CA's trade secrets.
[9] *See* Sections IV(C)(2) and IV(F) discussing substantial compliance and Due Process.
[10] *See* Section IV(C) discussing Rasier-CA's legal arguments.
[11] *See* Section IV(E)(4) discussing disproportionate fine.

In September 2013, the Commission issued a decision that established regulations governing the "nascent" industry of Transportation Network Company ("TNC") services. In doing so, the Commission stated that it did not want "to stifle innovation and the provision of new services that consumers want, but rather to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of these business models."[12] In the TNC Decision, the Commission adopted certain data production requests, including:

(1) Reporting Requirement (f), driver training information;

(2) Reporting Requirement (g), a report on accessible vehicles;

(3) Reporting Requirement (j), data for every single trip requested, including the date, time, start and end zip codes, miles traveled, and amounts paid for every single trip requested and accepted;

(4) Reporting Requirement (k), reports about problems with drivers; and

(5) Reporting Requirement (l), a report "detailing the average and mean number of hours and miles each TNC driver spent driving for the TNC."[13]

Of particular relevance, the TNC Decision states "TNCs shall file these reports confidentially ***unless*** in Phase II of this decision ***we require public reporting*** from [transportation charter party] companies as well."[14] Thus, under the TNC Decision, there is no clear guarantee that information a TNC believes is confidential will remain confidential if produced to the Commission. The regulatory framework may continue to evolve through Phase II and through rulemaking in other dockets.[15]

The history of the data reporting requirements is similarly one of evolution, with changes to the data reporting requirements occurring without an opportunity for public comment.

[12] Decision ("D.") 13-09-045 ("TNC Decision") at 3, 7.
[13] *Id*. at 27, 30-33.
[14] D.13-09-045 at 33 (emphasis added).
[15] *See, e.g.*, R.14-11-001, Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the Public Records Act, filed Nov. 6, 2014.

For example, the Commission's original proposed decision, issued on July 30, 2013, did not request the information sought in the final version of Reporting Requirement (j).[16] Rather, it sought only "a report detailing rides that were requested, but not accepted," and "the location and zip code of such rides as well as the number."[17] Rasier-CA's parent corporation, Uber Technologies, Inc. ("UTI"), responded that even this level of data could require producing confidential and protected trade secret information and questioned the Commission's need for this level of data.[18] Although the Commission repeatedly revised what became Reporting Requirement (j), it did not give UTI or any other participant another opportunity to comment.[19] The Commission settled on its fifth revision to Reporting Requirement (j), issued the day before the Commission adopted the TNC Decision.[20]

Although Rasier-CA had no opportunity to comment on the final revision to Reporting Requirement (j), it understood, as the Safety and Enforcement Division ("SED") recognized, "the regulations of the TNCs [are] still evolving" and "[t]here is still more to the rulemaking process."[21] More specifically, it recognized the SED's acknowledgement that some safety and regulatory requirements in the TNC Decision "lack[] clarity" and the SED mentioned "possible modifications to reporting requirements" including "how to effectively collect data on driving violations" and "[r]equests submitted via VoiceOver."[22] As the Commission knows, the TNC Decision required the Commission to "convene a workshop one year after the issuance of this decision to hear from all stakeholders on the impacts of this new mode of transportation and the accompanying regulations."[23] The SED agreed revisions to this still-evolving regulatory regime

[16] Rasier/Ex. 9, July 30, 2013 Proposed Decision of Commissioner Peevey at 26-27(i).
[17] *Id.*
[18] Rasier/Ex. 10, Verified Statement of Rasier-CA, LLC Responding To Order To Show Cause In Rulemaking 12-12-011 at 6; App. 3 at 6; Rasier/Ex. 10, App. A to App. 3 ("App. 3A") ¶¶ 3-4.
[19] Rasier/Ex. 10 at 6; Rasier/Ex. 10, App. 3 at 8; Rasier/Ex. 10 ¶ 4.
[20] Rasier/Ex. 10 at 6; Rasier/Ex. 10, App. 3 at 8; Rasier/Ex. 10 ¶ 4.
[21] SED/Kao, RT: 377:13-16.
[22] Rasier/Ex. 10 at 4 (quoting SED Report En Banc Transp. Network Cos. Rules & Reg., Nov. 4, 2014, at 3, 14). Presumably these statements implicate Reporting Requirements (g) and (k) concerning accessible vehicles and driver problems, two of the reports at issue in this proceeding.
[23] D.13-09-045 at 33.

should occur in a public forum that allows for public comment, for "some balancing of interests between industry and regulators," and for "an opportunity for the commission to consider the rights of the industry."[24] Rasier-CA filed a motion seeking to include consideration of the reporting requirements in Phase II.[25] In short, before these proceedings, Rasier-CA reasonably anticipated the Commission's data needs were continuing to evolve and that it was possible to reach compromises with staff concerning the interpretation of the Reporting Requirements.

B. Rasier-CA Acted in Good Faith and Attempted to Provide Data Allowing the SED to Provide Meaningful Analysis and Reports to the Commission

Before the September 19, 2014, data production deadline, Rasier-CA informed the SED that some data reporting requirements sought confidential and trade secret information.[26] Rasier-CA offered the SED aggregate information, believing it ***more*** user-friendly, responsive, and meaningful, as well as a solution to the problem of waiving trade secret protections.[27]

Rasier-CA submitted the following aggregate data, which the SED understood was "intended to be responsive to this requirement [(j)]:"[28]

- a report indicating the percentage of rides accepted out of the number requested, excluding customer cancels, by zip code, which the SED agreed allowed staff to compare whether in one zip code there is a lesser acceptance rate than another zip code;[29]
- a report showing the percentage, to the nearest one hundredth of a percent, of Rasier-CA's business in each zip code where it operated in California, which the SED recognized would, when considered with the previous report, allow the SED

[24] SED/Kao, RT: 377:17-25, 378:2-5.
[25] *See* Rasier's Motion to Amend Phase II Scoping Ruling to Add Additional Issue, filed Dec. 4, 2014, in the Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, Rulemaking 12-12-011.
[26] SED/Kao, RT: 336:11-15, 337:11-27; Rasier/Ex. 10 at 6-7; Rasier/Ex. 10, App. 3A ¶ 7; SED/Ex. 2, SED Report on the Failure of Rasier-CA, LLC to Comply with the Reporting Requirements of Decision (D.) 13-09-045, at 3.
[27] Rasier/Ex. 10 at 6-7; *see also* SED/Ex. 2 at 3; Rasier/Ex. 10, App. 3A ¶ 7.
[28] SED/Kao, RT: 324:25-28.
[29] SED/Fong/Kao RT: 325:9-19.

to compare access to Rasier-CA's service on a relative basis by zip code;[30]

- a report showing by zip code the median estimated time for arrival after a passenger requests a ride, which the SED indicated would provide a rough idea as to whether there is some disparity in the amount of time it takes to get a car in one zip code as compared to another zip code;[31] and
- heat maps graphically representing the data produced.[32]

After the SED raised concerns that it needed the underlying raw data, Rasier-CA offered the SED full access. Specifically, Rasier-CA offered the SED access to ***all the data sought*** under Reporting Requirement (j) at a neutral third-party site and offered to run queries across that data.[33] If that was insufficient, Rasier-CA also offered to pay for a third-party auditor, of SED's choice, to audit the data.[34] The SED ***did not dispute*** that either of these productions would have allowed it to confirm Rasier-CA does not geographically discriminate (the apparent policy objective of Reporting Requirement (j)), or to assess the data for any other purpose.[35] Even though production in these other forms might better fulfill the then-discernable policy goals, the SED declined "because that's not what is required by the Decision."[36]

Thus, as of November 2014, Rasier-CA had produced aggregate data and offered to make all of the underlying data available for the SED's review and use. Rasier-CA asked only for the accommodation that Rasier-CA not surrender custody and control of its confidential information. Rasier-CA was seeking to balance the Commission's need to analyze the data with its needs to maintain the confidentiality of its trade secrets. Indeed, under existing United States Supreme Court precedent, the disclosure of trade secrets to any entity—government or private—that has

[30] SED/Fong/Kao RT: 325:20-326:7 and 327:2-12
[31] SED/Fong/Kao RT: 327:25-328:16
[32] SED/Fong/Kao RT: 328:17-329:14
[33] SED/Kao, RT: 344:14-345:10; SED/Ex. 4, The Safety and Enforcement Division's Reply to the Verified Statement of Rasier-CA, LLC Responding to Order to Show Cause in Rulemaking 12-12-011, Dec. 9, 2014, at 5; Rasier/Ex. 10, App. 2 ¶ 5; Rasier/Ex. 10, App. 3A ¶ 11.
[34] SED/Kao, RT: 344:14-345:10; SED/Ex. 4 at 5; Rasier/Ex. 10, App. 2 ¶ 4; Rasier/Ex. 10, App. 3A ¶ 11.
[35] SED/Kao, RT: 345:26-346:5; SED/Ex. 4 at 5-6.
[36] SED/Kao, RT: 345:12-13; *see also* SED/Ex. 4 at 5-6; Rasier/Ex. 10, App. 2 ¶ 6; Rasier/Ex. 10, App. 3A ¶ 11.

not guaranteed confidentiality risks waiving trade secret protections.[37] Rasier-CA recognized the SED has regularly settled other disputes, and that the Commission ultimately decides whether to accept or reject a proposed settlement. Consistent with this common practice, Rasier-CA reasonably anticipated the SED had discretion, subject to Commission approval, to review the data and determine if it was sufficient to provide the Commission with meaningful reports. The SED, however, did not believe it could agree to anything short of strict compliance with the TNC Decision.[3839]

In analyzing these events and chronology, the POD incorrectly characterizes Rasier-CA's efforts as defiance and misconstrues the information Rasier-CA produced. It was not a "data dump" burying the SED in voluminous unusable data.[40] To the contrary, Rasier-CA produced aggregate information by zip code. The production format required by the SED—i.e., a spreadsheet listing millions of trips (which Rasier-CA has now produced)—could more fairly be termed a "data dump" than Rasier-CA's original production.

Further, Rasier-CA sought feedback from the SED in an effort to comply. Rasier-CA was trying to provide information necessary to meet the Commission's lawful regulatory needs without jeopardizing its confidential and trade secret information. Towards that end, Rasier-CA served data requests on the SED, asking the SED to identify "the purposes for which, and how, the SED intends to use the data requested" in Reporting Requirement (j).[41] Consistent with its view that the only relevant issue was strict compliance, the SED responded: "The [TNC] Decision does not state an explicit, specific purpose for each item of information required, nor does it order SED to use each item of information in a particular way."[42] The SED further

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[37] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984).
[38] *See* Rasier/Ex. 10 at 7, 25-26; Rasier/Ex. 10, App. 3A ¶ 7.
[39] The SED has also argued that if Rasier-CA has any issues with the TNC Decision's data requests, it should file a petition for modification. SED/Kao, RT: 317:7-18, 337:8-10, 337:21-27; SED/Fong, RT: 376:8-13. Concurrent with the filing of its Verified Response in this proceeding, Rasier-CA also filed a Petition to Modify the TNC Decision. *See* Rasier/Ex. 10, App. 3 (and attached appendices A-C).
[40] POD at 55.
[41] SED/Ex. 3 at 3.
[42] *Id.* at 4; *see also* SED/Kao, RT: 355:17-20

stated: "Our primary response has been that it's not up to SED to explain the purpose. The decision requires that information."[43] An SED witness admitted his "supervisor said that the purpose didn't matter."[44] In its Reply to Rasier-CA's Verified Statement, however, the SED identified the need to assess competition, congestion, and pollution as reasons for insisting on the individual trip-level data sought in Reporting Requirement (j).[45] Because the SED believed the purposes of the reporting requirements was irrelevant, the SED had not, until November 25, 2014, indicated those were the reports the SED intended to prepare using trip data.[46] As a result, it was difficult for Rasier-CA to understand if the information it was providing addressed the Commission's policy purposes.

In the OSC proceeding, one of Rasier-CA's defenses was substantial compliance; that it had acted in good faith to provide data that would allow the SED to meaningfully analyze public safety and equal access—the articulated regulatory purposes. In short, Rasier-CA believed the SED could provide the same material analysis using Rasier-CA's proposed production method (aggregate data with inspection and audit of the underlying data) without jeopardizing Rasier-CA's trade secret protections. Rasier-CA was not permitted, however, to fully develop the factual record at the evidentiary hearing on this defense[47] or on the SED's ability to provide meaningful analysis and reports.[48]

The POD erroneously characterizes Rasier-CA's efforts as insincere and fails to recognize Rasier-CA's good faith belief that, in this nascent industry undergoing its first data reporting cycle, the SED and industry could work together to provide meaningful regulatory information while balancing the industry's rights. Indeed, much of this dispute has centered on

[43] SED/Fong, RT: 356:11-15
[44] *Id.*
[45] SED/Ex. 4 at 8.
[46] SED/Fong/Kao, RT: 351:24-356:20.
[47] *See, e.g.*, RT: 329:24-334:22 (declining to permit Rasier-CA to seek admissions from the SED concerning the SED's use of the data produced and ability to provide meaningful reports to the Commission based on the data produced).
[48] *See, e.g.*, RT: 346:26-350:25; 368:19-369:14; 381:22-382:6 (declining to permit Rasier-CA to seek admissions concerning the SED's ability to provide meaningful reports to the Commission if it accepted Rasier-CA's offer of inspection and third party audit).

whether the SED has discretion to accept other forms of production, such as aggregate data supplemented by inspection and audit rights. Although Rasier-CA believes such discretion is appropriate, the SED indicated it lacked any discretion to deviate from the words of the TNC Decision.[49] Yet the SED had shown flexibility and discretion concerning other reporting requirements, which is why Rasier-CA reasonably believed the SED could work cooperatively with Rasier-CA on disputed issues.

For instance, the record showed the SED exercised discretion in interpreting other data reporting requirements, including Reporting Requirement (l). That reporting requirement seeks "the average and mean number of hours and miles each TNC driver spent driving for the TNC."[50] The SED, however, interpreted "average and mean" to mean "[a]verage and ***median***."[51] It exercised its discretion after the SED and Rasier-CA met on September 11, 2014 and "agreed that the terms 'mean' and 'average' represent roughly the same type of data, and that Uber could provide the average and median number[s]" instead—which would be more helpful to the SED.[5253] The SED interpreted the TNC Decision in this manner even though it does not strictly comply with the words the Commission used in the Decision. This flexibility reflects common sense, and Rasier-CA reasonably anticipated similar flexibility in interpreting the TNC Decision's other Reporting Requirements.

Similarly, the SED exercised discretion by creating Excel templates that deviate from the plain language of the TNC Decision. The SED's website instructs that "TNCs must use the spreadsheets posted below for reporting data."[54] One SED spreadsheet is the "Annual Report on Hours Logged by Drivers,"[55] which includes the month, VIN number, driver name (last and first

[49] *See* SED/Kao, RT: 345:12-13; SED/Ex. 4 at 5-6.
[50] D.13-09-045 at 32-33(l).
[51] SED/Ex. 2 at 5 (emphasis added).
[52] *Id.* at 6 n.11.
[53] In the same manner Rasier-CA was erroneously precluded from developing a record at the evidentiary hearing concerning its substantial compliance defense, Rasier-CA was not permitted to create a full record at the evidentiary hearing on the SED's flexibility and discretion interpreting the Decision. *See, e.g.*, RT: 305:5-308:16.
[54] http://www.cpuc.ca.gov/PUC/Enforcement/TNC/TNC+Required+Reports.htm.
[55] SED/Ex. 2, Att. A at 4.

initial), and number of hours per day each driver spent driving.[56] The SED included the VIN number and daily and monthly averages in this spreadsheet—which it directs TNCs to use—even though the TNC Decision nowhere requests that information.[57] Likewise, in the "Annual Report on Miles Logged by Drivers" spreadsheet that SED created, the SED requires TNCs to provide VIN numbers and monthly averages.[58] Thus, the SED exercised its discretion and required data ***other*** than the data strictly identified in the TNC Decision.

The SED has also interpreted the TNC Decision to allow for substantial compliance in other areas. In particular, when Rasier-CA expressed concern that driver names are commercially sensitive information, the SED accepted unique numeric identifiers instead of driver names.[59]

With numerous examples of the SED sensibly accepting substantial compliance, Rasier-CA believed in good faith the SED could exercise the same sensible discretion to obtain the information the Commission needed while protecting Rasier-CA's trade secrets. After it became clear that the SED would accept only strict compliance regarding Reporting Requirement (j), Rasier-CA filed a Petition to Modify Decision 13-09-045 (filed concurrently with its Verified Response to the OSC) seeking to vacate Reporting Requirement (j) and requiring stakeholders to work with the Commission to identify reasonable data reporting requests that address the Commission's redlining concerns while also protecting the TNC's confidential trade secret information.[60] The record does not reflect contempt; it reflects a good faith effort to address the needs of the Commission while protecting Rasier-CA's rights.

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[56] *Id.*
[57] *See* D.13-09-045 at 26-33.
[58] SED/Ex. 2, Att. A at 5.
[59] Rasier-CA was not permitted to ask the SED's witnesses this question in the hearing because this line of questioning was deemed outside the scope of the hearing. *See* RT: 305:19-308:16. But Rasier-CA was expressly given permission to develop these arguments in its post-hearing brief. *See* RT: 308:4-7.
[60] Rasier/Ex. 10 at 10; R.12-12-011, Petition of Rasier-CA, LLC to Modify Decision 13-09-045, Dec. 4, 2014, at 2-3.

III. ASSIGNMENTS OF ERROR

For the reasons set forth in this Appeal, Rasier-CA believes the following findings of fact and conclusions of law: (1) are inconsistent with or unsupported by the evidentiary record; (2) include improperly judicially noticed facts outside the appropriate record; (3) reflect legal issues raised for the first time in the POD without providing Rasier-CA meaningful notice and opportunity to respond; (4) an inaccurate account of Rasier-CA's substantial compliance and good faith efforts; and/or (5) are not supported by the law: Findings of Fact 23-26; 28; and 30-33 and Conclusions of Law 1-4; 7; 8; 11; 13; and 15-29.

IV. ARGUMENT[61]

A. The POD Improperly Judicially-Noticed Documents Outside the Record and Deprived Rasier-CA of Due Process

Almost six months after the evidentiary hearing, and three months after the final post-hearing briefing was complete, the ALJ notified the parties he was considering taking judicial notice of 14 separate documents, pleadings, and statements.[62] The ALJ did not indicate the portions of the documents he believed were relevant nor the purpose for which he intended to take judicial notice. Nevertheless, the ALJ asked the parties to present their position on the propriety of taking judicial notice. Rasier-CA objected, noting it could not meaningfully address judicial notice without knowing which facts within the documents were supposedly relevant and the purpose for which they would be used.[63] Rasier-CA asked the ALJ for clarification as to the specific matters and their relevance[64] and for an opportunity to respond.[65] Indeed, the SED

[61] For convenience, the argument sections of this Appeal generally follow the sequence of sections set forth in the POD.

