Decision No. R15-0985

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15R-0250TR

IN THE MATTER OF THE PROPOSED RULES REGULATING TRANSPORTATION NETWORK COMPANIES, 4 CODE OF COLORADO REGULATIONS 723-6.

RECOMMENDED DECISION OF ADMINSTRATIVE LAW JUDGE G. HARRIS ADAMS ADOPTING RULES

Mailed Date: September 11, 2015

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I. STATEMENT

1. On April 30, 2015, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) regarding proposed Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6. *See* Decision No. C15-0407 issued April 30, 2015. By that decision the Commission ordered that notice of a proposed rulemaking be filed with the Secretary of State for publication in the May 10, 2015 edition of *The Colorado Register*. The matter was referred to and administrative law judge (ALJ) to hold a public hearing on June 1, 2015.

2. The Commission issued the Notice of Proposed Rulemaking to regulate Transportation Network Companies (TNCs) in the State of Colorado. More specifically, the purpose of Rules 6701-6724 is to preserve the health, safety, and welfare of Coloradans and visitors to our state who use TNC services.

3. Interested participants were invited to file written comments addressing the proposed rules on or before May 15, 2015. Additionally, interested persons were invited to present comments orally at the hearing.

4. On May 13, 2015, the Commission notified the members of the General Assembly of the issuance of these proposed rules in accordance with § 24-4-103(3)(a.5), C.R.S., because they contain increases in fees or fines.

5. The hearing on June 1, 2015, was held as scheduled to consider oral and written data, views and arguments. At the conclusion of the hearing, the comment period was extended until June 8, 2015, for any reply comments. June 19, 2015 was also established as a deadline for anyone interested in filing Statements of Position.

6. After further comment and Statements of Position were filed by Rasier, Lyft, Metro Taxi, Yellow Cab, Union Taxi, and Freedom Cabs, the Commission referred the proceeding to an ALJ for issuance of a Recommended Decision and invited any additional comment. The Commission also scheduled a hearing to accept further oral comment. Decision No. C15-0757-I, issued July 27, 2015.

7. At the scheduled time and place, an additional hearing was convened to accept further comment.

8. Throughout the proceeding written comments were filed with the Commission by Rasier, LLC (Rasier); Lyft, Inc. (Lyft); MKBS, LLC d/b/a Metro Taxi (Metro Taxi), Colorado Cab Company, LLC d/b/a Denver Yellow Cab (Yellow Cab), Union Taxi Cooperative (Union Taxi), and Freedom Cabs, Inc. (Freedom Cabs) (collectively, the Taxi Carriers); Cowen Enterprises (Cowen); the Colorado Bureau of Investigation (CBI); the United States Hispanic Chamber of Commerce (USHCC), and Staff of the Public Utilities Commission (Staff). Public comments were also filed.

9. Staff, Rasier, and Lyft will be referred to as the Consensus Group as to their common position. Although each individually have advanced positions and rule language, the group contends proposed rules set forth in the Consensus Group's July 31 filing, as clarified at the August 12 hearing (e.g. Hearing Exhibit 8, as clarified), should be adopted.

They contend the consensus proposal upholds the letter and intent of the Transportation Network Company Act, §40-10.1-601, et seq., C.R.S. (TNC Act), while adequately addressing public safety.

10. Being fully advised in this matter and consistent with the discussion below, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

11. The statutory authorities for these rules are §§24-4-101, et seq., §40-2-108, and §§40-10.1.601 through 608, C.R.S.

12. The Transportation Network Company Act (the TNC Act) was enacted to govern TNCs in Colorado. § 40-10.1-601, et seq., C.R.S. The Commission is authorized to adopt rules consistent with the Act, including rules concerning administration, fees, and safety requirements. § 40-10.1-608, C.R.S.

13. The undersigned ALJ has reviewed and considered the record in this proceeding to date, including written and oral comments. This Recommended Decision generally focuses on contested issues addressed during the course of the proceeding. All modifications to the rules are not specifically addressed herein. The rules attached hereto are recommended for adoption. Any specific recommendations made by interested parties that are not adopted below or otherwise incorporated into the redlined rules attached are not adopted.

A. Non-Rule Specific Comments

14. Some general comment has been provided to the Commission. Staff first emphasizes the collaborative undertaking in Proceeding No. 14M-1014TR. Those efforts resulted in a broad area of consensus proposed rules that were largely incorporated

in the version of the rules in Recommended Decision No. R15-0223. The proposal was intended to implement the TNC Act, strike a balance to ensure public safety and financial responsibility, and address Staff's need for concise and enforceable rules.

15. Rasier's initial comments encourage the Commission to continue the legislative intent to embrace innovation, support consumer choice, and empower small business owners. Rasier states that it is committed to the safety of TNC drivers and riders, but comments that the proposed rules will add months to the process of vetting new TNC drivers. These burdens will frustrate growth of the industry and undermine the will of the people of Colorado. In several contexts throughout the rules, Rasier argues that the Commission does not have sufficient basis to adopt proposed rules.

