

Decision No. C22-0838

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22V-0538TNC

IN THE MATTER OF HOPSKIPDRIVE, INC'S CONFIDENTIAL VERIFIED PETITION FOR
WAIVER FROM TEMPORARY RULES 6724(E) AND 6724(F) PROMULGATED IN
PROCEEDING NO. 22R-0359TR PURSUANT TO COMMISSION RULES 1003 AND
6003(A)(I).

**DECISION GRANTING CERTAIN LIMITED VARIANCES
FROM TEMPORARY RULE 6724**

Mailed Date: December 28, 2022

Adopted Date: December 21, 2022

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a petition filed by HopSkipDrive, Inc (Petitioner) on December 1, 2022 (Petition). Through the Petition, Petitioner requests a temporary waiver or variance of Temporary Rules 6724(e) and (f) of the Commission's Transportation Network Company Rules, 4 *Code of Colorado Regulations* (CCR) 723-6-6700 through 6724. No interventions were filed supporting or opposing the Petition. The Colorado Department of Education (CDE) filed comments generally supporting the requested relief.

2. Consistent with the discussion below, the Commission finds Petitioner has shown good cause to grant certain limited variances from Temporary Rules 6724(e) and (f) through the earlier of the effective date of rules adopted in the Commission's permanent rulemaking proceeding, Proceeding No. 22R-0402TR, or the expiry by operation of law, on April 17, 2023, of the temporary rules adopted in Proceeding No. 22R-0359TR. These limited variances will provide

needed flexibility to Petitioner as it strives to timely implement the measures required in these temporary rules, while still ensuring its operations are meeting minimum safety standards consistent with Commission policy.

B. Procedural History

3. Temporary Rules 6724(e) and (f) were adopted through Decision No. C22-0552, issued September 19, 2022, in Proceeding No. 22R-0359TR, with an immediate effective date. These temporary rules satisfy the immediate Commission rulemaking obligations enacted in Senate Bill 22-144, codified at §§ 40-10.1-605(1)(r), C.R.S. (requiring driver training rules); 40-10.1-608(3)(a), C.R.S. (requiring minimum safety standards rules); and 40-10.1-609(2)(a), C.R.S. (requiring reporting rules). The temporary rules remain in effect until permanent rules become effective or for 210 days, whichever period is less. § 40-2-108(2), C.R.S.

4. In Decision No. C22-0552 adopting the temporary rules in Proceeding No. 22R-0359TR, the Commission stated that it expected transportation network companies engaging in subject services to immediately begin diligent efforts to update their operations and procedures to comply with the standards in the adopted temporary rules; however, a reasonable allowance would be made in strict enforcement of the rules through December 31, 2022, recognizing it will take a period of time for such companies to reach full compliance with all the standards implemented through the temporary rules.

5. On December 1, 2022, Petitioner filed the Petition, requesting waiver from Temporary Rules 6724(e) and (f) until the earlier of the effective date of rules adopted in the Commission's permanent rulemaking proceeding, Proceeding No. 22R-0402TR, or the expiry by operation of law, on April 17, 2023, of the temporary rules adopted in Proceeding No. 22R-0359TR. Petitioner states that, although it immediately began diligent efforts to comply with

all the standards implemented through the temporary rules, it will not be able to achieve full compliance with these rules by the strict enforcement deadline of December 31, 2022, as established in Decision No. C22-0552. Petitioner anticipates only a small percentage of its drivers and their vehicles will be in full compliance by this deadline, necessitating a cut in its services if the Petition is not granted. In support of the Petition, Petitioner filed copies of driver statements referenced in the Petition, transcripts from the public comment hearing in the Commission's permanent rulemaking, Proceeding No. 22R-0402TR, and a copy of Petitioner's 2021 Safety Report.

6. Through interim Decision No. C22-0792-I, as issued in this Proceeding, the Commission established a shortened period through December 14, 2022, for notice, intervention, and response to the Petition. No interventions were filed within this period.

7. Also, through interim Decision No. C22-0792-I, the Commission requested that CDE make an appropriate filing in this Proceeding explaining its support for the Petition. The Commission noted that Senate Bill 22-144 instructs the Commission to coordinate with CDE in promulgating rules and to periodically, in consultation with CDE, review and update the rules as reasonably necessary to ensure safe student transportation. On December 14, 2022, CDE filed comments stating that, overall, it finds Petitioner's request to be reasonable. CDE states that it agrees with Petitioner that medical screening tailored to their operation, in lieu of the standard outlined in the temporary rule, can appropriately serve the public interest. CDE also agrees with Petitioner's concerns about requiring drivers to conduct updated vehicle inspections prior to their next renewal date.

C. Findings and Conclusions

8. Pursuant to Rule 1003 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, the Commission may, for good cause shown, grant waivers or variances from Commission rules and substantive requirements contained in Commission decisions. In making its determination, the Commission may take into account, but is not limited to, considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. The Commission may subject any waiver or variance granted to such terms and conditions as it may deem appropriate.