[62] June 9, 2015 E-mail from ALJ Mason to Counsel for Rasier-CA, LLC, and to Counsel and Analysts for Safety and Enforcement Division entitled "R.12-12-011 OSC Re Uber: Consideration of Taking Judicial Notice."

[63] R.12-12-011, Rasier-CA, LLC's Response to ALJ Mason's June 9, 2015 Notice Concerning Consideration of Taking Judicial Notice in Order to Show Cause in Rulemaking 12-12-011 ("Rasier-CA Response to Judicial Notice"), Jun. 23, 2015.

[64] *Id*.

[65] The SED's response similarly reflected uncertainty as to the ALJ's consideration of the documents: "[i]f the assigned ALJ determines to take judicial notice of these documents for some other purpose that SED has thus far failed to recognize, SED requests an opportunity to state its position." R.12-12-011, SED Response to the Presiding Officer's Consideration of Taking Judicial Notice of Certain Documents ("SED Response to Judicial Notice"), Jun. 23, 2015 at 4.

expressed the same confusion, noting that it was unsure as to the ALJ's purposes and asking for further opportunity to respond if its assumptions were incorrect (as was the case).[66]

The ALJ did not provide clarification to either party. Instead, the POD judicially noticed not the existence of documents, but the ***contents*** for the truth of the matters asserted, and relied heavily on them in sanctioning Rasier-CA. Taking judicial notice in this manner violates (1) the Commission's Rules of Practice and Procedure,[67] and (2) Rasier-CA's due process rights. Rasier-CA had no meaningful notice or opportunity to respond to the evidence, which the ALJ independently assembled months after the evidentiary hearing, resulting in an inaccurate and incomplete record.

The POD takes judicial notice of the contents of three categories of documents:

- A January 6, 2015 administrative decision from a different jurisdiction involving a different regulatory framework.
- Filings and orders from two court proceedings which include factual allegations, legal arguments, and legal opinions on civil and statutory claims involving Rasier-CA's parent company.
- Websites discussing the growth of Rasier-CA's parent company and the results of a settlement agreement reached in a different jurisdiction involving a different regulatory framework.

The Commission's rules, and basic notions of fairness and due process, required meaningful notice and opportunity to respond before the POD relied upon these documents for any purpose, let alone to hold Rasier-CA in contempt, in violation of Rule 1.1, or to issue substantial fines and suspend Rasier-CA's license. Further, the POD's exercise of judicial notice

[66] R.12-12-011, SED Response to Judicial Notice ("If the assigned ALJ determines to take judicial notice of these documents for some other purpose that SED has thus far failed to recognize, SED requests an opportunity to state its position on whether such purpose(s) is/are relevant to this OSC proceeding.").
[67] Rule 13.9 of the Commission's Rules of Practice and Procedure permit an ALJ to take judicial notice, but only "of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."

violates the standards required of California courts under Evidence Code Section 450 et seq., which Rule 13.9 requires the ALJ to follow.

1. Relying on Judicially Noticed Documents Without Providing Meaningful Notice and Opportunity to Respond Deprived Rasier-CA of its Due Process Rights

It is fundamentally unfair and improper to rely on documents unilaterally collected and considered months after the evidentiary hearing and briefing concluded to support a multi-million dollar fine and the suspension of Rasier-CA's license. It is particularly unfair when Rasier-CA specifically requested clarification as to the specific matters to be noticed and their relevance so that it could exercise the basic right to be heard. Neither the documents nor the matters addressed therein were ever raised in the proceeding by the SED, so Rasier-CA had no notice that these matters would be relied upon to impose grave penalties. Furthermore, Rasier-CA was not given an opportunity to challenge the evidence through cross-examination or to provide the Commission with more complete information through relevant documentary evidence and witness testimony. As a result, Rasier-CA was deprived of basic due process, creating an incomplete and misleading record inconsistent with the Commission decision-making process as well as Rasier-CA's constitutional rights. Accordingly, the POD should not include consideration of the judicially-noticed documents.

As noted above, the Commission's Rules of Practice and Procedure permit judicial notice in the same manner as state courts may under Evidence Code section 450 et seq. A basic tenant underlying Evidence Code section 450 et seq. provides that "an opportunity . . . to know what the deciding tribunal is considering and to be heard with respect to both law and fact is ***guaranteed by due process***."[68] Moreover, where "there is a complex question as to the tenor" of the matter to be judicially noticed, "granting a hearing under subdivision (a) would be mandatory."[69]

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[68] Cal. Evid. Code §455, Law Revision Comm. Notes (emphasis added); *see also Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 509 (2010) (The Fourteenth Amendment guarantees "that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses.") (quoting *Motores de Mexicali v. Superior Court*, 51 Cal. 2d 172, 176 (1958)).
[69] Cal. Evid. Code §455, Law Rev. Comm. Notes.

Indeed, the California Evidence Code requires that Rasier-CA is provided a "reasonable opportunity to meet such information before judicial notice of the matter may be taken."[70] Courts are understandably cautious about employing judicial notice because it "do[es] away with the formal necessity for evidence because there is no real necessity for it."[71]

Although not binding on the Commission, the California Administrative Procedures Act ("APA") requires administrative agencies to follow these same procedures to ensure basic due process. Specifically, APA section 11515 allows an agency to take "official notice . . . ***of any fact*** which may be judicially noticed by the courts of this State," which requires that parties "be given a reasonable opportunity on request to ***refute the officially noticed matters by evidence or by written or oral presentation of authority***, the manner of such refutation to be determined by the agency."[72] In accordance with these procedures, Rasier-CA was entitled to notice of the ***specific*** facts considered for judicial notice and an opportunity to rebut these facts through cross-examination and introduction of its own relevant evidence. Providing a list of 14 separate documents with no explanation as to their relevance or the particular sections of the documents at issue is insufficient to give Rasier-CA meaningful notice of the facts to be judicially noticed or an opportunity to refute those alleged facts.[73] As a result, the POD's reliance on these judicially noticed facts violates both the procedural and substantive requirements to which state courts and other administrative agencies must adhere.

The failure to afford due process prejudices Rasier-CA, and has led to incorrect findings of fact and erroneous conclusions of law. For example, the POD takes judicial notice of an

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[70] Cal. Evid. Code § 455(b).
[71] 1 Witkin, Cal. Evid. § 3 (citing cases).
[72] Calif. Gov. Code § 11515 ("Official Notice") (within Chapter 5, "Administrative Adjudication: Formal Hearing") (emphasis added).
[73] *Franz v. Bd. of Med. Quality Assurance*, 31 Cal. 3d 124, 140 (1982) ("The agency's notification ***must be complete and specific*** enough to give an effective opportunity for rebuttal.") (emphasis added); *see also Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1086 (2nd Cir. 1982) ("it is error to accept the data (however authentic) as evidence . . . at least without affording an opposing party ***the opportunity to present information which might challenge the fact***" because the judicially-noticed fact "may not have been put in perspective by introduction of other relevant evidence") (emphasis added and citations omitted).

administrative "Notice of Decision" from New York involving an affiliated entity named Weiter LLC[74] as well as blog posts and news articles stating that Rasier-CA's parent company, Uber Technologies, Inc., produced trip data in New York and Boston.[75] Based on those documents, the POD concludes Rasier-CA should have complied with Reporting Requirement (j).[76] If Rasier-CA had been given proper notice that this was the purpose for which the POD intended to take judicial notice of this document, it would have presented testimony explaining the differences with the regulatory scheme and reporting requirements in New York; the difference in entities involved in New York; and that the New York entity did not produce the breadth of data the POD erroneously assumes. Specifically, Rasier-CA testimony could have explained that neither Boston nor New York sought fare information or the level of detail set forth in Reporting Requirement (j).[77] Accordingly, with meaningful notice and opportunity to respond, Rasier-CA could have presented evidence regarding these important differences— differences supporting Rasier-CA's view that Reporting Requirement (j) is burdensome, over-broad, and unnecessary to accomplish the Commission's regulatory objectives. Instead, the current record is incomplete

[74] POD at 16. The POD takes judicial notice on the basis the NY Notice of Decision is "decisional" law under Evidence Code Section 452(a). Section 452(a) applies to "decisional, constitutional, and statutory law of any state of the United States." Cal. Evid. Code § 452(a). California Evidence Code section 160 defines "law" to include law established by judicial decisions. *People v. Burnick*, 14 Cal.3d 306, 314, 535 P.2d 352, 357 (1975). It is unsettled whether "decisional law" includes administrative agency decisions. *See In re Renovizor's, Inc.*, 282 F.3d 1233, 1240 (9th Cir. 2002). Instead, some courts have relied on section 452(c) to permit judicial notice of the fact of a relevant administrative decision as an "official act" of the "legislative, executive, and judicial departments." *See Rodas v. Spiegel*, 87 Cal. App. 4th 513, 518 (2001).

[75] POD at 33-34.

[76] *Id*.

[77] The New York Decision refers to "the date of trip, time of trip, pick up location, and license numbers . . . ." *Notice of Decision, NLC v. Weiter* at 3. In comparison, the TNC Decision's Reporting Requirement (j) seeks the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates; the date, time, and zip code of each ride request, the concomitant date, zip of each zip code of each ride that was subsequently accepted or not accepted; columns that display the zip code of where each ride that was requested began, ended, the miles travelled, the amount paid/donated; and information aggregated by zip code and a statewide total of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers; and the concomitant date, time, and zip code of the driver in addition to that of the passenger.

and inaccurate. If New York and Boston are considered, the record should reflect that the New York decision and Boston agreement arose after the evidentiary hearing in this proceeding had concluded. Furthermore, shortly after Uber Technologies, Inc. reached an agreement with regulators in Boston, Rasier-CA indicated to the SED it intended to produce trip-level data to the SED and did so within a few weeks.[78]

2. The POD Improperly Takes Judicial Notice of the Truth of Facts Contained in Documents Rather than the Mere Existence of the Documents

The POD fairly indicates "there is a split of authority in California regarding taking judicial notice of pleadings, findings of fact, and conclusions of law in other proceedings" but then proposes a new approach to taking judicial notice.[79] The POD proposes to consider the truth of matters asserted in pleadings, findings of fact, and conclusions of law if they involve matters that are not reasonably subject to dispute in the other proceedings or were presented by Uber or otherwise not reasonably subject to dispute.[80] Despite those ostensible limits, the POD takes judicial notice of the truth of matters that were and are reasonably in dispute.

First, although there are divergent lines of authorities, the weight of the more recent California authorities is to prohibit taking judicial notice of the truth of the matters asserted in any court records—even in judicial opinions.[81] For example, in *Ross v. Creel Printing & Publishing Co.*,[82] the court held that judicial notice is available "only as to the ***existence*** of the

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[78] *See* Declarations of Wayne Ting and Krishna Juvvadi in Support of Rasier-CA, LLC's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011 reflecting production on February 5, 2015, of trip-level data responsive to Reporting Requirement (j).
[79] POD at 19-21.
[80] POD at 20.
[81] *Steed v. Department of Consumer Affairs*, 204 Cal. App. 4th 112 (2012); *see Williams v. Wraxall*, 33 Cal. App. 4th 120, 130 n.7 (1995) ("[w]e cannot take judicial notice of the truth of hearsay statements in the decisions or court files, including pleadings, affidavits, testimony, or statements of fact"); *Gilmore v. Superior Court*, 230 Cal. App. 3d 416, 418 (1991) (holding a trial court erred in taking judicial notice of a statement of facts in an appellate opinion to establish the truth of those facts)); *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th 875, 886 (2001) ("[N]either a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding.") (citation omitted).
[82] 100 Cal. App. 4th 736, 743 (2002) (emphasis added).

complaint, not as to the truth of any of the allegations contained in it." Indeed, one of the decisions the POD relies upon to reach its "compromise" position, *Weiner v. Mitchell, Silberberg & Knupp*,[83] has been criticized by more recent cases. In *Lockley v. Law Office of Cantrell*,[84] the court of appeals notes that *Weiner* has been called "clearly fallacious and indefensible" by later opinions.[85] Moreover, federal cases reinforce that judicial decisions are hearsay and may not be introduced for the truth of the matter asserted.[86]

Second, the POD does not consistently apply its own newly-created standard. For example, the POD relies on judicially noticed documents to pierce the corporate veil and treat Rasier-CA as UTI's alter-ego. Those matters are certainly subject to reasonable dispute, as Rasier-CA and UTI are separate legal entities. Rasier-CA is not aware of any case law in any jurisdiction suggesting a court may pierce the corporate veil *sua sponte* without giving either party notice and relying solely on judicially-noticed documents. Moreover, these are matters that were never raised in the evidentiary hearing or OSC briefing, further exacerbating the prejudicial harm from a lack of due process.

In addition, the POD takes notice of "pleadings, documents, and rulings" in *O'Connor v. Uber Technologies, Inc.*,[87] under Evidence Code § 452(d), for facts that are reasonably in dispute. The POD concludes that "it [is] appropriate as a matter of law to treat Uber and Rasier-CA as one in the same for purposes of assessing fines and penalties," citing excerpts from

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[83] *Weiner v. Mitchell, Silberberg & Knupp*, 114 Cal. App. 3d 39 (1980).
[84] 91 Cal. App. 4th 875, 882 (2001).
[85] *See Lockley*, 91 Cal. App. 4th at 882 (citing *Sosinsky v. Grant*, 6 Cal. App. 4th 1548 (1992)). *Weiner* "runs counter to the well-established principle that courts may not take judicial notice of hearsay allegations." *Id*. at 885. "[N]either a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding." *Id*. at 885.
[86] *See U.S. v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) ("A court judgment is hearsay 'to the extent that it is offered to prove the truth of the matters asserted in the judgment" and "[i]t is even more plain that the introduction of discrete judicial fact findings and analysis underlying the judgment to prove the truth of those findings and that analysis constitutes the use of hearsay."); *see also Cardinal v. Buchnoff*, 2010 WL 3339509, at *2 (S.D. Cal. Aug. 23, 2010) ("[a]dmitting a judicial opinion for the truth of the matter it asserts would present the jury with unreliable evidence, 'neither based on personal knowledge nor subject to cross-examination.'").
[87] No. 3:13-cv-03826-EMC (N.D. Cal. 2013).

declarations in *O'Connor* and an Order in *O'Connor* which stated "Uber never materially distinguishes between itself and Rasier or argues that Rasier's separate corporate status is relevant to this litigation."[88] The POD improperly accepts that assertion for the truth of the matter asserted.[89] Neither Rasier-CA's nor UTI's corporate structure were raised in the OSC proceedings. It is erroneous for the POD to assume Rasier-CA would not reasonably dispute an effort to pierce the corporate veil or assess alter-ego liability.

Similarly, the POD erroneously takes judicial notice of allegations in *National Federation of the Blind of California v. Uber Technologies, Inc.*,[90] relying on Evidence Code § 452(d), to conclude Rasier-CA received complaints from blind customers with service dogs who claimed they were denied service.[91] The POD assumes the allegations—that individuals complained—are true. Rasier-CA is not aware of any California authority permitting judicial notice of hearsay statements contained in court records—particularly allegations. To the contrary, the cases on both sides of the split of authority discussed in the POD agree it is improper to take judicial notice of the truth of matters asserted in hearsay allegations.[92] Because Commission Rule 13.9 prohibits judicial notice except "of such matters as may be judicially noticed by the courts of the State of California," the Commission should recognize that a California court could never take judicial notice of the truth of the matters asserted in hearsay allegations.

Third, the POD improperly takes judicial notice of blog posts, under California Evidence Code Section 452(h), as evidence of UTI's gross revenue. Specifically, the POD relies on blogs indicating "Uber has raised $1.2 billion of primary capital at a $17 billion pre-money valuation"[93] and that Uber has "grown to millions of trips per day" as a basis for calculating

[88] POD at 69 & n.81.
[89] *Gilmore*, 230 Cal. App. 3d at 418.
[90] No. 3:14-cv-04086 (N.D. Cal 2014).
[91] POD at 23-24.
[92] *Id*. at 19.
[93] *Id*. at 76 n.120.

Uber's gross revenues.[94] The POD "assumes" that if each ride costs $10 and there are 1 million rides per day over 30 days and 12 months, then "Uber's gross annual revenue would be $3.6 billion."[95] The assumption is erroneous. Moreover, UTI's gross revenue was never raised in the OSC proceedings and there was ***no*** evidence or argument presented concerning UTI's gross revenue—the POD's conclusion is pure speculation.[96] The POD should not rely on improper judicially-noticed facts, particularly when Rasier-CA was not provided an opportunity to address those facts.

B. The POD's Determinations Regarding Rasier's Compliance and Non-Compliance are Erroneous

1. Reporting Requirement (g) (Report on Accessibility)

The POD concludes Rasier-CA failed to comply with Reporting Requirement (g) concerning accessible vehicles because Rasier-CA did not report ***allegations*** made in a lawsuit by blind riders who claimed they were denied service because of their guide dogs.[97] For this failure, the POD imposes a $2,790,000 fine, as of June 30, 2015, with continuing fines of $10,000 per day.[98]

The SED never requested this information or referred to any "expanded" interpretation. The first indication that plaintiffs' allegations from a putative class-action should be reported as "data" appears in the POD—after it was too late for Rasier-CA to address the issue. In fact,

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[94] *Id.* at 77.
[95] *Id.*
[96] The POD erroneously relies upon *Ampex v. Cargle*, 128 Cal. App. 4th 1569 (2005) as support for taking judicial notice of the facts contained on websites. In *Ampex*, the Court of Appeals did not take judicial notice of the truth of facts contained on a website. It took judicial notice of the fact a plaintiff and a CEO had posted on public websites. "Ampex's Web site and the Yahoo! message board were offered to show that they existed in the public eye . . . ." *Id.* at 1573 n.2. One of the questions before the Court was whether an individual involved was a "limited public figure." *Id.* at 1577–78. The Court held he was, in part relying on the fact that he publicly posted press releases and letters on the company website. The contents of those releases and letters or the truth of matters asserted is never mentioned by the Court of Appeals; it was their existence in the public sphere that was relevant.
[97] POD at 23-25 (emphasis added).
[98] In response to the POD, Rasier-CA produced to the SED a report including alleged complaints by individuals with disabilities, even though the complaints did not involve requests for "accessible vehicles." *See* Declaration of Krishna Juvvadi in Support of Rasier-CA, LLC's Appeal of the POD, Aug. 14, 2015.