16. Rasier also comments that the proposed rules disregarded the months-long efforts of stakeholders in Proceeding No. 14M-1014TR, where the Commission asked participants to collaborate and propose "rule language that accounts for public safety and financial responsibility, Staff's need for concise and enforceable rules, and the legislative intent to promote innovative transportation services." *See* Decision No. C14-1246. Industry representatives met with Mr. Ron Jack, Chief of the Transportation Section of the Public Utilities Commission on multiple occasions, for dozens of hours, to reach "consensus rules" that would provide for safety and enforceability, while protecting innovation by avoiding unduly punitive and unnecessary regulations. It points out that the undersigned administrative law judge recommended "inclusion of the consensus proposal in the NOPR." Decision No. R15-0223, issued March 10, 2015.

17. The Colorado State Office of Mothers Against Drunk Driving provided general comment and requests the Commission seek to maximize the number of safe transportation options available to Colorado citizens.

18. The Southwest Energy Efficiency Project (SWEEP) generally supports mobility without need for a personal vehicle.

19. The Downtown Denver Partnership; Councilwoman Mary Beth Susman, Denver City Council District 5; and SWEEP encourage the Commission to continue to identify and, where appropriate, resolve current barriers to entry for TNCs.

20. In supplemental comment, Lyft identifies several factors upon which it contends TNC services are distinguished from taxicab service. Based upon these differences, it contends it is inappropriate to subject both services to the same regulation.

21. The undersigned agrees with many of the general comments expressed and will base the adopted rules thereupon. Through this rulemaking, the Commission has recognized that it is implementing landmark legislation recognizing TNCs. Although the Legislature did not expressly include a policy statement in the Act, Governor Hickenlooper authored a letter on the date he signed the TNC Act into law. *See* Exhibit A to Rasier, LLC's Comments and Proposed Draft Rule Language. The Governor summarized the spirit of the Act to "promote innovation and competition while protecting consumers and public safety."

22. The undersigned particularly grasps the balance recognized in protecting the traveling public while adopting permanent rules to implement legislation passed more than a year ago. Staff's expertise and experience gained to date proves especially valuable in achieving that balance as well as the Commission's encouragement to reach stipulations resolving any fact or matter of substance or procedure at issue. *See generally* Rules 1407 and 1408 of the Rules of

Practice and Procedure, 4 CCR 723-1. Following implementation, and with additional experience gained under these initial rules implementing the TNC Act, several considerations may be revisited in future proceedings, as appropriate.

B. 6702. Permit Requirements.

23. The Taxi Carriers support an annual application requirement for TNCs and payment of the associated fee. They also encourage adoption of an annual reporting requirement, similar to other carriers, so the Commission may better assess demand, service levels, and protection of common carriers from destructive competition.

24. Lyft opposes reporting requirements and supplements its comments to point out that the TNC Act expressly states that TNCs are not subject to the same annual reporting requirements as taxis. The TNC Act sets forth the specific reporting requirements.

25. While annual reporting may assist the Commission, the undersigned will rely upon Staff's support of the consensus language at this time. Without foreclosing future consideration of related issues, insufficient need has been shown to impose such requirement at this time and it is not apparent how such reporting aids the balance struck in the enacting legislation.

26. Staff comments that the addition of Rule 6702(e) is unnecessary. Pursuant to statute and Rule 6702(d), a TNC permit is only valid for a period of one year. A TNC need only apply again if they wish to renew the permit. If they choose to renew the permit, paying the fee is part of the application process and statutorily required.

27. The undersigned agrees with Staff's comment that the addition of Rule 6702(e) is unnecessary and it will not be adopted. There is no ongoing obligation for a TNC to apply for a permit in future (e.g., they may go out of business).

28. In order to administer and enforce the TNC Act, the Commission must be able to identify TNCs, particularly in response to complaints or inquiries from the public. The Commission's internal systems as well as those available to the general public (e.g., "Find Services and Professions Regulated by DORA" at https://www.colorado.gov/dora) rely upon the ability to type in a name about which information is sought.

29. During the course of the hearing, an image identified as Hearing Exhibit 7 formed the basis of a hypothetical discussion regarding the proposal to permit operations under a registered trademark (*See* Rule 6721). [1] No one present contended that Hearing Exhibit 7 could not be adopted as a trademark by a TNC.

30. If a TNC hypothetically operated under Hearing Exhibit 7 as a registered trademark, it is far from clear that the Commission would have any means to identify the operating entity or to maintain and review records of compliance. There would be no ability to enter such a trademark in the Commission's recordkeeping system or for the public to associate the trademark with a regulated entity. If a member of the public desired to contact a transportation provider operating under Hearing Exhibit 7 as a registered trademark, the Commission would not be able to identify the associated TNC.

31. Mr. Jack made clear during the discussion that the consensus proposal was an attempt to recognize that "Uber" is described as a registered trademark of Rasier. However, the undersigned is aware of no independent requirement that trademarks have or include the appearance of characters recognizable as letters, numbers, or anything else.