1. Medical Certification

9. Temporary Rule 6724(e) requires, in relevant part:

A TNC shall not permit a person to act as a driver, when performing services provided under a contract with a school or school district, unless the driver has been medically examined and certified under the provisions of 49 C.F.R. 391.41.

10. In the Petition, Petitioner states that, although it has made a good faith effort to comply with this standard, implementing a compliance structure has proven difficult because there were no previously existing processes in place for such a requirement. Petitioner states there are limited medical providers eligible to complete these certifications, especially in more remote areas. Petitioner states the certification required in this rule is not well suited to the type of drivers operating under its platform, including parents, grandparents, and retirees. Petitioner also raises concern regarding the cost of meeting this standard. Petitioner included comments from drivers stating this new standard is too onerous, considering their limited time operating on the platform, and would likely deter potential drivers.

11. The Commission finds Petitioner has shown good cause to grant a limited variance from this temporary rule. In the Petition, Petitioner credibly identifies several practical concerns

that it maintains have made it difficult to timely ensure its drivers complete the medical certification requirement. These concerns include difficulty in locating medical providers able to perform the U.S. Department of Transportation (USDOT) medical certification exam, the expansive geographic scope of Petitioner's operations, and the cost of completing this certification. Further, Petitioner makes clear that it does not realistically expect to reach substantial compliance with this rule by the strict enforcement deadline of December 31, 2022. In this unique circumstance and given that the December 31, 2022 deadline is only days away, the Commission recognizes that further accommodation is needed in order to provide Petitioner both the flexibility that addresses its practical concerns and additional time to ensure its drivers are medically certified. The Commission also finds persuasive CDE's comments, in support of the Petition, that medical screening tailored to this context, in lieu of the USDOT standards in the temporary rule, can appropriately serve the public interest.

12. The Commission affirms its policy determination, codified in the temporary rules, that medical certification is a necessary minimum safety standard; however, the Commission also finds it reasonable to grant a limited variance that allows Petitioner to demonstrate the medical fitness of its drivers through *either*: (1) certification pursuant to the USDOT standards in the temporary rule; or (2) certification by a doctor of medicine or osteopathy, a physician assistant, nurse practitioner, or clinical nurse specialist working under the direct supervision of a physician, using the form attached to this Decision as Exhibit A. In both cases, Petitioner shall require the driver to provide a copy of the completed certification to them for review to confirm the driver has successfully been certified as medically fit to drive. This variance is granted through the earlier of the effective date of rules adopted in the Commission's permanent rulemaking proceeding,

Proceeding No. 22R-0402TR, or the expiry by operation of law, on April 17, 2023, of the temporary rules adopted in Proceeding No. 22R-0359TR.

13. The form attached to this Decision as Exhibit A is the “TNC Medical Examination Report” previously used by the Commission to certify medical fitness of transportation network company drivers. This form is no longer in use by the Commission, as recent legislative changes codified in statute a lesser “self-certification” standard for such drivers.¹ With its Petition, Petitioner offered no substantive alternative to the requirement in the temporary rule for the Commission to consider. Therefore, the Commission finds that this previously vetted medical examination form provides a reasonable alternative that can be used, while a final form and certification process, specific to student transportation, is refined through the permanent rulemaking. If any issues arise during this interim period regarding this form, Petitioner is encouraged to work with Commission staff toward a reasonable resolution. The Commission also encourages Petitioner, CDE, and Commission staff to consider providing comments in the permanent rulemaking as to how any medical certifications completed under the temporary rules, including through this variance, should be treated on a going-forward basis under the permanent rules, once adopted and effective.

14. Finally, recognizing that it will take Petitioner a period of time to ensure that its drivers are meeting this medical certification requirement, either through the provisions in the current temporary rule or through the aforementioned alternative measure, it is reasonable to apply an additional 60-day allowance as it pertains to the strict enforcement of this temporary rule and the associated variance, from the effective date of this Decision. However, as in prior decisions,

¹ Senate Bill 21-260, effective June 17, 2021, modified § 40-10.1-605(1)(d), C.R.S., to require a transportation network company to confirm that drivers have self-certified through the company’s online application or digital network that he or she is physically and mentally fit to drive.

the Commission makes clear that it is still expected that Petitioner immediately begin diligent efforts to update its practices to implement this temporary rule, with variance, for its drivers. The Commission also notes that, in the interim, Petitioner bears the burden of ensuring that its drivers are medically fit to drive. Current statute imposes the basic requirement that all transportation network companies, including Petitioner, require their drivers to self-certify through the company's online application or digital network that he or she is physically and medically fit to drive. § 40-10.1-605(1)(d), C.R.S. Through this and other safety measures, Petitioner bears full responsibility for ensuring the safety of each driver that it allows onto its platform.

2. Vehicle Inspection

15. Temporary Rule 6724(f) requires, in relevant part:

A TNC shall not permit the use of a personal vehicle, when performing services provided under contract with a school or school district, unless the individual performing the vehicle inspection, as outlined in 6714, is an Automotive Service Excellence (ASE) certified mechanic qualified to perform the inspection and employed by a company authorized to do business in Colorado.