Rasier-CA believed the SED had conceded that Rasier-CA had nothing to report.[99] The Presiding Officer's interpretation, reflecting independent factual investigation, is new and surprising. Rasier-CA respectfully contends the fine is inappropriate and the POD erred by: omitting portions of the record supporting Rasier-CA's good faith belief it had complied with Reporting Requirement (g); adopting a new and more expansive interpretation of Reporting Requirement (g) seeking information that does not involve accessible vehicles; and taking judicial notice of unsubstantiated allegations from a pending lawsuit without providing Rasier-CA an opportunity to address the substance of the matter noticed.

a. The POD Omits Material Findings and Conclusions Concerning Rasier-CA's Compliance with Reporting Requirement (g)

Reporting Requirement (g) seeks:

> [A] report detailing the number and percentage of their customers who ***requested accessible vehicles***, and how often the TNC was able to comply with ***requests for accessible vehicles***.[100]

The POD correctly recognizes the Uber App did not have an accessible vehicle feature during the reporting period.[101] It is unclear, however, whether the POD recognizes that without an accessible vehicle feature, there was no mechanism to request an accessible vehicle (the information the first part of Reporting Requirement (g) seeks).

Because there was no mechanism, the SED admitted that if Rasier-CA used the SED's accessible vehicle reporting template, it would contain only zeros:

> Q. … So if the feature wasn't available, the answers that would be in this template on the annual report in Exhibit 2, they would all be zeros; right?
>
> A. Presumably, yes.[102]

The POD does not, however, acknowledge the undisputed evidence that Rasier-CA was not obligated to provide a mechanism for wheelchair accessible vehicles during the reporting

[99] RT: 312:17-21 (conceding Rasier-CA's report would "all be zeros").
[100] D.13-09-45 at 30-31.
[101] POD at 23.
[102] RT: 312:17-21.

period. The undisputed record shows that, before it applied for a TNC license, Rasier-CA informed the SED it would take up to six months after licensing to construct and implement a mechanism for customers to request wheelchair accessible vehicles.[103] Neither the Commission nor the SED raised any concern about this timeframe;[104] and the Commission expressly recognized the TNCs' Accessibility Report contemplated "a ***timeline*** for modifying apps so that they can allow passengers to indicate their access needs."[105] Indeed, at the hearing, SED witness testimony demonstrated Rasier-CA had forthrightly notified the SED it believed it had nothing to report because the App feature was not yet available:

> Q. . . . Rasier told the SED that it had nothing to report on the accessible vehicle front because the feature for accessible vehicles wasn't going to be available until October; right?
>
> A. Yes.[106]

The POD does not consider these facts when imposing $10,000-a-day fines. This evidence supports Rasier-CA's good faith belief it had complied with Reporting Requirement (g)—and it is evidence missing from the POD. Because Rasier-CA was not required to provide wheelchair accessible vehicles during the reporting period; believed it had nothing to report; explained to the SED the reason it believed it had nothing to report; and was not told of the new broader definition of Reporting Requirement (g) reflected in the POD, Rasier-CA should not be sanctioned.

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[103] *See* Rasier-CA, LLC Accessibility Plan, submitted to the Commission on November 7, 2013, at 1, *available at*: http://www.cpuc.ca.gov/NR/rdonlyres/193E3DA4-D0FF-497A-8E26-EDAC1C1339FE/0/UberAccessibilityPlan.pdf.
("Within six months of the [CPUC's] approval of Rasier's TNC application, Rasier will ensure that users of Uber's request software who request transportation provided by Rasier's partners may indicate their access needs.").

[104] The SED acknowledged Rasier-CA submitted an accessible vehicle plan indicating the Uber App would have an accessible-vehicle feature available within six months of receiving its license. R.12-12-011, The Safety and Enforcement Division's Opening Brief to Rasier-CA, LLC's Order to Show Cause in Rulemaking 12-12-011, Jan. 21, 2015 ("SED Op. Br.") at 6-7; SED Ex. 4 at 11-12.

[105] "Required Reports TNCs Must Provide the CPUC," *available at*: http://www.cpuc.ca.gov/PUC/Enforcement/TNC/TNC+Required+Reports.htm (emphasis added).

[106] RT at 312:3-8; *see also* Response to SED Data Request: R.12-12-011-SED Uber #003 reporting zero for the number and percentage of riders who requested accessible vehicles and how often Rasier-CA was able to comply with requests for accessible vehicles.

b. The POD Erroneously Adopts an Expansive View of Reporting Requirement (g)

The POD finds Rasier-CA in contempt because the POD has a "more expansive view of the concept of accessible vehicles than Rasier-CA."[107] Specifically, the POD indicates the report on accessible vehicle requests should include allegations from *National Federation of the Blind*—that blind individuals were denied service due to their guide dogs. The POD reasons that "blind persons are included in the definition of persons with a disability" in the American with Disabilities Act ("ADA") and, the POD contends "the Center for Accessible Technology points out, those passengers in need of accessible vehicles can include blind persons traveling with service animals."[108] The POD's reasoning does not justify sanctions for the following reasons.

First, the POD does not identify any evidence indicating Rasier-CA knew of the POD's expanded interpretation of Reporting Requirement (g). There is no dispute Rasier-CA communicated its understanding of Reporting Requirement (g) and its basis for believing it had nothing to report. If Rasier-CA's expressed understanding of the Requirement was incorrect, due process and basic notions of fairness require notice to Rasier-CA and an opportunity to respond before being held in contempt and sanctioned millions of dollars. Rasier-CA did not act in contempt by willfully failing to follow a Commission order. It did not know about the expansive interpretation until the POD. Indeed, upon receiving the POD and recognizing the expansive interpretation for the first time, Rasier-CA took action. It promptly reviewed its records to identify allegations or complaints made by any disabled individual. Rasier-CA has produced that information to the SED. Thus, after learning of the expansive interpretation, Rasier-CA has promptly complied with it.

Second, the expanded view is wrong. The POD relies on the ADA—a statute that was never raised, discussed, or briefed in the OSC proceedings—and misconstrues the ADA to expand Reporting Requirement (g). The ADA's standards for "accessible vehicles" focus on

[107] POD at 23.
[108] *Id*. at 24-25 (citing R.12-12-011, Center for Technology's Opening Comments on OIR, Jan. 28, 2013, at 7-8).

vehicles that can transport wheelchairs and similar mobility aids, not vehicles that accommodate service animals—which any vehicle will do. Specifically, the ADA's regulations explain that "a vehicle shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of this part and the standards set forth in part 38 of this title."[109] Part 38 in turn provides a detailed list of accessible vehicle design characteristics focused on wheelchair accessibility and related mobility aids.[110] For example, accessible vehicles use a "lift or ramp . . . with sufficient clearances to permit a wheelchair or other mobility aid user to reach a securement location" and the regulations set forth the technical requirements for the design load and controls of such devices.[111] While some of the technical requirements may also be beneficial to the visually impaired, there is ***nothing*** in the definition of accessible vehicles or Part 38 addressing service animals. To be clear, Part 37 of the ADA requires covered entities to "permit service animals to accompany individuals with disabilities in vehicles and facilities"[112] and to announce stops, allow sufficient time for a disabled individual, and similar accommodations—but those apply to all vehicles and are distinct from the definition of "accessible vehicle" in Part 38. In short, the ADA simply states that any vehicle, accessible or not, must accommodate service animals. Thus, the POD is wrong to assume that any request by a visually-impaired rider with a service animal is a request for an accessible vehicle.

Third, the POD misconstrues the Center for Accessible Technology's comments concerning accessible vehicles as a basis for expanding the definition of accessible vehicle in Reporting Requirement (g). The Center for Accessible Technology identifies three areas of concern: accessibility of the website/app; accessibility of vehicles for customers with mobility disabilities (including wheelchair users); and acknowledgement of the obligation to allow service animals to accompany disabled riders.[113] The Center for Accessible Technology does not

[109] 49 CFR §37.7(a) (governing "Standards for accessible vehicles").
[110] 49 CFR §38.1 et seq.
[111] 49 CFR §38.23.
[112] 49 CFR §37.167(d).
[113] Center for Technology's Opening Comments on OIR at 7-8.

discuss an "accessible vehicle" for service animals, only the obligation to allow service animals to accompany a customer in whatever vehicle is provided.

The ADA and the Center for Accessible Technology's comments reflect the basic understanding that an accessible vehicle is not necessary to accommodate a service animal. ***All vehicles*** should accommodate a service animal. Indeed, because it does not implicate the need for any special vehicle, Rasier-CA makes clear to its riders that "[t]here is no need for a user to indicate ahead of time that he or she is accompanied by a service animal."[114] A vehicle accommodating service animals is not (or need not be) an "accessible vehicle." Under the POD's expansive interpretation, all vehicles would be reported as "accessible vehicles," rendering superfluous Reporting Requirement (g). [115]

This is not a matter of Rasier-CA avoiding disclosure of its efforts to accommodate customers with disabilities. It is undisputed Rasier-CA submitted a two-page narrative describing Rasier-CA's progress toward meeting the timeline provided in its accessibility plan, which extended beyond the reporting period.[116] In a subsequent production, Rasier-CA explained it was working with UTI to provide an accessible vehicle feature on the Uber software application.[117] It also informed the SED the specific date on which it began tracking VoiceOver requests, and provided the number of VoiceOver requests (which Rasier-CA believes are largely requests for rides by visually—impaired passengers using a voice interface to request a driver).[118] Rasier-CA genuinely believed it had provided more than Reporting Requirement (g) required. It has not acted in contempt, and it should not be sanctioned.

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[114] *See* Rasier-CA, LLC Accessibility Plan, submitted to the Commission on November 7, 2013, at 1, *available at*: http://www.cpuc.ca.gov/NR/rdonlyres/193E3DA4-D0FF-497A-8E26-EDAC1C1339FE/0/UberAccessibilityPlan.pdf. The Accessibility Plan also explains: "[w]ithin three months of CPUC's approval of Rasier's TNC application, Rasier will add to its onboarding materials, which are presented to a partner before he or she may accept transportation requests through the Uber App, a statement that service animals should be accommodated in compliance with applicable laws."
[115] SED/Ex. 2, Attachment A at 4 of 27 (SED Reporting Template for Accessible Vehicle Report)
[116] Rasier/Ex. 10 at 8, 11-13; Rasier/Ex. 10, App. 3A ¶¶ 5-6, 8.
[117] Rasier/Ex. 10 at 8.
[118] *Id.*

c. The POD Improperly Takes Judicial Notice of Filings in National Federation of the Blind v. Uber Technologies, Inc.

The POD erroneously takes judicial notice of documents in *National Federation of the Blind of California v. Uber Technologies, Inc.*, No. 14-cv-4086 (N.D. Cal 2014), relying on Evidence Code § 452(d). Rasier-CA was not given notice of the purpose for which the ALJ intended to take judicial notice or the specific matter within each document to be noticed.[119] As a result, Rasier-CA did not have a meaningful opportunity to address the issues raised.

The POD describes the complaint in *National Federation* as alleging "multiple instances . . . where blind customers with service dogs claimed they were denied service by UberX drivers"—and "some of these customers complained to Uber."[120] The POD also takes judicial notice of a proof of service, a stipulation to extend time, Uber's motion to dismiss and supporting declaration, Uber's answer to the complaint, and the court's ruling on the motion to dismiss.[121] The POD does not identify the relevance of any particular adjudicative facts contained in any of the documents other than the complaint.

Relying on the complaint, the POD asserts Rasier-CA should have reported allegations it denied service to persons with service animals as part of its response to Reporting Requirement (g). The POD concludes that the complaint demonstrates Rasier-CA was "aware of allegations of complaints by persons with disabilities regarding their claimed inability to take advantage of the TNC service provided by UberX."[122] Notably, however, the complaint does not include a single allegation that a person with a disability requested an "accessible vehicle." To the contrary, the

[119] The Notice Concerning Consideration of Taking Judicial Notice listed documents the ALJ was considering for judicial notice but did not indicate the particular parts of the documents or the purpose for which the ALJ intended to use the documents or some parts of the documents. Rasier-CA responded by requesting clarification as to the specific matters and their relevance, and asked for an opportunity to respond to the propriety and tenor of the matters as contemplated under the California Evidence Code. *See* Rasier-CA Response to Judicial Notice. Rasier-CA did not receive any clarification before the POD was issued.
[120] POD at 23 & n. 21.
[121] *Id*. at 16–17.
[122] *Id*. at 24.

allegations reflect complaints that service animals were not accommodated in regular vehicles.[123] Those allegations do not reflect requests for "accessible vehicles" as the term is ordinarily used in the ADA. The POD errs in relying on the complaint to reach a contrary conclusion.

2. Reporting Requirement (j) (Report on Providing Service by Zip Code)

The POD concludes that Rasier-CA failed to comply with Reporting Requirement (j) by (1) not timely producing trip-level information; (2) not producing the correct concomitant date, time, and zip code of each ride that was subsequently accepted or not accepted (i.e., the driver's location) (the "correct concomitant data");[124] and (3) not producing fare information. Although these elements are part of a single Reporting Requirement, (j), the POD assesses three separate fines for failing to strictly comply:

(1) a $279,000 fine, $2,000 a day for 139 days for the untimely production of trip-level information;

(2) a $1,420,000 fine, as of June 30, 2015, with continuing fines of $5,000 per day for failing to produce the concomitant data; and

(3) a $1,420,000 fine, as of June 30, 2015, with continuing fines of $5,000 per day for failing to produce individual trip fare information.[125]

Rasier-CA respectfully contends the fines and suspension of its license are inappropriate and the POD errs by failing to recognize Rasier-CA's good faith and substantial compliance; by omitting evidence demonstrating that Rasier-CA produced the correct concomitant data on March 6, 2015, promptly after learning the SED's interpretation of the "concomitant data" language; and by rejecting Rasier-CA's trade secret, Fourth Amendment, takings, and jurisdiction arguments, and the undisputed evidence in the record supporting those arguments.

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[123] Although Rasier-CA disputes the claims asserted in the lawsuit, Rasier-CA takes seriously the need to accommodate persons with service animals. Rasier-CA's Code of Conduct makes plain that all driver-partners must accommodate service animals.

[124] It is undisputed that Rasier-CA produced concomitant data (i.e. concerning passengers) along with the rest of the information it submitted in response to Reporting Requirement (j) on February 5, 2015. However, after submitting this data, the SED notified Rasier-CA that the concomitant data submitted was not the correct data (i.e. concerning drivers), which Rasier-CA remedied promptly. Thus the concomitant data was produced twice, the second of which Rasier-CA refers to as the "correct concomitant data."

[125] POD at 81-83.

a. Rasier-CA's Good Faith and Substantial Compliance

Rasier-CA has now strictly complied with Reporting Requirement (j), including the production of confidential individual trip fare information.[126] The evidentiary record demonstrates it acted in good faith and substantially complied much earlier. Rasier-CA's good faith and substantial compliance, including efforts to ascertain the regulatory purpose of the data requirement and provide information that would enable the Commission to carry out its regulatory purpose is discussed in Section II(B) of this Appeal.

b. Rasier-CA Produced the Correct Concomitant Data on March 6, 2015

In an apparent oversight, the POD mistakenly finds that Rasier-CA has not produced the correct concomitant data. However, Rasier-CA did produce the correct concomitant data on March 6, 2015[127] promptly after the SED notified Rasier-CA that SED interpreted Reporting Requirement (j)'s concomitant data language to refer to driver location (not just passenger location as Rasier-CA had previously produced).[128] In March, 2015, the SED confirmed to Rasier-CA that it was satisfied the concomitant data had been produced on March 6, 2015. In light of this simple error in the POD, on July 23, 2015, Rasier-CA sought direction from the Presiding Officer concerning the accuracy and completeness of the record concerning the production of concomitant data.[129] In response to Rasier-CA's request for direction, SED again confirmed on July 23, 2015, that Rasier-CA had produced the correct concomitant data on March 6, 2015.

Although the correct concomitant data was produced on March 6, 2015, the POD holds Rasier-CA in contempt for ***not yet having produced the data***; imposes a $1.42 million fine

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[126] Rasier-CA's fare information is closely guarded confidential and proprietary information, subject to trade secret protections and the production of the data, which it understands the Commission will treat as confidential, is not a waiver of any trade secret or other lawful protections of the data.

[127] March 6, 2015 Second Declaration of Krishna Juvvadi in Support of Rasier-CA, LLC's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011 ("Second Juvvadi Declaration").

[128] R.12-12-011, Rasier-CA, LLC's Motion to Set Aside Submission and Reopen the Record in Order to Show Cause in Rulemaking 12-12-011, Feb. 17, 2015, at 4.

[129] July 23, 2015 E-mail from counsel to Rasier-CA to ALJ Mason, copying counsel for the SED re. R.12-12-011 OSC Re Rasier-CA, LLC – Request for Direction Regarding the Record.

(through June 30, 2015); and continues to impose an ongoing $5,000 daily fine for not having produced the data.

On July 24, 2015, the Presiding Officer notified the parties the Supplemental Juvvadi Declaration, which had been filed on March 6, 2015, will be marked and entered into the record as Exhibit 11-C as part of the Modified Presiding Officer's Decision ("MOD-POD"). The ALJ indicated he would address the impact of the Supplemental Juvvadi Declaration in the Modified Presiding Officer's Decision ("MOD-POD"). Rasier-CA respectfully believes consideration of the correct concomitant data production (as reflected in the Supplemental Juvvadi Declaration) should eliminate all contempt and Rule 1.1 violations, along with all corresponding fines attributable to the concomitant data. Because Rasier-CA acted diligently and in good faith to produce the correct concomitant data after learning the SED's interpretation of Reporting Requirement (j), it should not be sanctioned. Accordingly, the $1,420,000 fine, as of June 30, 2015, with continuing fines of $5,000 per day for failing to produce the concomitant data should be eliminated.

c. The POD Errs in Rejecting Rasier-CA's Legal Arguments and the Undisputed Evidence in the Record Supporting Them

The POD erroneously concludes that fare information is not confidential or a trade secret and rejects Rasier-CA's arguments concerning the limitations on the Commission's authority to require fare information.[130]

(1) Rasier-CA's Trip-level Information Is a Trade Secret

Rasier-CA's assertion that fare information is confidential and a trade secret was uncontested and undisputed through the entire course of the OSC proceeding.[131] The POD nevertheless concludes that Rasier-CA's fare information is not confidential or a trade secret

[130] To parallel the structure of the POD, Rasier-CA discusses its legal arguments concerning trade secrets, Fourth Amendment, and Takings as part of its discussion of Rule 1.1, *infra.*, and focuses in this section only on the two specific arguments raised in the POD's discussion on pages 26 through 29 concerning Rasier-CA's compliance with Reporting Requirement (j).
[131] POD at 27-28.

because Rasier-CA posts rate information, including a fare estimator, on its website. The POD's determination is erroneous.