[1] "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. §1127

While Commission records could be maintained for a trademark appearing as several types of characters, the rule of general applicability requires modification.[2] Rules 6702(c) and 6721 will be modified and clarified to permit use of trademarks that are words and/or names capable of being administered by the Commission and to extend prohibitions applicable to names and trade names to trademarks.

C. 6703. Commission's Records, Name Changes, Address Changes, and Address Additions.

32. Because Rule 6703(a) refers to "any information provided by a TNC," and is not explicitly limited to name and contact information, the Taxi Carriers propose that Rule 6703(a) be amended to read:

> Any information provided by a TNC for the Commission's files pertaining to name changes, address changes, and address additions, shall be deemed accurate until changed by the TNC.

33. Staff refers to the version of this rule in Recommended Decision No. R15-0223 that states: "[a]ny information provided by a TNC for the Commission's files shall be deemed accurate until changed by the TNC." The proposed rule replaces the word "deemed" with "relied on." Staff supports use of the word "deemed" because the meaning will change. To deem means to judge, to rely on means to trust. Staff needs the information TNCs provide to be judged accurate until they change it.

34. The undersigned agrees with Staff's clarification, consistent with Hearing Exhibit 8. Rule 6703(a) properly places the burden on TNCs to maintain current information on file with the Commission and permits reliance upon such information. The consensus language in Hearing Exhibit 8 will be relied upon at this time, as modified.

[2] The undersigned relies upon comment provided for purposes of this decision. However, no showing was made as to the identity of "Uber," "UberX" or "Uber Denver" or any transportation service of any kind provided or offered under such terms as trademarks, entities, trade names, or otherwise.

While the Taxi Carriers properly point out that the Commission may rely upon other information provided by a TNC, the purpose of Rule 6703(a) focuses upon the Commission's ability to rely upon contact information provided pursuant to the rule. Beyond that scope, reliability may be determined based upon applicable facts and circumstances or other applicable standards.

D. 6706. Financial Responsibility.

35. The Taxi Carriers contend consistent insurance requirements should apply to TNCs and taxi companies because a taxi company can convert to a TNC. Further, consistency ensures that a taxi company partially suspending its CPCN authority to operate as a TNC would still be required to comply for requirements applicable to the service it provides pursuant to each authority. Finally, consistency will avoid incentives to select the form of operation to minimize financial responsibility requirements.

36. The Taxi Carriers contend that the Commission should require TNCs to secure insurance as set forth in §40-10.1-107, C.R.S. and 4 CCR 723-6007. This requirement eliminates concerns over the existence or sufficiency of coverage under TNC drivers' personal automobile policies and establishes uniform insurance protection for both passengers and drivers during TNC trips.

37. The Taxi Carriers contend that TNCs should be required to provide workers' compensation coverage as required by §§8-40-301(d)(6) and 40-11.5-102, C.R.S. Although TNCs are not common or contract carriers, the Taxi Carriers contend that TNC drivers should have the same statutorily-mandated workers compensation coverage while providing trips through TNC apps as they have while working as independent contractors for other motor carriers.

38. Lyft counters in comment to oppose the Taxi Carriers' proposal. It contends the proposal would alter the statutorily prescribed insurance requirements for TNCs. The TNC Act expressly excludes TNCs from statutory requirements for motor carriers, including provision of workers' compensation insurance.

39. First and foremost, Commission rules do not determine or impose the requirement for an applicant to comply with the Workers' Compensation Act of Colorado. Rather, the Legislature has imposed requirements as a condition of obtaining authorities. See §40-10.1-401, C.R.S. The TNC Act makes clear that TNCs are unique and distinguished from other transportation providers. To require financial responsibility solely for consistency with other regulated services has neither been shown to be necessary nor would it be consistent with approach adopted by the Legislature. The Legislature chose not to require proof of workers' compensation insurance coverage in accordance with the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., in the TNC Act and it will not be imposed by rule. The proposed rule will be adopted without modification.

E. 6708. Driver Minimum Qualifications.

40. The Taxi Carriers support Rule 6708(a) requiring TNC drivers to be able to read and speak English sufficiently to communicate with passengers and enforcement officials. They recommend that Rule 6708(b) include a requirement that all TNC drivers obtain herdic licenses through the City and County of Denver in accordance with Section 55-41 of the Denver Municipal Code, and maintain proof of such licensure to be immediately provided by the driver to a Commission enforcement official upon request. Further, they contend this requirement would set an appropriate standard as being able to speak English sufficiently.

41. Staff initially raised concern that PUC enforcement officials have no training or expertise in identifying minimum English language reading and speaking proficiency. However, they have sufficiently resolved such concerns to support adoption of Hearing Exhibit 8.