16. In the Petition, Petitioner states it has signed an agreement with a large vehicle servicing operation, ensuring that its drivers' inspections are performed by ASE-certified mechanics. Petitioner states it also requires this ASE-certified mechanic inspection for all new drivers who join the platform. Petitioner states that, despite these efforts, it does not expect to be able to ensure all existing drivers receive these inspections by the strict enforcement deadline of December 31, 2022. Petitioner states the primary confounding factor for compliance is the fact that most drivers recently completed vehicle inspections under the Commission's previous rules. Petitioner states only 10 percent of its currently active drivers are due for renewal of their inspection by December 31 of this year, meaning 90 percent of its drivers would need to get an off-cycle inspection. Petitioner adds that over 200 of the currently active drivers just completed

their inspections under the previous rules this past August. For support, Petitioner provided driver comments attesting to their frustration with the obligation to obtain a new inspection before their prior inspection has expired. Petitioner adds that this requirement could impact its ability to attract and retain qualified drivers.

17. The Commission finds Petitioner has shown good cause to grant a limited variance from this temporary rule. In the Petition, Petitioner credibly identifies several practical concerns that it maintains have made it difficult to timely ensure all vehicles are meeting this updated inspection requirement. Most significantly, the fact that most of its drivers are not yet due for a renewal vehicle inspection. We also find persuasive CDE's comments, in support of the Petition, that it is reasonable for drivers to seek vehicle inspections performed by and ASE-certified mechanic when their currently held inspections become expired.

18. Although the Commission affirms its policy determination that this heightened inspection standard is a necessary minimum safety standard, it is reasonable to provide a variance that allows Petitioner to implement this heightened inspection requirement on a prospective basis. With this limited variance, the Commission still expects Petitioner to require this heightened requirement immediately for any new vehicles coming onto its platform, as well as for any existing vehicles, at such time when their next vehicle inspection comes due. This variance is granted through the earlier of the effective date of rules adopted in the Commission's permanent rulemaking proceeding, Proceeding No. 22R-0402TR, or the expiry by operation of law, on April 17, 2023, of the temporary rules adopted in Proceeding No. 22R-0359TR.

II. ORDER

A. It Is Ordered That:

1. The Commission grants, in part, and denies, in part, the petition for waiver filed by HopSkipDrive, Inc, on December 1, 2022, consistent with the discussion above.

2. The Commission grants certain limited variances from paragraphs (e) and (f) of Temporary Rule 6724 of the Commission's Transportation Network Company Rules, 4 *Code of Colorado Regulations* 723-6, consistent with the discussion above.

3. These variances are granted through the earlier of the effective date of rules adopted in the Commission's permanent rulemaking proceeding, Proceeding No. 22R-0402TR, or the expiry by operation of law, on April 17, 2023, of the temporary rules adopted in Proceeding No. 22R-0359TR.

4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 21, 2022.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "G. Harris Adams".

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

Commissioners

COMMISSIONER JOHN GAVAN
DISSENTING

III. COMMISSIONER JOHN GAVAN DISSENTING

1. The Petitioner received seven months to comply with the requirements mandated in statute per SB22-144. In addition, the requirements outlined in the statute were known months in advance of the passing of this legislation. It is clear that the Petitioner has procrastinated in complying with Colorado law. In their pleadings, the Petitioner states that at this time only 15 percent of their drivers and vehicles are able to comply with these two rules. After seven months, this is clearly an unacceptable situation from a public safety standpoint. If the Petitioner had shown a good faith level of effort to comply, I would have been more sympathetic.

2. In a spirit of incrementalism, the Commission in response to an Application for Rehearing, Reargument, or Reconsideration filing by the Petitioner, issued revised temporary rules based on compliance concerns raised by the Petitioner. Neither of the two rules in this proceeding were modified under this provision. This was made clear to the Petitioner at the time that compliance with Rules 6724(e) and 6724(f) was expected and mandatory.

3. Throughout the interim period of the temporary rules, the Petitioner has failed to make any effort to suggest alternative requirements to Rules 6724(e) and 6724(f). If some effort had been made to help the Commission better understand the issues and revisit these two rules, I again would have been more sympathetic.

4. The safety and well-being of the children being transported by the Petitioner is paramount. Just 40 days prior to the Petitioner's filing, a ride-share driver in Colorado was charged with 41 felony counts including kidnapping and sexual assault. This incident underscores the extreme importance of holding transportation companies accountable to a high-level standard. In the case of the transport of vulnerable people, such as children, this standard must be higher as SB22-144 makes very clear.

5. As a result of the decision reached in Proceeding No. 22V-0538TNC on December 21, 2022, the Commission failed to apply the necessary protections that this vulnerable demographic requires; I fear that public safety, as a result, has been compromised and I hope that we do not come to regret this action.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOHN GAVAN

Commissioner