In Rasier-CA's first response to the Order to Show Cause, it explained that the individual trip information is a protected trade secret under California law.[132] It included, as part of the appendices, a declaration which explained:

> This information is highly confidential. If provided, the information displays a complete picture of Rasier'[s business. The information would allow any person determine where and when Rasier's business is concentrated, which segments of its business are most remunerative, and in fact how much income Rasier grossed in California during the reporting period.
>
> Rasier does not disclose this information publicly because competitors could use the information to assess their relative market share or for purposes of business and financial modeling. In addition, they could use their relative market position to attempt to attract more customers and drivers, or could use it to help in their own fundraising efforts.[133]

The SED's Reply never challenged—or even addressed—Rasier's trade secret evidence or argument.[134] At the evidentiary hearing, Rasier-CA's witness testified repeatedly that Rasier-CA had withheld certain trip-level information because the data is "highly confidential, proprietary trade secrets."[135] SED witnesses confirmed the agency had never challenged that the information constituted trade secrets.[136] SED's witnesses further confirmed that before the September 19, 2014 reporting deadline, Rasier-CA had communicated to SED its concern that the fare "information included trade secrets."[137] Rasier-CA again raised the trade secret arguments in post-hearing briefing.[138] And again, the SED's post-hearing briefs failed to dispute Rasier-CA's evidence or arguments concerning any data's status as a trade secret.[139]

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[132] *Id*. at 23-24; Rasier/Ex. 10 at 23-25.
[133] Rasier/Ex. 10 at App. 2A, Declaration of Krishna K. Juvvadi in Support of Petition of Rasier-CA, LLC to Modify Decision 13-09-045 at ¶¶12-14.
[134] *See generally* SED/Ex. 4, SED Reply (Dec. 9, 2014).
[135] RT: 396:9–10; *see also* Rasier/Ting, RT: 395:5–6, 395:25–26.
[136] SED/Fong/Kao, RT: 299: 14-25.
[137] RT: 337:21–27.
[138] R.12-12-011, Rasier-CA, LLC's Post-Hearing Opening Brief on Order to Show Cause in Rulemaking 12-12-011 ("Rasier Op. Br."), Jan. 21, 2015, at 18-21; Rasier-CA, LLC's Reply Brief to SED's Post-

There was no evidence or argument presented during the proceedings challenging Rasier-CA's trade secret claim. Nevertheless, the POD erroneously concludes that Rasier-CA's individual fare information for every one of millions of rides is not a trade secret because general rate information, including a fare estimator, is made public on Uber's website. The POD fundamentally misconstrues Rasier-CA's trade secret claim. A fare estimator and information regarding how rates are calculated are entirely different from a compilation of the specific individual fares for every individual trip that actually occurred in California in a year, together with the time and location these fares were charged. Moreover, for the reasons explained in Section IV(A), *supra*, concerning the POD's improper judicial notice of facts, the POD's consideration of evidence outside the record violates Rasier-CA's due process rights. If Rasier-CA had known its trade secrets claim was contested and the basis on which it would be contested, it would have presented further evidence and argument to support its claim for trade secret protection and rebut the POD's inappropriately judicially noticed evidence.

For example, had Rasier-CA been given notice that anyone disputed its trade secret claim, Rasier-CA would have presented further evidence demonstrating that (1) Rasier-CA has invested substantial time and money in creating tracking software recording the details of every ride offered by its independent drivers and every ride accepted by riders, (2) that individual trip information is kept confidential, even within the company, by storing the information in a password-protected database available only on a need-to-know basis by select employees that are told the information is confidential and cannot be disclosed to anyone, (3) that Rasier-CA uses the information for many purposes, including to determine market trends and opportunities; and (4) that as the TNC with the most data, the information would be very valuable to competitors by, among other things, allowing competitors to prioritize markets for expansion without having

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Hearing Opening Brief on Order to Show Cause in Rulemaking 12-12-1011 ("Rasier-CA Reply Br."), Feb. 5, 2015, at 5 n.4, 7-9.

[139] R.12-12-011, The Safety and Enforcement Division's Opening Brief to Rasier-CA, LLC's Order to Show Cause in Rulemaking 12-12-011 ("SED Op. Br."), Jan. 21, 2015, at 3; The Safety and Enforcement Division's Reply Brief to Rasier-CA, LLC's Order to Show Cause in Rulemaking 12-12-011, Feb. 5, 2015, at 6.

to conduct market research. The record, however, shows that the SED never disputed the data constituted trade secrets, and the POD improperly makes a determination on an issue that was not litigated and is contrary to the undisputed evidence.

(2) Rasier-CA Raised Legitimate Arguments Concerning the Scope of the Commission's Authority to Require the Production of Fare Information

The POD concludes, that despite the Commission's clear recognition that "TCPs are not public utilities" that the extent of the "Commission's ability to regulate and fine a TCP such as Rasier-CA is the same."[140] The POD reasons that nothing in the Passenger Charter-Party Carriers' Act *prevents* the Commission from requiring TCPs to produce fare information.[141] However, the Passenger Charter-Party Carriers' Act does limit the Commission's authority to that which is "necessary and convenient in the exercise of such power and jurisdiction" as prescribed in the Passenger Charter-Party Carriers' Act.[142] The Passenger Charter-Party Carriers' Act limits the Commission's authority to "supervise and regulate" TCPs "[t]o the extent that such is not inconsistent with the provisions of this [Passenger Charter-Party Carriers' Act]."[143] Specifically, section 5401 of the Passenger Charter-Party Carriers' Act prohibits the Commission from regulating TCP rates. Therefore, TCP rate regulation is outside the Commission's "power and jurisdiction." The Commission long ago recognized this limitation of their authority over TCPs. In 1976, the Commission held that:

> The Commission exercises regulatory jurisdiction over charter-party carriers ***as to fitness to operate, insurance, and safety***. The Commission ***does not exercise any control over the rates charged other than to enforce Section 5401*** which provides that charges shall be computed and assessed on a vehicle mileage or time or use basis, or a combination thereof, and that no individual fare rates shall be charged.[144]

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[140] POD at 28.
[141] *Id*. at 29.
[142] Pub. Util. Code § 5381.
[143] Pub. Util. Code § 5381.
[144] D.86670, 80 CPUC 769, at *13-14 (1976) (emphasis added).

The Commission later elaborated that Section 5401 allows charter-party carriers "considerable latitude" in computing and assessing fares, and that the "only express statutory prohibition is on charging on an "individual fare basis."[145] In light of this limited scope of jurisdiction over fares, requiring Rasier-CA to produce the actual fares charged for each and every one of millions of rides exceeds the Commission's limited authority to ensure Rasier-CA is not charging on an individual fare basis. Such a broad demand in the context of this limited jurisdiction constitutes "excessive" information not "limited in scope" and not "relevant in purpose."[146]

Moreover, the POD wrongly concludes that posting a basic ***rate*** calculator is the equivalent of disclosing the company's actual ***fare*** information for millions of specific trips. Rasier-CA's method for calculating rates is clearly posted on its website without disclosing specific fares for specific individual trips. This information allows the Commission to exercise its authority to ensure individual fares are not charged. In fact, Rasier-CA has never disputed that the Commission may require TNCs produce information necessary to investigate specific complaints, and Rasier-CA has already provided and continues to provide such information to the SED investigators. However, requiring a TNC to provide an individual record during a regulatory investigation is very different from requiring the blanket production of millions of fares.

Rasier-CA's contention that the Commission does not need every fare charged for each of the millions of rides provided throughout California is consistent with the Commission's own conclusions. For example, in Resolution TL-19004, the Commission waived the requirement that Passenger Stage Corporations ("PSCs") (which are public utilities subject to the Commission's full rate regulation jurisdiction) file annual financial reports because the burden on PSCs and on staff in "mailing, receiving and maintaining them" far outweighed any benefit—

[145] D.96-08-034, 1996 Cal. PUC LEXIS 854, at *31.
[146] *Patel v. City of Los Angeles*, 738 F.3d 1058,1064 (9th Cir. 2013) (internal quotation marks and citations omitted).

particularly because the Commission does not set rates for most PSCs.[147] Accordingly, Resolution TL-19004 concluded that due to the decreased "level of economic regulation of PSCs" the Commission no longer needed the "annual filing of detailed financial information" to "administer its PSC regulatory program."[148] The Commission thus recognized that where it does not regulate rates, there is no need for complete fare information.

The Commission's conclusion that detailed annual financial reports ***are unnecessary*** to administer its regulatory program where it does not set rates supports Rasier-CA's position. Requiring charter-party carriers—which are not subject to rate regulation at all—to provide even more extensive financial information is excessive and beyond what is necessary for the Commission to administer its regulatory program under the Passenger Charter-Party Carriers' Act. Because fare information is not "necessary and convenient in the exercise of [the Commission's] power and jurisdiction"[149] Rasier-CA believes it is beyond the Commission's appropriate jurisdiction.

3. Reporting Requirement (k) (Report on Problems with Drivers)

Reporting Requirement (k) seeks the number of drivers who received a violation or suspension, the outcome of the investigation into those complaints, accidents or incidents involving TNC drivers, the cause of any such accidents and amount paid to any party, and the date, time, and amount paid by the "driver's insurance, the TNC's insurance, or any other source."[150] The request also seeks the "total number of incidents" in the reporting year.[151]

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[147] The Commission does not set rates for most PSCs anymore because most have been granted a "zone of rate freedom" whereby the PSCs are permitted to charge rates within a range authorized by the Commission where the PSC is operating in a competitive market.
[148] Resolution TL-19004 at 3-4.
[149] The POD also implies that the Commission's authority to require the production of fare is demonstrated by the fact that other TNCs provided the information to the Commission. POD at 29. As the POD demonstrates, however, there is substantial risk a TNC will be punished if it asserts its legal rights. That other TNCs did not assert their legal rights does not demonstrate agreement with either side's position. Other TNCs may believe the Commission has authority to require the production of fare information or they may have been reluctant to incur the cost of defending their rights and face the risk of draconian penalties and revocation of license for having raised defenses. The POD should not draw any conclusions or inferences about the law based on the action or inaction of other TNCs.
[150] D.13-09-045, *mimeo* at 32.

The POD accepts Rasier-CA's argument that, because it does not have access to amounts paid, if any, by any party other than the Rasier-CA's insurance, it was not in violation of the Reporting Requirement (k).[152] The POD maintains, however, that Rasier-CA has not complied with Reporting Requirement (k) because it has not produced information on the cause of each incident. As a result, the POD imposes at fine of $1,420,000 through June 30, 2015, with continuing fines of $5,000 per day for failing to produce cause information.[153] Rasier-CA believes the POD erroneously omits consideration of Rasier-CA's substantial compliance with Reporting Requirement (k); the omission of cause information from the SED's reporting template for Reporting Requirement (k); and the uncertainty concerning the meaning of cause. If those arguments and evidence are properly considered, Rasier-CA believes a fine is unwarranted. Regardless, Rasier-CA has now strictly complied by creating and producing cause information.

First, Rasier-CA did produce a detailed report. The undisputed evidence in the record reflects Rasier-CA produced a "Report on Problems With Drivers" that included the date and time of each incident, the outcome or status of each investigation or the zero tolerance complaint, the nature of the allegation, the amount paid by Rasier-CA's insurance, and the claim status. Rasier-CA believed this information was responsive to Reporting Requirement (k) and would allow the SED to investigate and assess the broadest array of potential public safety issues that may be associated with Rasier-CA's partners (i.e., the TNC drivers).[154] The sole category Rasier-CA failed to produce was cause information—and it did so with good reason.

Second, perhaps reflecting the relatively low priority of the information, the SED's reporting template for Reporting Requirement (k) did not even include a field for cause. Rasier-CA used the SED's template for complying with Reporting Requirement (k), modifying it only to exclude insurance payment information it did not possess and to add fields disclosing the

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[151] *Id.*
[152] POD at 29.
[153] *Id*. at 82.
[154] SED/Ex. 1, Report on the Failure of Rasier-CA, LLC to Comply with the Reporting Requirements of Decision (D.) 13-09-034, Oct. 2014, at 5.

status of any claim (e.g., pending or closed) and the allegation involved in each accident (e.g., bodily injury).[155] In short, Rasier-CA completed the template SED provided—and gave ***more*** information than asked. It cannot be reasonably suggested Rasier-CA was trying to conceal information.

Third, the record demonstrates Rasier-CA explained to the SED that the "cause" of each incident was an ambiguous term that would require a legal determination of fault.[156] Rasier-CA further cautioned that any compilation of cause would be unreliable and potentially misleading if no legal determination had been made.[157] The SED acknowledged that Rasier-CA "expressed a willingness to 'work with' SED" on this issue, a fact not mentioned in the POD.[158]

Rasier-CA's record concerning Reporting Requirement (k) demonstrates good faith and substantial compliance. It produced nearly everything required, and in some instances more than was required. The sole information in dispute was cause, which Rasier-CA has now attempted to construct and provide. Based on the undisputed evidentiary record, the POD errs in assessing a $1,420,000 fine with continuing $5,000 daily fines for noncompliance with Reporting Requirement (k).

C. Rasier-CA Should Not Be Held in Contempt

The POD concludes that Rasier-CA is, beyond a reasonable doubt, in contempt under Public Utilities Code Section 2113. To reach this conclusion, the POD asserts Rasier-CA acted willfully (inexcusably) because it knew about the reporting requirements; could have complied; and did not present sufficient legal arguments excusing performance or factual evidence demonstrating substantial compliance.[159] Rasier-CA does not dispute it was aware of the

[155] SED/Ex. 1 at Att. A.
[156] Rasier Op. Br. at 8, 12-13.
[157] *Id.* at 13.
[158] SED Op. Br. at 7.
[159] POD at 30-58.

reporting requirements or had the technical ability to create or provide most of the information, but those are ***not*** the issues.[160]

The issues are (1) whether Rasier-CA's legal grounds for noncompliance were so baseless as to be contemptuous or Rule 1.1 violations, and (2) whether the factual evidence demonstrates substantial compliance. As to legal issues, it is difficult to understand how Rasier-CA's assertion of constitutional and statutory rights, grounded in precedent, is conduct warranting contempt—beyond a reasonable doubt. As to the factual record, Rasier-CA offered the SED full access to ***all*** data requested and offered to pay a third party auditor of the SED's selection to audit the information Rasier-CA produced.[161] Rasier-CA was not seeking to conceal information from the Commission or the SED and did not intend any disrespect to the regulatory process. In effect, the accommodation Rasier-CA requested was that the SED review the data without requiring Rasier-CA to relinquish control of the data. Rasier-CA requested that accommodation to avoid any risk its trade secrets would be disclosed publicly.

The POD finds contempt by misunderstanding Rasier-CA's efforts to learn why information was needed and how it would be used. Rasier-CA did not contend it need not produce trip data unless the SED disclosed its regulatory purposes. Rather, Rasier-CA sought to ascertain the purpose of the information to show that the trip-date it produced would permit the SED to satisfy the Commission's regulatory purposes—i.e., substantial compliance.[162] The record reflects Rasier-CA produced trip reports, which it believed addressed the policy goals of the TNC Decision, and it asked repeatedly for information to determine the Commission's policy

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[160] As the POD recognizes, Rasier-CA did not have the ability to produce information it did not possess, such as third-party insurance payment information, and the record reflects Rasier-CA did not understand the definition of "cause" or track cause information. *See* Section IV(B)(3).

[161] SED/Kao, RT: 324:7-326:3; 344:23-345:13.

[162] *See, e.g.*, *Butrica v. Beasley*, D.88933, *mimeo* at 7-9 (1978) (substantial compliance fulfilled goals and was justified); *Dart Indus., Inc.*, D.80958, 1973 Cal. PUC LEXIS 1262, at *8-9 (1973) (procedure for obtaining deviation substantially complied with intent of statute though did not strictly comply); *App'n of Sierra Pac. Power Co. for Approval of Its Proposals to Implement Direct Access Billing Options & Separate Costs for Revenue Cycle Servs.*, D.99-02-081, 1999 Cal. PUC LEXIS 86, at *8-10 (1999) (applicants substantially complied with decisions where, among other things, applicants "made some significant steps to satisfy [the] objective" and presented proposals "at least conceptually consistent" with the decision);

goals. This was not defiant or contemptible behavior; it was a good faith effort to substantially comply while balancing Rasier-CA's needs to protect its confidential and trade secret information from the risk of disclosure.

The POD's contempt finding is unwarranted—particularly when considering the high standard: beyond a reasonable doubt.[163] Rasier-CA's legal arguments were well-founded, and the evidentiary record demonstrated substantial compliance.

California law recognizes trade secret protections, and the Constitution prevents the government from seizing or taking trade secrets without an articulated legitimate or necessary regulatory interest. The Commission or ALJ may disagree with Rasier-CA's legal arguments, but it is not contemptible for a party to assert constitutional and other lawful rights grounded in precedent.

1. Rasier-CA's Legal Arguments Were Well-Founded and Largely Uncontested[164]

a. Rasier-CA's Trade Secret Arguments Were Well-Substantiated and the Evidence Was Undisputed

The POD errs in concluding that Rasier-CA's trip-level information, including compilation of fare information, is not a protectable trade secret.[165] The conclusion is contrary to the undisputed evidence in the record (discussed in Section II(B)), and contrary to law. The

[163] *See In re Winship,* 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue") (internal citations omitted); Cal Pen Code § 1096 ("Reasonable doubt is … that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge")(cited by *People v. Wilson*, 3 Cal. 4th 926, 943 (1992)); *People v. Brannon*, 47 Cal. 96, 97 (1873)("There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence").

[164] Rasier's well-substantiated arguments concerning compliance with Reporting Requirements (g) and (k) are discussed in Sections IV(B)(1) and IV(B)(3) of this Appeal.

[165] POD at 45-53.

issue was ***never*** contested in the OSC proceedings and was raised for the first time in the POD. The POD's analysis of California trade secret law is erroneous.[166]

First, the POD contends Rasier-CA's data is not a trade secret because the specific compilation "in template form" sought by Reporting Requirement (j) was created "at the behest of the Commission" and not for "some competitive advantage over its competitors."[167] The POD's reasoning does not make sense and is unsupported by law or fact. Simply, if the government directed Coca-Cola to provide a list of the ingredients in each of its products in a particular template or sequence, the ingredients would not cease to be trade secrets.[168] Likewise, the data Rasier-CA collects and uses, and has collected since before any regulatory requirement to preserve this data, does not lose its trade secret protection because the SED seeks some of that information in a particular template or format.