42. Rasier argues that requiring drivers to read and speak English sufficiently is unnecessary because a person must be able to read and speak English to obtain a Colorado drivers license. Further, it argues the requirement is not enforceable because the term "sufficiently" is impermissibly vague and susceptible to discrimination. Rasier requests that the Commission return to the consensus proposal and remove the language requirement from this rule.

43. USHCC argues that the requirement to read and speak English sufficiently is arbitrary and invites discrimination against minority groups.

44. In supplemental comment, Lyft reiterates comment by others and states language requirements are redundant and impose an impermissibly vague standard. However, Lyft ultimately supports the proposed inclusion in Hearing Exhibit 8. As to proposals to requiring compliance with herdic requirements, Lyft comments that the Commission should not attempt to legislate on behalf of municipalities.

45. After considering all comments, the undersigned finds the requirement to read and speak English has not been shown to be necessary and is potentially problematic. First, the Commission has at least limited ability to enforce obligations upon TNC drivers. Secondly, uncontested comments demonstrate that the requirements to obtain a Colorado driver's license are not determined by the Commission. Most important to the substance of this proceeding, no showing has been made that the TNC Act obligates TNC services to be provided using the English language or a common carrier obligation to serve the public. Further, as to enforcement personnel, those subject to these rules are charged with knowledge and

must comply with these rules without regard to the ability to read or speak the English language. Decision No. R10-0358.[3] Thus, sufficient need for the potentially troublesome provision has not been shown and will not be adopted at this time.

46. The proposal to require herdic licenses through the City and County of Denver will also not be adopted. Such a provision might impose upon other jurisdictions, sufficient need has not been shown, and it is unclear how such proposal would apply outside of Denver.

F. 6710. Record Maintenance and Retention.

47. The Taxi Carriers suggest that TNCs, rather than any third party, be required to maintain all required records in the original format for one year and that production requirements of Rule 6005(b)(I)(A)-(C) apply to TNCs. The Taxi Carriers contend these requirements would promote accountability and accuracy in TNC records.

48. Lyft opposes any modification to the proposed rules eliminating the ability of TNCs to use a third party for record retention "during the first year." It contends the proposal is vague and protectionist. Any concern as to enforcement should be disregarded based upon Staff's support for the consensus proposal.

49. The Taxi Carriers reasonably point to comparable recordkeeping requirements applicable to them. However, the administrative burden of document retention for TNCs must be balanced with the need demonstrated and Staff's support of the consensus position not requiring retention in the original format. Joining the consensus group, Staff is necessarily satisfied that

[3] "All persons are charged with knowledge of the Commission's Rules. It is not a defense to an allegation that someone violated a rule that the person had not read the rule and was unaware of it. Intent describes the mental state that accompanies an action. As stated in the Colorado Criminal Code, 'A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the specific result proscribed by the statute defining the offense." Decision No. R10-0358 at 4, *citing* § 18-1-501(5), C.R.S.

access to records of TNCs for enforcement will be reasonable and acceptable. While the matter may be revisited in a future proceeding, the consensus group position will be adopted.

50. The ability of the Commission to administer the Act is largely dependent upon availability of documentation to verify TNC compliance. While the rule will be not be modified to require TNCs to retain the records, the rule will be modified to make clear that the TNC is responsible for maintenance of records whether they choose to maintain the records themselves or engage a third party do so.

51. The version of Rule 6710(b) in Recommended Decision No. R15-0223 states, in part, that "A TNC shall maintain the following data for each trip, as applicable, for a minimum of one year from the date of each such trip." The proposed rule replaces the second use of the word trip with "prearranged ride." Although prearranged ride is defined, trip is not. In comment Staff was concerned that the change is potentially confusing. However, a change is not reflected in Hearing Exhibit 8. For the sake of consistency the rule Staff's comment suggests either referencing "trip" in both instances, or referencing "prearranged ride" in both instances. While the undersigned believes the two terms to be used for the same meaning in the context of this rule, defined terms will be adopted throughout the rules for uniformity and consistency.

52. The Taxi Carriers recommend that Rule 6710(c)(I) and (V) require TNCs to maintain copies of drivers' applications and drivers' licenses for a period of three years, aligning with the limitation of actions for various claims. Further, this would correspond with record maintenance requirements applicable to other motor carriers. Lyft argues that the rules should not impose record retention policies in addition to those in the statute. In supplement, it contends that proposals requiring retention of a driver's application and driver's license for a period of three years is inappropriate.

53. First, it is noteworthy that the consensus group proposes that application and license records be maintained throughout the term of service under the proposed rule. The issue addressed only affects retention when the term of service ends. Mitigating concerns raised by the Taxi Carriers, it is also notable that minimum Commission record retention requirements do not negate requirements of other applicable bodies of law (e.g., preservation of relevant information when litigation is reasonably anticipated). *See e.g.,* Aloi v. Union Pac. R.R. Corp., 129 P.3d 999, 1003 (Colo. 2006) and Castillo v. Chief Alternative, LLC, 140 P.3d 234, 236 (Colo. Ct. App. 2006). Based upon this clarification and understanding, the period advocated in the consensus proposal is reasonable and will be adopted.

54. The Taxi Carriers support requirements in Rule 6710(d) requiring maintenance of certain data for each written report of conduct in violation of §40-10.1-605(6), C.R.S. for a minimum of one year from the date the report is received by the TNC.

55. The undersigned joins concerns raised by the Taxi Carriers, to a degree. The rules will be clarified so that the retention requirement extends from the due date of the annual report. This will establish a uniform timeline applicable to all TNCs that will operated independently of the receipt of incident data and the actual filing date of any annual report. Such a standard will ensure that Staff has time to investigate any incident following receipt of the annual report.

56. Proposed changes to Rule 6710(d)(III) require TNCs to maintain documentation showing the TNC's monitoring of a driver's performance with respect to §40-10.1-605(6), C.R.S. Staff raises concern as to the lack of specificity describing what constitutes monitoring of performance or what documentation is required to do so. As written, the rule is administratively unenforceable. If adopted, an enforcement official will inevitably be put into a position of

having to make a determination on the issue without any guidance or support from the Commission. The rule should either provide specific requirements for TNCs to follow, or should not be adopted.

57. Rasier comments that the proposed rule goes beyond the scope of the statutory requirement and is impermissibly vague. It also comments that the proposed documentation requirement is unnecessary because TNC's annual report will include record of any discipline administered as a result of a driver's report of refusal to transport a passenger pursuant to pursuant to §40-10.1-605(9), C.R.S. At hearing, Rasier also addressed documentation requirements in Proposed Rule 6710(d)(III). Rasier contends the modification to the consensus proposal is unnecessary because of the statutory requirements.

58. The consensus proposal is reasonable and will be adopted, as modified. As to annual reporting, experience will be gained through reporting of TNC actions addressing violations. The proposed rule is not clear as to the nature and extent of monitoring contemplated. If the information included in the adopted rule proves unavailable or insufficient, then clarified or modified of reporting requirements may be revisited.

G. 6712. Criminal History Record Checks.

59. The Taxi Carriers support requirements in Proposed Rule 6712, that all criminal history record checks be conducted in accordance with §40-10.1-110, C.R.S. (as set forth in §40-10.1-605(3)(a)), but oppose including the option for TNCs to conduct background checks through a privately administered national criminal history record check. They contend the proposed rule will provide an opportunity for those not being able to pass criminal history checks of other regulated carriers attempting to drive for TNCs due to less comprehensive criminal history checks.

60. The Taxi Carriers also recommend application of requirements in Rule 6105(k)-(m) to TNCs. These additional provisions would add any disqualified TNC drivers to the Commission's password-protected database, and would establish procedures and regulations pertaining to driver disqualification. Collectively, these provisions would help prevent disqualified TNC drivers from driving for other transportation service providers.

1. Statutory Concerns

61. Rasier contends that requirements of Proposed Rule 6712(a) should not be adopted because requiring fingerprint based background checks for all TNC drivers directly contradicts the terms of the TNC Act. Rasier's comments also address the legislative history leading to passage of SB 14-125 and a proposed amendment that was rejected in the process that would have required TNCs to rely solely on fingerprint based background checks. Moreover, limiting the options available to TNCs is argued to frustrate efforts to implement background checks that are more thorough than fingerprint based background checks.

62. Rasier points to the plain language of §40-10.1-605(3)(a)(I), C.R.S. as providing two options to complete background checks: based upon §40-10.1-110 or "a privately administered national criminal record check, including the national sex offender database." §40-10.1- 605(3)(a)(I), C.R.S. Rasier contends the first requires fingerprints, where the second does not. Rasier comments that background checks conducted in accordance with the second alternative include multiple layers of personal identification data. Identifiers are confirmed by a trace of previous residence and employment history and used to identify and pull relevant records. Rasier also verifies the identity of a TNC driver applicant by comparing the applicant's bank account information with the applicant's name and social security number (SSN).

Rasier comments that the Commission lacks authority to deny TNCs the option of relying on a privately administered background check that do not rely on fingerprints.

63. Lyft references Rasier's comments regarding legislative intent, without duplicating the content.

64. At hearing, Mr. David Estrada, Vice President of Government Relations for Lyft, encouraged the Commission to respect the integrity of the legislative process. He contends that the law clearly and expressly permits privately administered background checks for TNC drivers.

65. The undersigned generally agrees with the comments of Rasier and Lyft. The plain language of the Act expressly grants TNCs the option to use third-party background checks without specifying that they be based upon fingerprints. Although not necessary, it is noteworthy that a provision requiring TNCs to rely on fingerprint-based background checks was expressly considered and rejected.[4] Director, Doug Dean, made clear in testimony that the Act would not require fingerprint-based background checks.[5] Finally, the Governor expressly acknowledged the alternative option based upon publicly available information in his signing statement.[6]

[4] Meeting of the Colorado Senate Labor, Business & Technology Committee, at 17:52 (Feb. 11, 2014), available at http://coloradoga.granicus.com/MediaPlayer.php?view_id=41&clip_id=4983 ("The Director [of the Commission] wants to have fingerprint background checks for all drivers. I personally am not supportive of that. I believe the bill the way it is written says that you can do an individual corporate background check or a fingerprint background check. I think that's appropriate - leave it up to the individual companies to decide what is best for them.") (statement of Senator Harvey, co-sponsor of the TNC Act).