Moreover, as explained in Section IV(B)(2)(c) above, if Rasier-CA had been given notice that its trade secret claim was in dispute, Rasier-CA would have been able to present evidence establishing that Rasier-CA and its affiliates have invested substantial time and money in creating software capable of recording every ride requested by riders and every ride accepted by its independent driver-partners, including fare information for those rides. Rasier-CA uses the information to improve its business and for many business purposes. The purposes include, among others, determining market trends, opportunities for expansion, and pricing. As Rasier-CA's business has grown, so has the value of the information it has compiled. With information

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[166] California law protects trade secrets because "fundamental to the preservation of our free market economic system is the concomitant right to have the ingenuity and industry one invests in the success of the business or occupation protected from the gratuitous use of that 'sweat-of-the-brow' by others." *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1520 (1997).

[167] POD at 46.

[168] The cases cited in the POD do not support the POD's reasoning. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), and *Courtesy Temporary Service, Inc. v. Camacho*, 222 Cal. App. 3d 1278 (1990), address misappropriation of customer lists and other information by former employees. There was no dispute that the customer lists and operational information fell within the bounds of "information" under CUTSA, and both courts found the information constituted trade secrets. Here, Rasier-CA's operational information is ***not*** a customer list. Moreover, they do not address the production of compilations to the government, let alone whether a compilation of individual trade secrets may also be protected as a trade secret.

on many markets where other TNCs are not operating, the information would be valuable to competitors seeking to prioritize markets for expansion without having invested the time and expense in developing market research or data independently. Plainly the information is protectable under California trade secret law. [169]

Second, the POD asserts Rasier-CA's information is not a protectable trade secret because Rasier-CA lacks any reasonable expectation trip data the Commission ordered the TNCs to compile would be kept secret. Again, the POD erroneously assumes, without any basis, that Rasier-CA does not compile or use information that falls within the categories contained in Reporting Requirement (j)'s template for independent purposes. Moreover, the POD improperly asserts Rasier-CA has waived any trade secret protections because of "***Rasier-CA's*** voluntary preparation and submittal of trip data in Boston, and the submittal of trip data in New York." [170] Rasier-CA did not submit any data in Boston or New York[171] and it is improper for the POD to assert actions by legally separate entities can waive Rasier-CA's rights.[172]

Furthermore, the POD's analysis highlights the harm caused by improperly taking judicial notice of the New York and Boston documents, particularly without providing Rasier-CA meaningful notice and an opportunity to respond. The entities involved in Boston and New

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[169] "'Information' has a ***broad*** meaning under the UTSA," and is "***unlimited*** as to any particular class or kind of matter." *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.*, 226 Cal. App. 4th 26, 53 (2014) (emphasis added) (quoting *Trade Secrets Practice in Cal.* § 1.2 (Continuing Ed. Bar 2013) (citing *Forro Precision, Inc. v. International Business Machines Corp*., 673 F.2d 1045, 1057 (9th Cir. 1982)); 1 *Milgram on Trade Secrets: Definitional Aspects* § 1.01 (2013)).

[170] POD at 46 (emphasis added).

[171] If the issue had been raised in advance of issuing the POD, Rasier-CA would have introduced evidence demonstrating that the entity involved in the New York proceeding operates as a commercial livery service, not as a peer-to-peer TNC.

[172] As a legal matter, there are more than 100 distinct legal entities under the Uber brand, operating in disparate geographic markets around the world, and organized under the laws of more than 55 countries. It is a "general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries…Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Moreover, a State's extraterritorial application of its laws to conduct that takes place outside its borders is unconstitutional. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985); *Edgar v. MITE Corp*., 457 U.S. 624, 642–43 (1982).

York did ***not*** produce fare information nor did they produce many of the other categories of data sought by Reporting Requirement (j). And, the POD's analysis fails to consider the confidentiality protections involved in the production of the more limited trip information involved in New York and Boston. Simply, the POD's analysis is speculative, erroneous, and not supported by the record.

Third, the POD asserts, without citation to any evidence or basis, that Rasier-CA's information would not provide competitors with economic value because "[a]ll TNC drivers know where the zip codes and neighborhoods are that have the greater chances of securing rides for the day, so any release of Rasier-CA's trip data isn't going to provide the competition with information that they don't already possess."[173] The POD's speculation is factually wrong and has absolutely no basis in the record. As set forth in Section IV(B)(2)(c) above, Rasier-CA uses its information in a variety of ways to establish a competitive advantage, and competitors interested in expanding into new markets substantially benefit from knowing Rasier-CA's market data. It is simply not true that all TNC drivers or TNCs operate with the same information concerning the best places and times to operate—and it is unclear why the POD states otherwise, since it cites nothing.[174] Even if it were true, information does not lose its trade secret status merely because it is readily ascertainable.[175]

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[173] POD at 46-47.

[174] Information allowing competitors "to target their sales efforts" has independent economic value. *Abba Rubber Co. v. Sequist*, 235 Cal. App. 3d 1, 19 (1991). In *Abba Rubber*, the Court of Appeals explained that a customer list has independent economic value because it allows a competitor "to distinguish proven consumers" and "target their sales efforts" and "see at a glance where to attempt to sell his wares." *Id.* at 20 (citing *American Credit Indemnity Co. v. Sacks*, 213 Cal. App. 3d 622, 625 (1989)). Thus, because the information "would allow a competitor to direct sales efforts to" customers more likely to purchase, it was protected under the California Uniform Trade Secrets Act. *Id.* (quoting *American Credit*, 213 Cal. App. 3d at 630–31).

[175] "[I]information can be a trade secret even though it is readily ascertainable, so long as it has not yet been ascertained by others in the industry." *Abba Rubber Co.*, 235 Cal. App. 3d at 22; *see also SkinMedica, Inc. v. Histogen, Inc.*, 869 F. Supp. 2d 1176, 1193 (S.D. Cal. 2012) ("In California, information can be a trade secret even though it is readily ascertainable, so long as it has not yet been ascertained by others in the industry.") (citation and internal punctuation omitted).

Fourth, the POD contends that even if the data were subject to trade secret protection, it could be protected by limiting its release to aggregated information.[176] The POD fails to recognize the TNC Decision makes clear the Commission is not guaranteeing confidentiality of the reports—even if they are filed confidentially. The TNC Decision states "TNCs shall file these reports confidentiality ***unless*** in Phase II of this decision ***we require public reporting*** from [transportation charter party] companies as well."[177] Simply, there is not a clear guarantee the information produced will remain confidential in the future. The United States Supreme Court indicated that the holder of trade secret information loses its privilege and Fifth Amendment protections when it produces trade secrets without "a guarantee of confidentiality."[178] Given the TNC Decision contemplates possible disclosure and the SED has actually disclosed TNC data,[179] Rasier-CA could not (and cannot) risk losing its trade secret and Fifth Amendment constitutional rights against takings.[180] In short, the record reflects that Rasier-CA's trip data is a trade secret.

b. Rasier-CA's Fourth Amendment Arguments Are Well-Founded

Although the POD disagrees with Rasier-CA's Fourth Amendment arguments, those arguments are nonetheless well-grounded in case law and logic, and do not support a contempt finding. Under the Fourth Amendment, when agencies seek documents, the documents "to be produced [must be] adequate, but ***not excessive***."[181] Although the Commission may require businesses "to maintain records for routine inspection when necessary to further a legitimate regulatory interest," the Fourth Amendment "places ***limits*** on the government's authority":

> The government may ordinarily compel the inspection of business records ***only through an inspection demand*** sufficiently limited in

[176] POD at 47.
[177] D.13-09-045 at 33 (emphasis added).
[178] *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1008 (1984).
[179] SED/Kao, RT: 363:13-364:9.
[180] *See Phillip Morris, Inc. v. Reilly*, 312 F.3d 24, 39 (1st Cir. 2002) (recognizing companies there would "lose their trade secrets" because the law at issue contained no promise of confidentiality).
[181] *Craib v. Bulmash*, 777 P.2d 1120, 1124 (Cal. 1989) (emphasis added) (quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946)).

> scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[182]

Thus, the Fourth Amendment prevents a state agency from making an excessive inspection demand.

It is difficult to reconcile the Supreme Court's "limits on the government's authority," with the SED's position that "the Commission has ***complete*** authority over Rasier" and "is certainly not held only to regulate based on the 'policy purposes' of its TNC regulations."[183] That assertion—that the Commission possesses limitless authority over Rasier-CA—is also reflected in the evidentiary record. The SED plainly admitted the Decision identifies no "purpose for each item of information required, nor does it order SED to use each item of information in a particular way."[184] At the evidentiary hearing, the SED witnesses admitted they had never considered Rasier-CA's Fourth Amendment rights and did not believe they needed to do so.[185] The POD agrees, holding the Commission may demand the details of every transaction and every record so "that the Commission acquires the fullest possible picture" of Rasier-CA's operations and impacts.[186] Rasier-CA respects the Commission's authority but state agencies cannot constitutionally demand and inspect a business's records simply to obtain "the fullest picture" of the business. Rasier-CA is not aware of any case law supporting such a broad and limitless power to search and seize documents.

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[182] *Patel v. City of Los Angeles*, 738 F.3d 1058, 1064 (9th Cir. 2013) (internal quotation marks and citations omitted), *aff'd City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). Further, these restrictions apply regardless whether the responding party produces records under an administrative subpoena, agency rule, or order. See Morton Salt, 338 U.S. at 652-53 (1950) ("The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." (citation omitted)); *Craib*, 777 P.2d 1120, 1125 (Cal. 1989) (citing *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 66-67 (1974)).

[183] Ex. 4 at 10.

[184] R.12-12-011, Petition of Rasier-CA, LLC to Modify Decision 13-09-045, Dec. 4, 2014, App. B (SED Resp. and Obj. to Rasier-CA's First Set of Data Req. at 1-1).

[185] RT: 299:26–300:13 ("Q . [I]n considering whether to propose an order to show cause on sanctions, your responsibilities did not include looking at Fourth Amendment limits . . .? A [Kao]. I don't believe so. A [Fong]. No. Q. So the job was you took the words in the decision and you compared them to what was actually produced and that's it, right? A. [Kao]. We reviewed what was required by the decision and looked at what Rasier produced and considered whether what Rasier produced had met the requirements of the [D]ecision.").

[186] POD at 42–43.

In support of its conclusion that Rasier-CA's Fourth Amendment arguments are unsubstantiated and a basis for contempt, the POD cites *California Bankers Association v. Shultz*, 416 U.S. 21 (1974). But that case supports Rasier-CA's position. In *Shultz*, plaintiffs challenged the Bank Secrecy Act of 1970, which required banks to maintain records of domestic transactions and to report high-dollar foreign and domestic transactions.[187] The law contained extensive "congressional findings" and expressly identified the law's purpose: to ensure the creation and maintenance of bank records that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[188] Plaintiffs argued that the government violated the Fourth Amendment by requiring the banks to maintain records of ***all*** transactions.[189] The Supreme Court disagreed, holding the statute did not violate the Fourth Amendment in part because it ***did not require banks to turn over records of all transactions***—the government could obtain the information ***only*** "through existing legal process"—i.e., a subpoena.[190] Instead, the banks were required to report only a "relatively limited group of financial transactions in foreign commerce."[191] The reporting requirement of foreign transactions was constitutional because the transactions "take place across national borders" where "those entering and leaving may be examined . . . without violating the Fourth Amendment."[192] Further, the law was "sufficiently tailored so as to ***single out*** transactions found to have the greatest potential" for abuse.[193] For the same reason, the Court upheld the reporting requirement for high-dollar domestic currency transactions: the reporting of "abnormally large transactions in currency" was "sufficiently

[187] *Shultz*, 416 U.S. at 25–26.
[188] *Id.* at 31.
[189] *Id.* at 52.
[190] *Id.* at 52 ("We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. ***Neither the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the Government***; both the legislative history and the regulations make specific reference to the fact that access to the records ***is to be controlled by existing legal process***.") (emphasis added); *id.* at 27 ("records would not be made automatically available for law enforcement purposes (but could) only be obtained through existing legal process").
[191] *Id.* at 62.
[192] *Id.* at 63.
[193] *Id*.

related to a tenable congressional determination as to improper use of transactions."[194] In short, *Shultz* holds that a reporting requirement is likely constitutional if it does not demand ***all*** documents but targets specific information tied to an articulated purpose.

Unlike *Shultz*, the Commission requires reporting ***all*** transactions—without limitation of any kind. Reporting Requirement (j) is indiscriminate; it fails to "single out" any type of transaction that might relate to public safety or redlining. Further, while the Bank Secrecy Act expressly identified how the reporting requirements tied to the law's purpose, the SED declined to identify any link between the trip-level data and the Decision's stated objectives until months after the reporting date.[195] Indeed, Rasier-CA asked at four separate meetings that SED identify the regulatory purpose of the trip-level data, to which an SED supervisor responded: "[T]he purpose didn't matter."[196] The SED has taken the position that the Commission's authority is "complete," it is entitled to any documents or information that might give it the "fullest picture possible," and Rasier-CA's data could be used for any purpose or none at all.[197] Rasier-CA does not fault the SED for expressing its view, but it is not an accurate understanding of the law.

Next, the POD reasons that Rasier-CA has a diminished expectation of privacy because it is a closely-regulated industry.[198] While the Commission has broad authority and responsibility to regulate charter-party carriers as to fitness to operate, insurance, and safety, that does not automatically mean it is a "closely-regulated industry" as that term is used under Fourth Amendment law. Rasier-CA notes that the Supreme Court recently cautioned courts about declaring industries to be "closely regulated." In *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (applying California law), issued only weeks ago,[199] the City of Los Angeles argued that

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[194] *Id.* at 67.
[195] RT: 351:24-356:20.
[196] *See* RT: 356:11–21.
[197] Two months after the reporting date, the SED argued, for the first time, that the trip-level data could be relevant to reports on congestion and pollution. RT: 351:24-356:20
[198] *Id.* at 44.
[199] Rasier-CA cited the Ninth Circuit opinion in *Patel* in its OSC filings supporting its Fourth Amendment arguments. After the OSC briefing concluded, the United Supreme Court unanimously affirmed the Ninth Circuit.

hotels were "closely regulated" and thus had a lower expectation of privacy under a "more relaxed standard" of the Fourth Amendment. In rejecting the city's argument, the Supreme Court noted that "[o]ver the past 45 years, the Court has identified "only ***four*** industries that have such a history of government oversight" as to meet the lower standard.[200] "Simply listing these industries"—liquor, firearms, mining, and junkyards—"refutes [the city's] argument that hotels should be counted among them."[201]

As the POD indicates, lower courts in the Second Circuit have determined taxi companies are closely-regulated industries.[202] California courts do not appear to have addressed the issue, but even the courts in the Second Circuit have stated that the diminished expectation of privacy exists "particularly in information ***related to the goals*** of the industry regulation"[203]—i.e., the goals Rasier-CA repeatedly asked the SED to identify. Moreover, the Second Circuit's precedent does not fit neatly onto the TNC industry, where driver-partners are often not commercially-licensed drivers like taxi drivers, but are instead part-time drivers using their personal vehicles and who may transport riders infrequently. At the very least, this is a developing body of law subject to interpretation, and Rasier-CA's arguments are anything but contemptuous.

Lastly, the POD concludes that Reporting Requirement (j) "cannot be deemed burdensome or oppressive" because other TNCs complied.[204] Whether smaller competitors complied or chose not to challenge the reporting requirements is not a basis for concluding they agree that the reporting requirements are proper. The other TNCs' decisions may reflect only a determination that the cost of asserting their legal rights and the risk of a substantial fine (of the type the POD imposes) were too great to pursue.

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[200] *Id.* at 2454 (emphasis added).
[201] *Id.*
[202] POD at 44 (citing *Buliga v. N.Y. City Taxi Limo. Comm.*, 2007 WL 4547738 (S.D.N.Y. 2007)).
[203] *Buliga v. N.Y. City Tax Limo. Comm.*, 2007 WL 4547738, at *8 (Dec. 21, 2007) (citation omitted).
[204] POD at 45.

While the Commission may ultimately disagree, Rasier-CA's arguments are neither specious nor unsupported. These tensions—industry regulation versus privacy rights—have been litigated between businesses and government agencies for decades and continue to be litigated today. It is not surprising that the lines for regulating a "nascent industry" are uncertain and still developing. Rasier-CA should not be held in contempt for asserting protections valid arguments under the Fourth Amendment.

c. Rasier-CA's Arguments Under the Fifth Amendment Are Well-Founded

Rasier-CA's arguments under the Fifth Amendment rely on substantial case law, are well-founded, and therefore, should not be used as a basis for sanctions. Both the Takings Clause of the Fifth Amendment to the U.S. Constitution and California state law require compensation for takings of all types of property—including intangible property.[205] The United States Supreme Court recognizes the Fifth Amendment's Taking Clause applies to the government-compelled disclosure of a company's trade secret data.[206] If an individual "discloses his trade secret to others who are ***under no obligation*** to protect the confidentiality," then "his property right is extinguished."[207] California law is the same: "[T]he trade secret can be ***destroyed*** through public knowledge."[208]

While the POD argues that "steps ***can*** be made to maintain the secrecy of the information," the Commission was never ***obligated*** to do so—which raises a substantial risk for Rasier-CA.[209] Under *Ruckelshaus*, the disclosure to the Commission—even if compelled by regulation—could compromise Rasier-CA's trade secret rights. Other courts have held the same.

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[205] *See, e.g. Kimball Landry Co. v. United States*, 338 U.S. 1, 10–11, 16 (1949) (holding that intangible property is condemnable only upon just compensation because "the intangible acquires a value . . . no different from the value of the business's physical property."); *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135, 1167 (Cal. Ct. App. 2006) ("The takings clauses of the United States and California Constitutions protect not only tangible property, but also intangible trade secret property rights protected by state law.").
[206] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984).
[207] Id.at 1002.
[208] Cal. Civil Code § 3426.1, Legis. Comm. Notes (1984).
[209] D.13-09-45 at 33 n.42.