[5] Hearing of the Colorado House Transportation & Energy Committee, at 5:37:42 (Apr. 2, 2014), available at http://coloradoga.granicus.cotn/MediaPlayer.php?view 1d=24&clip id=5559 ("I think you've heard there's a difference. We require for taxis and limos, the statutes have required for several years now, CBI/FBI fingerprint background checks. The transportation network companies in this bill would be able to do either that or their own private background check.") (Testimony of Doug Dean).

[6] Office of the Governor, Signing Statement for SB14-125, available at https://www.colorado.gov/pacific/governor/atom/18976 ("[D]rivers for transportation network companies will be subject to background checks performed by private companies that rely only upon publicly available information, rather than the stringent fingerprint background check for drivers of other passenger carriers performed by the Federal and Colorado Bureaus of Investigation.").

2. Necessity of Fingerprint Based Searches

66. Rasier requests that the Consensus Rule proposed be adopted, eliminating the requirement that "the criminal history record check must include a fingerprint investigation." It contends that third-party background checks are rigorous and thorough without reliance upon fingerprints.

67. Rasier criticizes fingerprint based background checks because they rely on the Federal Bureau of Investigation's (FBI) database of records of arrests. Thus, it is over-inclusive because it includes records of arrests that never resulted in prosecutions or convictions. The United States Attorney General has concluded that roughly half of the records in the FBI database are missing final disposition information.[7] Failure to timely updated exculpatory information could result in disqualification of innocent TNC driver applicants.

68. Rasier comments that the FBI database is also under-inclusive because it does not reflect arrests from police departments that do not supply the FBI with records in a timely manner, arrests that occur without fingerprints being taken, or arrests that are very recent.

69. In sum, Rasier comments that an individual should not fail a TNC background check, and possibly lose a work opportunity, because he or she was arrested but never convicted of a crime; nor should a person be denied the opportunity to work after he or she has served their time and paid their debts to society. Aside from database concerns, Rasier comments that fingerprints create unwarranted burdens on TNC drivers because they take months to complete and TNC drivers cannot drive pending the outcome of the check.

[7] Editorial Board, *A Flawed Background-Check System*, The New York Times (Aug. 18, 2013), *available at* http://www.nytimes.com/2013/08/19/opinion/a-flawed-background-check-system.html?_r=1.

70. Rasier contends it has developed a better way to conduct background checks and that it is commonplace for drivers passing applicable fingerprint based checks to fail Rasier's background check. Its private background checks verify criminal history information by searching federal, state, and local records and the National Sex Offender Registry. It relies upon outside vendors to visit county courthouses to search criminal records when necessary. Driving records are obtained from state Departments of Motor Vehicles and an SSN trace confirms that the SSN provided in the application aligns with known locations of residence or employment. Third-party criminal background checks also pick up civil litigation and pending charges for violent crimes and/or severe misdemeanors, which fingerprint based searches often fail to capture.

71. Finally, Rasier comments that California, Illinois, Virginia, Utah, Kentucky. Idaho, Arkansas, Arizona, Georgia, North Dakota, Wisconsin, Tennessee, Montana, Indiana. Oklahoma, Pennsylvania, and the District of Columbia all have statutes or administrative rules for TNCs that do not include fingerprinting requirements. Several cities have also established TNC regulations without adopting fingerprinting: New Orleans (Louisiana), Portland (Oregon), Seattle, (Washington), Minneapolis (Minnesota), Cincinnati (Ohio), and Detroit (Michigan).

72. Lyft comments that fingerprint based background checks are unnecessary and counterproductive when also performing national criminal record checks using a combination of personal identifiers. Lyft's comments describe the background screening it conducts for all driver applicants, which Mr. Schwall reiterated at hearing.

73. Lyft also comments on limitations of the FBI's Fingerprint Based System. Because it was not intended to be used for employee or independent contractor background checks, it is flawed to be used for that purpose. First, it is incomplete because it is entirely

dependent on state agencies to timely and accurately report fingerprint based records from state databases. Second, the FBI system excludes thousands of county records that are not associated with a fingerprint in cases where a fingerprint was never taken. Third, there is at least a lag in follow-up reporting.

74. Lyft also contends that FBI system results can be unhelpful or counterproductive. While fingerprints are associated with arrests, it is the disposition record that is determinative for qualification. Lyft sites reports concluding that the FBI system falls far short of providing complete disposition records.

75. Aside from the substance of the report, Lyft notes that TNC drivers are not permitted to drive until a criminal history record check is completed. Thus, delays affect TNCs and drivers. Whereas background checks currently take an average of three days, Lyft estimates the additional time to obtain and investigate FBI reports will double the time necessary to complete a check. Lyft concludes that the FBI fingerprint requirement adds significant additional delay and cost to the TNCs' criminal history record check while adding little, if any, to public safety.

76. At hearing, Mr. Curt Schwall commented on behalf of Lyft to address background screening in terms of fingerprint checks versus name based public record checks. Mr. Schwall is Vice President of Corporate Ethics and Compliance at Sterling Backcheck. Sterling Backcheck is an authorized channeler of FBI data. With statutory authorization, his firm would be permitted to perform fingerprint based background searches, provided that the FBI approved their reason for ordering.

77. Mr. Schwall explains that the FBI criminal record database is an investigative tool for law enforcement. Data is transferred to the FBI from local jurisdictions through a state repository. It contains a great deal of arrest-only information, without disposition. It is best used as a pointer file in terms of trying to identify records in other locations. It has been well publicized that the FBI data is incomplete in many cases. It misses final case dispositions, it lacks disposition updates such as expungements, and it is certainly not designed for employment. Many lower level offenses that do not result in an arrest are not found in the FBI database. Without an arrest, no fingerprints are taken; thus, they are not entered into the FBI database. He opines it is not the gold standard for background screening.

78. Mr. Schwall describes the background checks his firm performs for Lyft. Environmental criminology shows that most crimes are committed in close proximity to one's address or place of work. Searches begin with an address history that is used to focus jurisdictional searches for primary source data where an offense is most likely to have been committed. Federal court records are reviewed. A sex offender registry search is done. Pointer files, comparable to the FBI data file, are used to review aggregated publicly-available information from around the country (e.g., the National Criminal Database). If something is found through a pointer file, the information is confirmed to be up to date and the most accurate information is reported. An arrest records database with over 3,500 jurisdictions participating is reviewed.

79. Searches currently performed for Lyft take approximately two to three days. If fingerprint requirements are added, Mr. Schwall explains that responsive information from the pointer file could add several weeks or even a couple months to the time necessary to complete the check.

80. Mr. Schwall comments that the background check file, based on jurisdictional searches and layered services, is more up to date than the FBI database and provides the individual with protections under the Fair Credit Reporting Act. Because FBI checks are not considered consumer reports, the individual is not afforded federal rights based on that information. In terms of quality, timeliness and overall cost, he concludes a thorough layered jurisdictional search is a superior search over those using FBI data.

81. At hearing, Mr. Estrada commented that there is no basis for the disruptive change to the status quo in the proposed rules. Changing the existing system of privately administered background checks will decrease the number of TNC drivers on the road, harming consumers and prospective drivers. He commented that Governor Hickenlooper's June 5, 2014letter , signed with the TNC Act, expressed concerned that TNC drivers will be subject to background checks performed by private companies that rely on publicly available information rather than by the stringent fingerprint background checks for drivers of other passenger carriers performed by the FBI and CBI. The Governor asked that Staff monitor the issue and report any identified problems to his office. He contends that the Commission has not reported any problems with privately administered background checks and that there are no problems to report. See also Exhibit A to Lyft's Supplemental Reply Comments

82. In Lyft's experience from getting over 100,000 people across the United States to sign up to drive, getting people to complete the process is difficult and costly. It constantly works to remove friction and shorten time, while maintaining safety. The burden of a fingerprint requirement (finding a location, taking time to go there, completing the process, submitting the information, and then waiting up to a month) will cause tremendous drop off in driver acquisition.

83. If the Commission investigates use of private background checks, as Mr. Estrada comments that the Governor asked, he proposes that a study be conducted. Lyft would be a willing partner in such a study.

84. At hearing, Will McCollum, General Manager for Uber Denver, addressed Lyft's comments regarding the background check process and explained Uber's vendor background check process. It reviews the motor vehicle history and National Sex Offender Registry. There is a Social Security trace and a multistate criminal search utilizing the National Criminal Database. The Federal Public Access to Court Electronic Records is reviewed. Rather than rely on electronic databases that are manually updated, vendors visit the actual source, the courthouse in each county if there is a flag. Sometimes they find that charges are added or amended. Detailed information regarding conviction dates, the disposition dates, and sentences served are reviewed. Sometimes they find that charges are dismissed.

85. Current checks take two to five days to complete. Turnaround time is of paramount importance. A two month timeframe to get background checks processed would be extraordinarily detrimental to Uber's business model. Because drivers cannot begin providing TNC services until the process is complete, there is a high probability that drivers will not complete the process. Mr. McCollum also emphasized the importance of an accurate background check so that partnership is not denied to those who have never been convicted of any of the crimes they have been accused of or any of those violations.

86. Colorado Cab Company and Metro Taxi respond to TNC comments that public safety should not hinge on the TNC business model.