Indeed, in *Philip Morris, Inc. v. Reilly*, the First Circuit applied *Ruckelshaus*, explaining that the compelled disclosure of the ingredients in tobacco products constituted an unconstitutional taking of a trade secret.[210] There, the regulatory scheme treated the information as confidential unless the state later found disclosure "could" reduce risks to public health—leaving the door open to disclosure, as the Commission has done here.[211] The First Circuit reasoned that the state's ability to release the information—i.e., the lack of guaranteed confidentiality—meant the government was forcing "companies to cede their trade secrets."[212] Even when balanced against the "significant, ***perhaps compelling***, state interest" in the health of its citizens, the court still found a taking.[213]

As in *Reilly*, a regulatory body asks Rasier-CA to disclose trade secrets—trip data—without guarantees against disclosure. Without such guarantees, Rasier-CA risks its trade-secret rights simply by turning over the data.[214] Accordingly, Rasier-CA's concerns are valid, grounded in substantial case law, and are neither an "artifice" nor a "false statement of fact or law."

In response to Rasier-CA's arguments, the POD argues that Reporting Requirement (j) is not a taking under either the *per se* test or the "ad hoc" test.[215] Under the *per se* test, a regulation constitutes a taking when it "completely deprives an owner of *all* economically beneficial use of her property."[216] Outside of *per se* takings, "regulatory takings challenges are governed" by three factors: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[217] Rasier-CA does not assert the Commission's reporting requirements

[210] *Philip Morris, Incorp. v. Reilly*, 312 F.3d 24, 45-46 (1st Cir. 2002).
[211] *Id.* at 29; D.13-09-45 at 33 & n.42.
[212] *Id.* at 39.
[213] *Id.* at 44 (emphasis added).
[214] Cal. Civil Code § 3426.1, Legis. Comm. Notes (1984) (disclosure "destroy[s]" trade secrets).
[215] POD at 48–49.
[216] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).
[217] *Id.* at 538 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

constitute a *per se* taking.[218] The Reporting Requirement does, however, lead to a taking under the ad-hoc test.

First, the economic impact is substantial. With Rasier-CA's trip data in hand, competitors could, among other things: determine the most-profitable zip codes in which to expand; use the data against Rasier-CA to solicit investors; direct their driver-partners to more efficiently compete with Rasier-CA. In short, destroying the trade-secret protections for Rasier-CA's most sensitive data—the detailed information of every trip, driver-partner, rider, and fare in every zip code—could have a substantial economic impact.

Second, Rasier-CA invested millions of dollars in developing the technology that tracks and analyzes the data, and Rasier-CA has a reasonable investment-backed expectation its data would remain secret. That expectation is reflected in *Reilly*, where the First Circuit found that because "Massachusetts has long protected trade secrets," the tobacco companies had a "reasonable investment-backed expectation that their ingredient lists will remain secret."[219] California has similarly long protected trade secrets, and Rasier-CA's expectations are equally well-founded as those in *Reilly*. Further, the TNC industry is new, with various regulatory agencies developing evolving regulations which address confidentiality. At the time Rasier-CA invested in creating its data, there were no regulation that would have required disclosure of this data, and therefore, no suggestion that this information would not remain a trade secret.[220] Confusingly, the POD contends "there is no state law that recognizes trip data as inherently private or that the creation of same invests it with some sense of privacy," and thus, Rasier-CA had no reasonable expectation of maintaining its trade secrets.[221] That is incorrect. As shown above, Rasier-CA's trip data falls squarely within California's trade-secret protections, which

[218] *Reilly*, 312 F.3d at 33.
[219] *Id.* at 41.
[220] *See id.* at 40 (history of regulatory-mandated disclosure relevant to reasonableness of expectation of maintaining trade secrets).
[221] POD at 52.

certainly invests the information with "some sense of privacy." The data is a statutorily-protected "secret."[222]

Third, the character of the government action—the Reporting Requirement—unnecessarily threatens to harm Rasier-CA's rights. As the First Circuit explained, "[i]t appears paradigmatic that" if a government regulation mandates disclosure of trade secrets without confidentiality protections, the owner "will lose the right to exclude others" and "consequently, their trade secrets will ***lose all value***."[223] "[S]hould a competitor use published data, the [ ] companies will have no ability to enforce their rights," just as Rasier-CA would lose its right to prevent its competitors from using published trip-data to compete unfairly.[224] The First Circuit reached its conclusion even after considering the state's "compelling" interest in "promot[ing] the health of its citizens," because the regulations were not sufficiently linked to the articulated regulatory purpose.[225] "[F]or a state to be able to completely destroy valuable trade secrets, it should be required to show more than a *possible* beneficial effect."[226] The same is true here: narrower regulations could achieve the same beneficial effect without destruction of the trade secrets. That is the reason Rasier-CA sought to provide sufficient alternative data; offered full inspection; and has petitioned to modify the TNC Decision. Regardless, Rasier-CA's arguments under the Fifth Amendment, based in part on *Ruckelshaus* and *Reilly*, are well-grounded concerns and do not warrant contempt or Rule 1.1 sanctions.

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[222] *See* Cal. Civil Code § 3426 et seq. (recognizing trade secrets as private and protecting them from disclosure). Indeed, California recognizes that "fundamental to the preservation of our free market economic system is the concomitant right to have the ingenuity and industry one invests in the success of the business or occupation protected from the gratuitous use of that 'sweat-of-the-brow' by others." *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1520 (1997)

[223] *Reilly*, 312 F.2d at 41 (emphasis added).

[224] *Id.* at 42.

[225] *Id.* at 44.

[226] *Id.* at 44 ("The tremendous individual loss is simply not justified by such a speculative public gain.").

d. The POD Misconstrues Rasier-CA's References to Discovery Disputes

The POD's discussion of Rasier-CA's legal arguments, as a basis for contempt, begins with criticism of Rasier-CA's discussion of discovery rules and disputes.[227] Although most of the POD's analysis addresses the Commission's jurisdiction and authority, which Rasier-CA addresses in Section IV(B)(2)(c)(2) of this Appeal, the POD misunderstands Rasier-CA's references to discovery disputes. Rasier-CA did not intend any disrespect for the Commission's authority or the requirements of the TNC Decision; it sought to compare the current dispute over the production of data to a discovery dispute so as to find guiding principles for resolution. For example, the Federal Rules of Civil Procedure recognize that a party may satisfy a request for the production of documents (including data or other tangible items) by making the documents available for inspection.[228] Rasier-CA believed reference to the Federal Rules of Civil Procedure would help demonstrate the ability to accept inspection as a means of producing documents was well-grounded in law and practice as an alternative to relinquishing custody and control of documents. Rasier-CA did not intend to trivialize the Commission's regulatory authority or orders.

2. Rasier-CA's Substantial Compliance Argument Is Supported by the Record

The POD acknowledges numerous Commission decisions use the concept of substantial compliance as a defense but erroneously concludes Rasier-CA did not substantially comply with Reporting Requirement (j).[229] Based on the facts discussed in Section II(B), Rasier-CA respectfully believes it substantially complied by producing data allowing the SED to provide meaningful reports to the Commission and advance the articulated policy objectives of the TNC Decision. Although Rasier-CA believes the imposition of a fine for failing to strictly comply

[227] POD at 35-39.
[228] Fed. R. Civ. P. 34.
[229] POD at 53. In its discussion of the substantial compliance defense, the POD does not address whether Rasier-CA substantially complied with other reporting requirements or the reporting requirements as a whole.

sooner places form over substance, Rasier-CA has now strictly complied by producing fare information.

As the POD notes, "[s]ubstantial compliance … means actual compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. ***Substance prevails over form***."[230] This Commission has long recognized substantial compliance as a valid defense to enforcement of agency orders or decisions—particularly when, as here, any noncompliance does ***not*** implicate public safety.[231] For example, in one of many instances where the Commission found substantial compliance, the Commission denied a motion to dismiss for lack of compliance where a required notice did not strictly use the words provided for under the decision, because the notice, nevertheless, "substantially complied with the terms of our order").[232]

Under settled Commission precedent, a regulated entity has substantially complied if its conduct (1) enables the Commission to achieve the policy goals of the underlying decision, (2) is justified, or (3) demonstrates the party's good faith efforts to strictly comply. Accordingly, the Commission has found substantial compliance where: the method of compliance fulfilled goals and was justified[233]; the procedure for obtaining deviation substantially complied with intent of statute though did not strictly comply[234]; applicants "made some significant steps to satisfy [the]

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[230] *W. States Petroleum Ass'n v. Bd. of Equalization*, 57 Cal. 4th 401, 426 (2013) (citation omitted) (emphasis added).
[231] *See, e.g.*, *Beasley*, D.88933, *mimeo* at 7-10 (1978) (finding respondents not in contempt of agency decision where substantially complied with decision)[231]; *In re: Commission's Own Motion to Assess & Revise the New Regulatory Framework for Pac. Bell & Verizon Cal.*, D.03-10-088, 2003 Cal. PUC LEXIS 657, at *2-4 (2003) (party substantially complied with six performance standards in general order because it met standards 76% of the time); *Investigation on Commission's Own Motion into whether Existing Standards of the Commission Regarding Drinking Water Quality Adequately Protect Public Health & Safety*, D.00-11-014, 2000 Cal. PUC LEXIS 722, at *14-15 (2000) (utilities substantially complied with testing and monitoring requirements);
[232] *In re App'n of S. Cal. Gas Co. & Pac. Lighting Gas Supply Co.*, D.84-09-089, 1984 Cal. PUC LEXIS 1013, at *65 (1984)
[233] *See, e.g.*, *Beasley*, D.88933, *mimeo* at *7-9.
[234] *Dart Indus., Inc.*, D.80958, 1973 Cal. PUC LEXIS 1262, at *8-9 (1973)

objective" and presented proposals "at least conceptually consistent" with the decision[235]; and where an applicant showed it had taken steps toward full compliance.[236] In fact, the Commission has issued at least 47 decisions that reference substantial compliance.[237]

In rejecting Rasier-CA's substantial compliance argument, the POD asserts Rasier-CA's efforts were "akin to discovery dumps of thousands of documents on an adversary . . . ."[238] The assertion is wrong. The POD misconstrues the information Rasier-CA produced (discussed in Section II(B) above). The data was voluminous, but it was not a "discovery dump" burying the SED in voluminous ***unusable*** data.[239] To the contrary, Rasier-CA produced aggregate information, which was intended to be less burdensome than disaggregated individual trip information and easier for the SED to review and interpret. Moreover, Rasier-CA did not, as the POD contends, suggest staff simply review the voluminous documents.[240] Rather, Rasier-CA produced the aggregate data; offered to make individual trip-level data available for inspection; and even offered to pay for a third party auditor selected by staff to assist in evaluating the data.[241]

Finally, the POD rejects substantial compliance on the mistaken belief Rasier-CA failed to produce the correct concomitant data. As explained in Section II(B) above, it is undisputed that Rasier-CA produced the correct concomitant data on March 6, 2015, promptly after learning of the SED's interpretation of Reporting Requirement (j). The POD appears to have overlooked the evidence demonstrating the correct concomitant data was produced.

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[235] *App'n of Sierra Pac. Power Co. for Approval of Its Proposals to Implement Direct Access Billing Options & Separate Costs for Revenue Cycle Servs.*, D.99-02-081, 1999 Cal. PUC LEXIS 86, at *9 (1999) (applicants substantially complied with decisions

[236] *App'n of Kernville Domestic Water Co.*, D.84-07-008, 1984 Cal. PUC LEXIS 1313, at *9 (1984) (applicant substantially complied with decision

[237] *See* Cases Cited in Rasier-CA, LLC's Post-Hearing Opening Brief and Additional Substantial Compliance Cases (attaching Commission decisions).

[238] POD at 55. The POD relies on cases interpreting discovery disputes when discussing substantial compliance (POD at 55-56) but incongruously criticizes and holds Rasier-CA in contempt in part for making references to discovery disputes and rules which the POD indicates are different from a Commission Order (POD at 35).

[239] POD at 55.

[240] *Id*. at 56.

[241] SED/Kao, RT:324:7-326:3; 344:23-345:13.

D. Rasier-CA Did Not Violate Rule 1.1

Rasier was respectful and direct in the conduct of the OSC proceedings, raising valid legal arguments as discussed above and is unaware of any case in which penalties have been imposed for raising legal defenses. Although the POD disagrees with Rasier-CA's arguments, Rasier-CA has been forthright with the SED in stating its reasons for not strictly complying and has provided alternatives attempting to substantially comply while trying to protect its trade secrets. This is not a case of a regulated entity attempting to conceal information or mislead the Commission or staff.

1. A Rule 1.1 Violation Requires a False or Misleading Statements of Fact, Not an Assertion of Legal Argument

The POD finds that Rasier-CA violated Rule 1.1 on the basis that it asserted "***multiple legal defenses that were unsound***."[242] However, Rule 1.1 violations occur where a party makes untruthful, factually incorrect, or factually incomplete statements that were intended to or in effect mislead the Commission, not where a party presents valid, if ultimately unsuccessful, legal arguments.[243] The Commission recognized this distinction when it held that the Commission "cannot penalize a party for stating its position" as "the objective truthfulness of facts is quite a different matter from the logical credibility of an argument."[244] Indeed, every Rule 1.1 decision cited in the POD involved false or misleading statements of fact, withholding of material information that misled the Commission, or the failure to update an incorrect statement of fact.[245]

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[242] POD at 60 (emphasis added).

[243] Although not applicable to the situation here, to be clear, the Commission has also found Rule 1.1 violations where a party has failed to comply with the ex parte rules, which violation was considered to be "disrespect[ful of] the Commission and its Administrative Law Judges (*see, e.g.,* D.15-06-035 at 2), and where a party made factually unfounded criminal accusations that "poison[ed] the atmosphere of already-difficult litigation conditions" and that failed to "maintain the respect due to the Commission" (*see* D.00-09-007 at 21).

[244] D.96-09-083, *Vinodrai Rawal, dba the Wharf Airporter vs. SFO Airporter*, at * 13-14.

[245] D.13-12-053 (the "lack of candor, withholding of information, or failure to correct information or respond fully to data requests" constituted a Rule 1.1 violation because it allowed a "key false statement of fact to persist uncorrected"); D.09-04-009 (Rule 1.1 violation because they attempted to mislead the Commission by falsely certifying in the application that it had not been sanctioned by a state regulatory agency for failure to comply with any regulatory statute, rule, or order – again, a false statement of fact); D.01-08-019 (Again, this case found a Rule 1 violation for failure to disclose certain information that had "the effect of misleading the staff. Even if one did draw an analogy here, there is no allegation that the

Furthermore, the POD's reliance on D.94-11-018 and D.01-08-019 is misplaced. The reference to Rule 1 in D.94-11-018 is for the proposition that reports filed with the Commission must be "accurate" and not that Rule 1 itself creates an obligation to file reports. Similarly, the POD erroneously interprets Decision 01-08-019 which held that "intent to deceive" was not required to find a Rule 1.1 violation because, regardless of intent, the Commission and staff were actually misled.[246] The POD inappropriately converts this "intent to deceive" standard into an "intent to disobey" standard. Again, Rule 1.1 is concerned with dishonesty, not the simple failure to comply with a Commission order, which is governed by Pub. Util. Code Section 5413. Rasier-CA has not lied or misrepresented the information it withheld or the reasons why. Rather, Rasier-CA has presented a legitimate objection regarding what information it can be legally required to divulge.

A party has a right to object to a Commission order or staff without being penalized for making that objection—a right the Commission has long-recognized. For example, the Commission's General Order ("GO") 167 requires generating asset owners to "provide information as requested" to Commission staff and to "cooperate with [staff] in the provision of information."[247] In response to concerns that objections to providing confidential information could be treated as a "failure to cooperate" under GO 167, the Commission held it "should be understood that ***a lawful and reasonable assertion of rights would not be used as a basis for finding a violation***" of this General Order or a failure to cooperate. In fact, the Commission modified GO 167 to reflect this understanding. [248] Given that the Commission has plainly stated that "a lawful and reasonable assertion of rights" cannot support a violation, it is difficult to

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Commission has been misled by the failure to produce the data Rasier-CA argues the Commission has no authority to require); D.94-11-018 (Again, this case involves a Rule 1 violation for making statements that were "not true." Since the POD bases the Rule 1.1 violation on Rasier-CA's assertion of legal arguments, not incorrect or untrue facts, the mind state involved in making a false or misleading statement is not at issue); and D.92-07-084 (found Rule 1.1 violation for "failing to provide the correct information in its report, and in not informing the Commission of the actual [contractual status], SoCalGas misrepresented and misled the Commission").

[246] D.01-08-019, at 14.

[247] General Order 167 § 10.1 (emphasis added).

[248] D.06-01-047 at *47-48.

understand how Rasier-CA can be sanctioned nearly $8 million have its license suspended for asserting "legal defenses that were unsound,"[249] as the POD states. Rasier-CA should not be penalized for making a lawful and reasonable assertion of its rights.

2. Rasier-CA's Legal Assertions Are Reasonable and Grounded in Commission Precedent

Rasier-CA's legal assertions are reasonable and have support in Commission precedent. For example, the Commission recognized the limits to its authority to obtain information from regulated entities on the same basis asserted by Rasier-CA in this proceeding. A request for information or inquiry, the Commission found, "must have some rational relationship to public utility regulation."[250] Further, the Commission concluded, while it has the "authority to obtain information from non-public utilities and/or non-regulated entities in certain circumstances" this "does not mean that the Commission may obtain any information from any entity at any time. . . . The precise limits of the Commission's authority in any given case must necessarily be determined based on the facts and circumstances of such case."[251] Relying on these same principles, Rasier-CA argued that the "facts and circumstances" relating to non-public utility charter-party carriers such as TNCs establish that the Commission's authority to obtain information from Rasier-CA is limited.

An exhaustive search of Commission decisions involving Rule 1.1 violations did not uncover a single instance where the Commission sanctioned a party for making "unsound" legal arguments.[252] In one case, the Commission rejected a party's request for sanctions because "it has failed to show that [the legal assertion] is so ***self-evidently wrong*** that to adopt it and advocate it before the Commission warrants sanctions against the adopting party."[253] The POD's determination that Rasier-CA's legal arguments were "unsound" does not provide a sufficient

[249] POD at 60, 66 (emphasis added).
[250] D.08-04-062, 2008 Cal. PUC LEXIS 147, at *9.
[251] *Id.* at 13-14.
[252] *Cf.* D.00-09-007, finding a Rule 1.1 violation for filing pleadings full of malicious accusations and gratuitous statement reflecting the rancor between the parties. The violation reflected the tone of the pleadings, which were disrespectful, not the validity or soundness of the legal arguments.
[253] D.00-09-007, 2000 Cal. PUC LEXIS 688, at Section 3.5.

basis for a Rule 1.1 violation or any other basis for sanctions, as Rasier-CA's legal contentions were grounded in legal principles recognized by this Commission. The POD's imposition of sanctions for asserting legal arguments based on constitution, statutory, and case authorities is unprecedented. Accordingly, the POD does not establish that Rasier-CA's legal arguments are "so self-evidently wrong" that they warrant sanctions.

E. Fine and Penalties Are Unsupported by the Record and Law

1. Section 2107 Is Not applicable to TNCs (Except by Analogy)

The POD relies on Public Utilities Code Sections 2107 and 5411 for authority to impose fines on Rasier-CA.[254] However, neither of these provisions govern the Commission's authority to penalize charter-party carriers such as Rasier-CA. Public Utilities Code Section 2107 is codified within "Division 1: Regulation of Public Utilities."[255] As explained in Rasier-CA's briefs[256] and acknowledged by the POD,[257] charter-party carriers like Rasier-CA are not public utilities subject to Division 1 of the Public Utilities Code. Rather, the Passenger Charter-Party Carriers' Act codified in Chapter 8 of "Division 2: Regulation of Related Businesses by the Public Utilities Commission"[258] contains separate penalty provisions the legislature crafted specifically for charter-party carriers. As explained further in Section IV(E)(2), *infra*, while there are certain parallels between the penalty provisions found in Pub. Util. Code Sections 2100 *et seq*. and 5411 *et seq*., the Commission cannot rely on Section 2107 to impose penalties on Rasier-CA. Rasier-CA recognizes that the language of Section 2107 is similar to the language in the penalty statute applicable to charter-party carriers (Section 5413) and, therefore, the Commission's precedent establishing the criteria for the assessment of a penalty is relevant to applying Section 5413, however, and the is subject to Section 5413's penalty limits.[259]

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[254] POD at 60.
[255] Public Utilities Code §§ 201-3384.
[256] R.12-12-011 Rasier Reply Brief at 8-9 n.6.
[257] POD at 28.
[258] Public Utilities Code §§ 5351-5443.
[259] Section 2107 allows the fines between $500 and $50,000 per offense, whereas § 5413 limits penalties to not more than $2,000 per offense.

2. Section 5411 Is a Criminal Statute Not Within CPUC Jurisdiction to Enforce or Apply. The Maximum Fine Per Offense Possible Is $2,000 Pursuant to Pub. Util. Code 5413

The POD imposes a "maximum fine amount of $5,000 per offense" pursuant to Pub. Util. Code § 5411.[260] Section 5411, however, involves a criminal offense and penalty and the Commission does not have authority to prosecute criminal offenses. Instead, the Commission may enforce civil penalties. In this case, the applicable civil statute in the Passenger Charter-Party Carrier Act is Section 5413, which has a maximum fine of $2,000 per offense. The POD erred in relying on a criminal statute in assessing $5,000 daily fines, which are substantially greater than the maximum fine amounts permitted under the relevant statute.

The Commission has recognized it may not enforce criminal provisions of the Public Utility Code. For example, in interpreting Public Utility Code Section 2114,[261] a provision similar to Section 5411, the Commission explained that the "reference in §2114 to the phrase 'guilty of a felony' is clearly intended to create a criminal offense within the statutory framework of the PU Code."[262] Because the "fine prescribed in §2114 is dependent upon a guilty conviction," which is within the exclusive jurisdiction of the courts, [263] the Commission concluded that Section 2114 did not create "an independent basis for [the Commission to impose] a stand alone fine upon a utility."[264] Similarly, an entity that violates Section 5411 is "guilty of a misdemeanor." Therefore, prosecution of an alleged violation of Section 5411, and

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[260] POD at 62 (stating: We need not decide if the Commission is limited to the monetary penalty limit of $50,000 per offense provided by Pub. Util. Code § 2107, or the monetary fine limit of $5,000 per offense provided by Pub. Util. Code § 5411, when a TCP violates Rule 1.1, since we are electing to impose the maximum fine amount of $5,000 per offense.")

[261] Section 2114 provides:

> Any public utility on whose behalf any agent or officer thereof who, having taken an oath that he will testify, declare, depose or certify truly before the commission, willfully and contrary to such oath states or submits as true any material matter which he knows to be false, or who testifies, declares, deposes, or certifies under penalty of perjury and willfully states as true any material matter which he knows to be false, is guilty of a felony and shall be punished by a fine not to exceed five hundred thousand dollars ($500,000).

[262] D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *34-35.

[263] D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *34; *See also* D.07-07-043, 2007 Cal. PUC LEXIS 279, *199 (Conclusion of Law 72 recognizing that "This Commission lacks criminal jurisdiction").

[264] D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *34.

imposition of the $5,000 maximum penalty, is a criminal proceeding that must occur in a court, not before this Commission.

In contrast to the criminal penalties available after prosecution under Section 5411, Public Utilities Code Section 5413, in the Passenger Charter-Party Carrier Act, provides the Commission with the authority to levy civil penalties. Those civil penalties are limited, however, to $2,000 per offense. The POD erred in using a $5,000 per offense basis.

The POD further errs by imposing daily fines based on the criminal statute, specifically by combining Section 5411 with Section 5415. Section 5411, the criminal statute, imposes a $5,000 maximum penalty per offense. Section 5415 allows the Commission to assess a per-day penalty for continuing violations. Because the Commission does not have jurisdiction to impose fines under Section 5411, it should not be used as a basis for imposing daily fines.

The SED argued that the Commission may impose a higher maximum penalty per offense than is permitted by Section 5413 through other means. Specifically, the SED argued that the maximum fine per offense is $7,500 pursuant to Section 5378(b).[265] However, as Rasier-CA explained in its Post-Hearing Reply Brief,[266] the SED's reliance on Section 5378(b) is misplaced. Section 5378(b) provides only for a flat penalty of $7,500 as "an alternative to canceling, revoking, or suspending the permit or certificate," which is the penalty available under Section 5378(a). As an alternative to revoking a permit, which can only occur once, so too is the $7,500 penalty limited to a one-time fine.

Furthermore, using Section 5378(b) to impose fines greater than authorized by Section 5413 would be contrary to basic principles of statutory construction. Courts should "give effect, if possible, to every clause and word of a statute"[267] and "avoid rendering superfluous" any statutory language.[268] This presumption also guides interpretation of "redundancies across

[265] SED Op. Brief at 14.
[266] Rasier Reply Br. at 10.
[267] *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).
[268] *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). *See also Bailey v. United*

statutes."[269] That is, overlapping statutes should be read to give effect to each other. Combining Section 5415 with the higher limits set in Section 5378(b) or Section 5411 would render Section 5413's lower limit meaningless and superfluous, and should not be done.

In sum, the legislature carefully crafted a range of penalties under the Passenger Charter-Party Carrier Act; a $5,000 maximum criminal penalty is available only in court prosecutions; a $7,500 maximum flat penalty is available as an alternative to revocation of a permit; and a $2,000 maximum per offense penalty is permitted for violations of the Charter-Party Carrier Act.

3. Factors for Determining the Amount of a Fine Under Section 5413 Were Not Properly Considered or Applied

To determine the amount of the fine, the POD relies on the criteria described in D.98-12-075.[270] Although this decision reflects the Commission's penalty analysis pursuant to Pub. Util. Code Section 2107, which is not applicable to charter-party carriers, Rasier-CA recognizes that these principles were drawn from numerous Commission decisions concerning penalties in a wide range of cases, and that the Commission relies on these principles as precedent in determining the level of penalty in the full range of Commission enforcement proceedings.[271] As such, Rasier-CA agrees that these principles guide the Commission's determination pursuant to Pub. Util. Code section 5413 as well, which is the relevant statute applicable to charter-party carriers. Rasier-CA believes, however, the factors were not properly considered or applied.

a. Severity of the Offense

The "Severity of the Offense" factor considers whether the violation resulted in physical harm, economic harm, or harm to the regulatory process, and the number and scope of the violations.[272] In applying this standard, the POD concludes that Rasier-CA "harmed the

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States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense).

[269] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (finding that, in spite of considerable overlap between two provisions, each addressed matters that the other did not)

[270] D.98-12-075, 1998 Cal. PUC LEXIS 1016 *52-60.

[271] *Id*.

[272] POD at 64-65.

regulatory process by failing to produce the required information to the Commission which, in turn, frustrated the Commission's ability to access the available data to evaluate the impact of the TNC industry on California passengers."[273] The POD's conclusion has no evidentiary support in the record and, rather than reflecting an analysis of the facts of this case, is a legal conclusion that assume all failures to strictly comply with a Commission order results in "harm to the regulatory process" and should be considered a high level of severity.

As explained in more detail in Section II(B), it is undisputed that Rasier-CA offered the SED full access to all data sought under Reporting Requirement (j) at a neutral third-party site, and to run queries across that data.[274] Further, the SED did not dispute that this method of production would have allowed assessment of the data for any purpose the SED or Commission might identify.[275] Moreover, the SED did not identify any regulatory harm that resulted or would result from Rasier-CA's proposed alternatives. In fact, the evidence demonstrates that the SED was able to use the data Rasier-CA produced to evaluate the impacts on California passengers, and the SED presented the results of this evaluation at the Commission's hearing *En Banc* on November 4, 2015.[276] Accordingly, there is no factual or evidentiary basis to conclude there was any harm to the regulatory process.

b. Conduct of the Utility

The "Conduct of the Utility" factor considers the utility's actions to prevent, detect, disclose and rectify the violation.[277] The only explanation the POD gives for assessment of Rasier-CA's "conduct" is that Rasier-CA had the ability to comply with the Reporting Requirements and "declined to do so by interposing a series of unsound legal arguments and objections."[278] As explained in Section II(B), Rasier-CA has continually attempted to work in good faith with SED since before the September 19, 2014 reporting deadline to find a way to

[273] *Id*. at 65.
[274] SED/Kao, RT: 344:14-345:10; SED/Ex. 4 at 5; Rasier/Ex. 10, App. 2 ¶ 5; Rasier/Ex. 10, App. 3A ¶ 11.
[275] SED/Kao, RT: 344:14-345:10; SED/Ex. 4 at 5-6.
[276] SED Report En Banc Transp. Network Cos. Rules & Reg., Nov. 4, 2014, at 3, 14).
[277] POD at 65-66.
[278] *Id*. at 66.

provide the SED full access to the data without waiving its trade secret privilege. The POD refused to consider these good faith efforts to "cooperatively" work with the SED to substantially comply, as required by criteria established in D.98-12-075.

Furthermore, the POD's conclusion that Rasier-CA's lawful and reasonable assertion of rights is an aggravating factor is contrary to Commission precedent and practice, which holds that it "should be understood that a lawful and reasonable assertion of rights would not be used as a basis for finding a violation."[279] The POD's conclusion that Rasier-CA should be punished for asserting its legal rights contravenes both basic due process protections and Commission precedent.

c. Financial Resources

The POD improperly considers the resources of Rasier-CA's parent in imposing sanctions. According to the POD, a fine should "reflect the financial resources of the utility," and the POD considers UTI's financial resources "based on the legal theories of parent/subsidiary and alter-ego liability."[280] Rasier-CA never received notice that the relationship with its parent company was even at issue, and it was therefore not afforded the opportunity to present evidence or argument on the matter. Yet even on the facts of an incomplete record, the POD erroneously pierces the corporate veil, an equitable remedy employed "only in the case of fraud or certain other exceptional circumstances."[281] The circumstances before the Commission do not warrant veil piercing.

(1) Rasier-CA Received No Notice the Relationship With UTI Was at Issue and Was Deprived of Due Process.

Rasier-CA never received notice that UTI's revenues would be considered via an alter-ego theory, leaving Rasier-CA no opportunity to respond. "The alter ego doctrine is subject to standards of due process arising under the 14th Amendment of the United States

[279] D.06-01-047 at 47-48 (modifying General Order 167 to include Rule 12.1, which explicitly provides that a party's "lawful and reasonable assertion of its rights under this General Order or state or federal law will not be considered a failure to cooperate.")
[280] POD at 66–67.
[281] *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004).

Constitution."[282] The Fourteenth Amendment guarantees "that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses."[283] Failing to allow a defendant to address alter-ego liability "would ***patently*** violate this constitutional safeguard."[284] Indeed, a party must plead specific facts in its complaint to pursue alter-ego liability.[285]

Here, the SED never raised the possibility of alter-ego liability. Thus, Rasier-CA presented no evidence on the issue. Neither party had considered the issue until it unexpectedly appeared in the POD (supported only by erroneously judicially-noticed evidence received after the evidentiary hearing and post-hearing briefing were complete). But the very case law the POD relies on demonstrates that the parties are entitled to litigate the issue of alter-ego liability.[286] The POD pierces the corporate veil, relying on evidence not properly before the tribunal and which Rasier-CA never had the opportunity to rebut. For those reasons, Rasier-CA was deprived of due process.

(2) The POD Erroneously Pierces the Corporate Veil.

The POD erroneously pierces the corporate veil in concluding that Rasier-CA is the alter-ego of UTI.[287] California public policy "dictates that imposition of alter ego liability be

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[282] *In re Titan Telecomm., Inc.*, 2003 Cal. PUC LEXIS 79, at *22 (2003) (citing *Motores de Mexicali, S.A. v. Superior Court*, 51 Cal. 2d 172 (1958)).
[283] *Id.* (citing *Motores de Mexicali*, 51 Cal. 2d at 176); *see also Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 509 (2010) ("Due process guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses"—including specifically in applying alter-ego liability).
[284] *In re Titan Telecomm., Inc.*, 2003 Cal. PUC LEXIS 79, at *22 (emphasis added).
[285] *Gerritsen v. Warner Bros. Entertainment Inc*., 2015 WL 3958723, at *21 (C.D. Cal. June 12, 2015) ("[Plaintiff] must allege specific facts supporting both of the necessary elements" of alter-ego liability.).
[286] *See Las Palmas Assoc. v. Las Palmas Ctr. Assoc*., 235 Cal. App. 3d 1220 (1991) (parties presented evidence and argument on alter-ego liability) (cited at length in POD at 67); *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673 (1940) (parties presented evidence and argument on alter-ego liability) (cited in POD at 68).
[287] Courts have noted the alter-ego analysis often goes by other names: "[The] so-called 'alter ego theory' is often used interchangeably with such expressions as 'disregarding the corporate entity' and 'piercing the corporate veil.' . . . In addition, some courts use the word 'agent' to describe what is essentially the same relationship contemplated by the term 'alter ego.'" *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1235 (N.D. Cal. 2004) (quoting *Mobil Oil Corp. v. Linear Films Inc.*, 718 F. Supp. 260, 266 (D. Del. 1989)).

approached with caution."[288] "[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require."[289] "The doctrine of piercing the corporate veil . . . is the rare exception, applied ***in the case of fraud or certain other exceptional circumstances***."[290] In short, veil piercing is reserved for rare circumstances.

California courts have cautioned against piercing the corporate veil specifically to warrant higher awards by looking to a parent company's higher revenues—precisely as the POD does. In *Walker v. Signal Cos., Inc.*,[291] plaintiffs sued their home builder for failing to complete their residence on time and exposing them to tax liability. Plaintiff won punitive damages, but sought to justify a higher award by considering the revenues of a parent company. The court rejected the plaintiff's bid because "***[t]he sole basis for holding [the parent] liable would be to enable the plaintiffs to obtain an increased aware of punitive damages because of the substantial net worth of the parent***. There is no factual justification to do so."[292]

To determine whether veil-piercing is appropriate, California applies a two-part test: (1) "that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist;" and (2) "that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[293] The POD does not cite this universally-recognized test. Instead, the POD concludes that "Uber's control over Rasier-CA's operations are so pervasive" that the Commission may pierce the corporate veil and consider unsubstantiated estimates of Uber's gross revenues in setting a sanction.[294] That is not enough.

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[288] *Las Palmas Assoc. v. Las Palmas Ctr. Assoc*., 235 Cal. App. 3d 1220, 1250 (1991) (citing *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990)).
[289] *Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 511 (2010) (quoting *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 301 (1985)).
[290] *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003)) (emphasis added).
[291] *Walker v. Signal Cos., Inc*., 84 Cal. App. 3d 982 (1978).
[292] *Id.* at 1001 (emphasis added).
[293] *Greenspan*, 191 Cal. App. 4th at 511; *see also Las Palmas Assoc. v. Las Palmas Ctr. Assoc*., 235 Cal. App. 3d at 1249 (same).
[294] POD at 75.

(a) UTI and Rasier-CA Are Separate Legal Entities.

Rasier-CA and UTI do not share such a unity of interest and ownership as to destroy legal separation. California courts hold that "allegations that the defendant was the sole or primary shareholder are inadequate as a matter of law to pierce the corporate veil. Even if the sole shareholder is "entitled to all the corporation's profits, and dominated and controlled the corporation, that fact is insufficient by itself to make the shareholder personally liable."[295] The question is whether "the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former."[296]

If Rasier-CA had been notified that veil-piercing was an issue and had been permitted to present evidence, it would have shown Rasier-CA's managers are distinct from UTI's directors. Although the POD judicially notices that UTI's CEO, Mr. Kalanick, was the "sole managing partner" of Rasier-CA as evidence of control, that fact was no longer true in September 2014, when Raiser filed its verified report.[297] Rasier-CA has two separate managers. Rasier-CA pays UTI a service fee for the overhead and administrative cots provided by UTI. Rasier-CA independently contracts with driver-partners. Rasier-CA is covered by its own insurance that does not cover UTI. And the Commission has already recognized their separate regulatory status: Rasier-CA is an acknowledged TNC, while "Uber does not meet the definition of a TNC."[298] While Rasier-CA is wholly owned, it is a separate legal entity.

In reaching the opposite conclusion, the POD relies on judicially-noticed facts that California courts have declared unpersuasive. The POD notes that the email address on Rasier-CA's TNC application is an Uber address ("rasier-ca@uber.com"); Rasier-CA has stated it is affiliated with Rasier, LLC and UTI; both Rasier-CA and UTI are represented by Davis Wright Tremaine, LLP; UTI's "financial viability" rests, in part, on Rasier-CA; UTI requires its

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[295] *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) (quoting 1 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 41.35, at 671 (1999)).
[296] *Id.* at 22 (quoting *NetApp, Inc. v. Nimble Storage, Inc.*, 2015 WL400251, at *5 (N.D. Cal. Jan. 29, 2015)).
[297] POD at 70–71.
[298] D. 13-09-45 at 24.

subsidiaries to carry insurance; and UTI sets fares and controls billing.[299] Yet courts have weighed those types of factors and found them insufficient to meet the first element of the alter-ego test.

In *Gerritsen v. Warner Bros. Entertainment, Inc.*,[300] the court held that a wholly-owned and controlled subsidiary of Warner Brothers was not an alter-ego and veil piercing inappropriate.[301] The suit involved a dispute over the story to the Oscar-winning movie *Gravity*, where plaintiff had authored a best-selling book of the same name and accused Katja Motion Pictures and New Line Productions, two subsidiaries of Warner Brothers, of failing to abide a contract for rights to the story. The court held there was no unity and disregarded the overlap of officers and directors because "[it] is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary."[302] Moreover, "the fact that a parent and subsidiary share the same office location, or the same website and telephone number, does not necessarily reflect an abuse of the corporate form and existence of an alter ego relationship"—instead, these are corporate efficiencies.[303] Even the fact that the parent calls the subsidiary a "division," or "issues press releases on their behalf in [the subsidiary's] name," or "that defendants share common business departments and employees;" or that the parent "provides funding to [the subsidiary]" does "not necessarily indicat[e] an alter ego relationship."[304] "Rather, they are common aspects of parent-subsidiary relationships."[305] It did not matter that Warner Brothers controlled what films were made and what films were not, how many films were produced annually, or required that all films be distributed through Warner

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[299] *Id.* at 68–72.
[300] __ F. Supp. 3d __, 2015 WL 3958723 (C.D. Cal. June 12, 2015) (applying California law)
[301] *Id.* at *5.
[302] *Id.* at 23 (quoting *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 548–49 (2000)); *see also Institute of Veterinary Pathology v. California Health Labs, Inc.*, 116 Cal. App. 3d 111, 120 (1981) (no alter ego liability where plaintiff "only establishes intercorporate connections between [companies] and [plaintiff] fails to set forth any direct evidence of [parent's] manipulative control of its subsidiaries which would require imposition of liability")).
[303] *Id.* at *24 (citations omitted).
[304] *Id.*
[305] *Id.*

Brothers.[306] All of these facts are "merely incidental to a typical parent-subsidiary relationship," but they do not indicate "***manipulative control*** by the parent of its subsidiaries."[307]

Here, the POD cites no manipulative control by Uber. The facts the POD does cite—shared email addresses, offices, employees, and attorneys, control of company policy and imposing insurance requirements—are the same factors found unpersuasive in *Gerritsen*—they establish only a "typical" parent-subsidiary relationship. Moreover, if Rasier-CA had been permitted to litigate this issue, it would have presented evidence of legal separation in the record. But even as the one-sided record stands, there is nothing suggesting Uber exercises manipulative control over Rasier-CA or that the parent-subsidiary relationship is anything other than typical, and the unity element is not met.

(b) Recognizing Legal Separation Would Not Result in an Inequitable Result

Recognizing separate legal entities would not produce an inequitable result. California courts will pierce the corporate veil only where a party has "abused the corporate form to evade individual liability, circumvent a statute, or accomplish a wrongful purpose."[308] Piercing is appropriate only where recognizing legal separation would "sanction a fraud or promote injustice."[309] "Effectively, the corporation must be a sham and exist ***for no other purpose than as a vehicle for fraud***."[310]

Thus, the "chief illustrations of disregarding the corporate entity involve using the corporate form to evade individual liability to third parties."[311] The very case discussed by the POD is the perfect example. In *Las Palmas*,[312] a developer, Hahn, fraudulently used its subsidiary, Devcorp, to avoid liability on guarantees to third parties, thereby justifying veil

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[306] *Id.* at *5.
[307] *Id.* at *25 (quoting *Institute of Veterinary Pathology*, 116 Cal. App. 3d at 120) (emphasis added).
[308] 9 Witkin Sum. of Calif. Law § 9 (10th ed. 2010).
[309] *Gerritsen*, 2015 WL 3958723 at *26 (quoting *First Western Bank & Trust Co. v. Bookasta*, 267 Cal. App. 2d 910, 914–15 (1968) (citations omitted)).
[310] *McKeeson HBOC, Inc. v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1095 (9th Cir. 2003) (applying Delaware law) (emphasis added).
[311] 9 Witkin Sum. of Calif. Law § 11 (10th ed. 2010).
[312] 235 Cal. App. 3d 1220 (1991); *see also* discussion in POD at 67.

piercing. Hahn sold a shopping center to a group of buyers, and as part of the transaction, Devcorp guaranteed the leases of two problem tenants.[313] Hahn then "liquidat[ed] the company's assets and discharg[ed] its executives and employees," leaving Devcorp "a shell company with Hahn's staff transacting its remaining business" and refusing to abide the guarantees.[314] A jury found that Hahn and Devcorp "had fraudulently misrepresented their intent to honor the guaranties," had "acted with oppression, fraud, or malice," and that "Devcorp was the alter ego of Hahn, Inc., and that Hahn, Inc. should be held liable."[315] In short, Hahn and Devcorp were "combined into a single enterprise to defraud buyers."[316] These types of cases—where a parent uses a subsidiary to dodge liability by emptying the corporate entity—are common.[317] There is no evidence supporting a conclusion Rasier-CA exists to avoid liabilities, and the POD errs in considering UTI's alleged financial resources when determining a fine against Rasier-CA.

d. Totality of Circumstances

The "Totality of the Circumstances" factor considers the degree of wrongdoing and the harm, "evaluated from the perspective of the public interest."[318] Again, the POD summarily concludes that Rasier-CA's "actions impeded the Commission's staff from exercising its obligations to analyze the required data so it could advise the Commission of the regulations imposed on the TNC industry were protecting the public interest."[319] The POD does not cite any evidence supporting this conclusion. As explained above (Section IV(E)(3)(a), the SED was not "impeded"; indeed the SED admitted the aggregate data Rasier-CA provided combined with full access to the raw underlying data Rasier-CA offered would have allowed the SED to provide the

[313] *Id.* at 1231–32.
[314] *Id.* at 1233.
[315] *Id.* at 1237.
[316] *Id.*
[317] *See also Jack Farenbaugh & Son v. Belmont Constr., Inc.*, 194 Cal. App. 3d 1023, 1030 (1987) (company faced with judgment liability by leaving entity "a hollow shell without means of satisfying its existing and potential creditors" and transferring the debtor's assets to a new entity).
[318] POD at 77-78.
[319] *Id*. at 78.

Commission with meaningful reports. The POD does not identify any other harm to the public interest caused by Rasier-CA. Accordingly, there is no basis for finding the public interest was harmed by Rasier-CA.

e. Failure to Consider Mitigating Factors

Although the POD recognizes that the "Totality of the Circumstances" factor requires the consideration of mitigating facts, the POD fails to do so.[320] In fact, the POD omits all mitigating evidence. It ignores the extensive evidence of substantial compliance (Section II(B)), including its ***complete*** compliance with nearly all of the Reporting Requirements, and substantial compliance with the disputed Reporting Requirements. The POD also fails to consider Rasier-CA's good faith efforts (Section II(B)) to find a way to provide full access to all data without waiving its trade secret privilege and right to protect confidential information.

f. Role of Precedent

The POD's reliance on the *Cingular*,[321] *Qwest*,[322] and *SCE PBR OII*[323] decisions is misplaced, in part, because these cases involved public utilities that are subject to a maximum fine of up to $20,000 per offense pursuant to Pub. Util. Code section 2107. As explained in Section IV(E)(1), Pub. Util. Code Section 2107 does not apply to charter-party carriers like Rasier-CA. Rather, the applicable penalty provision is Pub. Util. Code section 5413, which provides a maximum fine of up to $2,000 per offense. The fact that the entities in these cases were facing a maximum fine 10 times larger than permitted here should guide the Commission to reaching a proportionately lower fine; that is, any reasonable penalty range for a charter-party carrier should be no more than 1/10th the penalties that have been found be reasonable under Pub. Util. Code section 2107. Consistent with this logic and in light of the $4,000-$5,000 per violation range of penalties imposed in *Cingular*,[324] *Qwest*,[325] and *SCE PBR OII,*[326] a more

[320] *Id*. at 77.
[321] POD at 78 (citing D.04-09-062 at 62).
[322] POD at 79 (citing D.02-10-059 at 43, n. 43).
[323] POD at 79 (citing D.08-090038 at 111).
[324] D.04-09-062 at 62 ($5,000 per violation per day).
[325] D.02-10-059 at 59 ($5,000 per violation).

proportionate penalty in this instance, assuming any penalty is justified, would be between $400-$500 per violation.

4. The Proposed Fine Is Disproportionate to the SED's Recommendation and the Lyft Settlement, Making it Arbitrary and Capricious

The POD's recommended fine amounts are disproportionately large considering the SED's recommended fine and the SED's recent settlement with Lyft, Inc. in its parallel OSC proceeding. As the POD notes, the SED's most recent recommended penalty amount was $2,000 a day for Rasier-CA.[327] Yet the POD recommends a fine of $7,326,000[328]—a sum so far in excess of the SED's recommendation it is disproportionate, unreasonable, and contrary to due process.[329]

The outsized nature of the fine is particularly evident when compared to the Lyft settlement, approved by the Commission in D.15-07-012.[330] The Commission opened a parallel Order to Show Cause proceeding against Lyft for failing to comply with the TNC Decision's reporting requirements.[331] Lyft challenged the Order to Show Cause and an evidentiary hearing was held on December 18, 2014, the same day as the evidentiary hearing for Rasier-CA.[332] Following the evidentiary hearing, SED and Lyft conducted settlement negotiations.[333] As with Rasier-CA, SED recommended a fine amount of $2,000 a day against Lyft, or $120,000 for the

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[326] D.08-090038 at 161, 203-204 ($12,000 per day for least three violations of the Pub. Util. Code, so approximately $4,000 per violation).
[327] POD at 81.
[328] POD at 83.
[329] *See* D.04-09-061, 2004 Cal. PUC LEXIS 477 (finding that it was not reasonable to impose an 18 percent penalty on under-reported earnings because the errors had no consequences for ratepayers). *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (holding that a $2 million punitive damages award violated the due process clause of the 14th Amendment, considering the ratio of actual harm to punitive damages); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, or, in this case, of 145 to 1.")
[330] D.15-07-012 at 10, Att. A at 3.
[331] *See id* at 5.
[332] *Id.* at 5.
[333] *Id.* at 6.

sixty days Lyft had not complied. Lyft and the SED agreed on, and the Commission approved, a settlement of $30,000, one-fourth of the SED's recommendation.[334] While Rasier-CA took approximately four times longer than Lyft to strictly comply, it faces fines more than 240 times the Lyft settlement. Such a disproportionate penalty is unfair and improper.

F. The Proceedings Failed to Accord Rasier-CA with Due Process

The POD, and the evidentiary record, unfortunately reflect a pattern of denying Rasier-CA its Fourteenth Amendment right to due process in the OSC proceedings.[335] As described throughout this Appeal, the POD considers evidence and reaches conclusions on legal and factual issues that were never raised or presented in the proceedings. In proceedings where Rasier-CA's license is facing suspension and millions of dollars of fines have been assessed, Rasier-CA should have received meaningful notice and an opportunity to respond to the myriad new issues the POD has raised for the first time. Moreover, Rasier-CA should have been given the opportunity to fully develop the record at the evidentiary hearing concerning Rasier-CA's substantial compliance and good faith defense—i.e., that its production and inspection offer would allow the SED to fulfill the Commission's regulatory purposes without jeopardizing Rasier-CA's trade secret protections.

First, as discussed in Section II(B), Rasier-CA's examination of the SED witnesses was erroneously curtailed at the evidentiary hearing concerning key elements of Rasier-CA's good faith and substantial compliance defenses, which also support its constitutional and trade secret defenses. As discussed in Section IV(C)(2), under settled Commission precedent, substantial compliance is a defense if such compliance (1) enables the Commission to achieve the policy goals of the underlying decision, (2) is justified, or (3) demonstrates the party's good faith efforts to strictly comply. Rasier-CA was prohibited from examining witnesses fully to gain admissions

[334] *Id*. at 10, Att. A at 3.
[335] *Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 509 (2010) (The Fourteenth Amendment guarantees "that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses").

supporting the factual bases for its defenses.[336] Specifically, during the evidentiary hearing, counsel for Rasier-CA respectfully raised concern he was not being permitted to develop the factual record sufficiently:

> I appreciate that very much, your Honor. I certainly don't want to irritate your Honor by going down roads that you think are improper, but I am concerned that substantial compliance is not just a legal issue. It is a factual issue where it's important to have a factual record of what was done, why it was done, and whether it in fact substantially complied. That's been my concern. But if your Honor's direction is don't go there, I'll do my best to honor that. I just would like that to be clear.[337]

The Presiding Officer responded that the "factual components" concerning substantial compliance were ***already*** "established in the record" by Rasier-CA's briefing.[338] But there is a material difference between Rasier-CA's written submission of evidence and ***admissions*** from the SED. Ultimately, the Presiding Officer prohibited Rasier-CA from questioning the SED witnesses fully regarding substantial compliance and then issued a POD concluding Rasier-CA's substantial compliance defense was "Factually Erroneous."[339]

Second, the POD reflects extensive independent factual investigation by the Presiding Officer after the evidentiary hearing and post-hearing briefing was complete, without providing Rasier-CA meaningful notice or opportunity to respond to the alleged facts. For example, as discussed in Section IV(A), the POD takes judicial notice of more than a dozen documents without providing Rasier-CA meaningful notice or opportunity to respond.[340] In adjudicatory

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[336] *See, e.g.*, RT: 305:19-307:24 (declining to permit Rasier-CA to seek admissions from the SED concerning the SED's flexibility to interpret the Reporting Requirements, to demonstrate Rasier-CA's good faith basis for anticipating negotiation was possible); RT: 329:24-334:22 (declining to permit Rasier-CA to seek admissions from the SED concerning the SED's use of the data produced and ability to provide meaningful reports to the Commission based on the data produced); RT: 346:26-350:25; 368:19-369:14; 381:22-382:6 (declining to permit Rasier-CA to seek admissions concerning the SED's ability to provide meaningful reports to the Commission if it accepted Rasier-CA's offer of inspection and third party audit); *see also* Record Citations in Section II(B) above.

[337] RT: 349:18-350:2.

[338] RT: 348:16-350:25.

[339] POD at 53.

[340] As discussed in Section IV(A)(2) the POD improperly relies on the truth of the matters asserted in the documents judicially noticed, which lead to speculative and erroneous conclusions regarding Uber's gross revenues (something Rasier-CA was never informed was at issue and which no party raised or addressed

proceedings, like these, both the Commission and the California Supreme Court have recognized the need to "require some internal separation between advocates and decision-makers to preserve neutrality."[341] Consistent with this basic due process principle, the Commission has held that "the role of an ALJ is that of an impartial and neutral fact-finder."[342] Accordingly, the SED (or other Commission staff) should "do [the] preliminary investigation" and "prosecute the matter" . . . "so that the ALJ and [Assigned Commissioner] ***will be in their usual impartial role, rather [than] acting simultaneously as prosecutor and judge.***"[343] In conducting an extensive independent factual investigation and introducing his own evidence via judicial notice, the Presiding Officer impermissibly took the role of both prosecutor and judge in violation of Rasier-CA's due process rights.

Rasier-CA recognizes the conduct of the proceedings and the conclusions in the POD reflect genuine frustration with Rasier-CA for not strictly complying with all of the Reporting Requirements in a timely manner. Moreover, it is aware that raising these due process arguments may lead to further frustrations. That is not Rasier-CA's intent nor its desire. Rasier-CA raises these arguments both as a legitimate basis for appeal and in the hope the Presiding Officer understands Rasier-CA's perspective and its approach to these proceedings were efforts to build a record supporting its legal defenses. In a proceeding where Rasier-CA is facing suspension of its license to operate and multi-million dollar fines, Rasier-CA respectfully believes it was entitled to meaningful notice of the arguments and evidence that would be used against it. Similarly, Rasier-CA was entitled to a meaningful opportunity to build a factual and legal record supporting its defenses. Respectfully, Rasier-CA did not receive meaningful notice and opportunity to defend itself in these proceedings.

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in the proceedings); piercing the corporate veil (a subject never raised in the proceeding); and removing Rasier-CA's trade secret protections (an issue that had been undisputed in the proceedings).

[341] *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 737 (2009).

[342] D. 94-03-046, R. 93-11-032, *Rulemaking on the Commission's Own Motion for the Purpose of Adopting Disqualification Procedures Due to Bias and Prejudice to Comply with Section 309.6 of the Public Utilities Code.*

[343] D.00-01-022, at *27 (concurring opinion).

V. CONCLUSION

For the reasons explained above, Rasier-CA believed it had strictly complied with Reporting Requirement (g); had no reliable information to provide concerning the one missing component of Reporting Requirement (k); and had substantially complied with Reporting Requirement (j) in a manner allowing the SED to provide meaningful reports to the Commission while protecting Rasier-CA's trade secrets. Rasier-CA disagrees with the POD's contrary determinations but understands the POD and has strictly complied. It should not be sanctioned for raising legitimate concerns and honest legal arguments, even if the Presiding Officer did not ultimately agree with those arguments, and it certainly should not be fined an amount 240 times greater than Lyft.

/s/

Robert Maguire
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: *robmaguire@dwt.com*

August 14, 2015

Attorneys for Rasier-CA, LLC

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)

DECLARATION OF KRISHNA JUVVADI IN SUPPORT OF RASIER-CA, LLC'S APPEAL OF THE PRESIDING OFFICER'S DECISION FINDING RASIER-CA, LLC, IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, AND THAT RASIER-CA, LLC's, LICENSE TO OPERATE SHOULD BE SUSPENDED FOR FAILURE TO COMPLY WITH COMMISSION DECISION 13-09-045

Robert Maguire
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: *robmaguire@dwt.com*

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Attorney for Rasier-CA, LLC

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I, Krishna Juvvadi, declare:

1. I am Senior Counsel for Uber Technologies, Inc., the parent of Rasier-CA, LLC.

2. I make this declaration in support of Rasier-CA, LLC's Appeal of the Presiding Officer's Decision Finding Rasier-CA, LLC, in Contempt, in Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure, and that Rasier-CA, LLC's License to Operate Should be Suspended for Failure to Comply with Commission Decision 13-09-045.

3. On August 13, 2015, Rasier-CA, LLC produced to the Safety and Enforcement Division ("SED"), via hand delivery of a secure encrypted flash drive, confidential data in response to Decision 13-09-045. The confidential data produced includes (1) an Annual Report on Accessible Vehicles with a report on WAV vehicles requested and a report on alleged transportation service issues; (2) an updated Report on Problems with Drivers with information on cause; and (3) trip-level fare data for the trips reported in Rasier-CA, LLC's Annual Report.

I declare under the penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of August, 2015, at San Francisco, CA.

Krishna Juvvadi