87. The Fingerprint Vendor Technology Evaluation (FpVTE) 2003, which was conducted by the National Institute of Standards & Technology (NIST) on behalf of the Justice Management Division (JMD) of the U.S. Department of Justice was filed as comment. The Abstract states:

> FpVTE 2003 was conducted to evaluate the accuracy of fingerprint matching, identification, and verification systems. The FpVTE is one of the tests that NIST has conducted in order to fulfill part of its PATRIOT Act mandate. Additional evaluations include the testing of the FBI IAFIS system, the US-VISIT IDENT system and SDKs (Software Development Kits) from several vendors. Eighteen different companies competed in FpVTE, and 34 systems were evaluated. Different sub tests measured accuracy for various numbers and types of fingerprints, using operational fingerprint data from a variety of U.S. Government sources. The most accurate systems were found to have consistently very low error rates across a variety of data sets. The variables that had the clearest effect on system accuracy were the number of fingers used and fingerprint quality. An increased number of fingers resulted in higher accuracy: the accuracy of searches using four or more fingers was better than the accuracy of two-finger searches, which was better than the accuracy of single-finger searches. The test also shows that the most accurate fingerprint systems are more accurate than the most accurate facial recognition systems, even when comparing the performance of operational quality single fingerprints to high-quality face images.

88. Staff also filed an article entitled Accuracy and Reliability of Forensic Latent Fingerprint Decisions. The Abstract of that article states:

> The interpretation of forensic fingerprint evidence relies on the expertise of latent print examiners. The National Research Council of the National Academies and the legal and forensic sciences communities have called for research to measure the accuracy and reliability of latent print examiners' decisions, a challenging and complex problem in need of systematic analysis. Our research is focused on the development of empirical approaches to studying this problem. Here, we report on the first large-scale study of the accuracy and reliability of latent print examiners' decisions, in which 169 latent print examiners each compared approximately 100 pairs of latent and exemplar fingerprints from a pool of 744 pairs. The fingerprints were selected to include a range of attributes and quality encountered in forensic casework, and to be comparable to searches of an automated fingerprint identification system containing more than 58 million subjects. This study evaluated examiners on key decision points in the fingerprint examination process; procedures used operationally include additional safeguards designed to minimize errors. Five examiners made false positive errors for an overall false positive rate of 0.1%. Eighty-five percent of examiners made at least

> one false negative error for an overall false negative rate of 7.5%. Independent examination of the same comparisons by different participants (analogous to blind verification) was found to detect all false positive errors and the majority of false negative errors in this study. Examiners frequently differed on whether fingerprints were suitable for reaching a conclusion.

89. Katherine A. Paige, Fingerprint Examiner II, for the CBI commented to compare fingerprint to name check background requests. First she notes that 69 different areas of the Colorado Revised Statutes mandate either a name based or fingerprint based background check.

90. Name based background checks can be conducted through the CBI. Those performed through a website cost $6.85. The results are generally received at the terminal of the requester, and in most cases are instantaneously received. Those requested in paper cost $13.00. Paper results are generally received by the requester within three to five business days, plus mail time. Name based checks require an exact name and date of birth match. A social security number is not required to obtain results. Ms. Paige notes that there are individuals with the same names and dates of birth. Those having been arrested may change their names and/or dates of birth. Names may sound similar, but have different spellings or nick names might be used in an attempt to hide true identities. Once notified, the CBI works with agencies and victims of identity theft to remove an erroneously used name from the public view of a record. While these procedures may seem to be more cost effective and time efficient, she notes that the name and date of birth accuracy may lead to a false presumption.

91. Ms. Paige goes on to explain why fingerprints are the best approach to obtain an exact matching inquiry. Fingerprints are unique and permanent to each individual person. From infancy to adulthood, the ridges do not change. The CBI stores and maintains over three million individual's fingerprints in a database called the Morpho Biometric Identification System.

92. The Commission is authorized to submit fingerprints for background checks. The fee is $39.50. Results are available electronically within three business days after submission. Fingerprints submitted to the CBI are forwarded to the FBI. The FBI does not have a name based background check process. Submitted fingerprints are also maintained at the CBI so that notification can be made in the event of a subsequent arrest. This service is not available for name based background checks.

93. A report titled: One Standard for All, Criminal Background Checks for Taxicab, For-Hire, and Transportation Network Company Drivers, was also filed as public comment. The report is intended to provide a comprehensive understanding of available background checks. It also addresses concerns as to how varying standards put the riding public at risk. The authors seek to determine the "best practices" for ensuring that those who drive the public meet basic requirements.

94. The Honorable Ted Harvey, Senator Cheri Jahn, Representative Dan Pabon, and the Honorable Libby Szabo, commented that “[l]ayering on top of the private background check option a requirement to go through the CBI/FBI database would erase the entire purpose of the alternative options: to give TNCs an avenue to avoid the delays and shortcomings associated with fingerprint based checks.”

95. In supplemental comment, Lyft urges the Commission to reject any proposed fingerprint based background check because they have not been shown to be superior to the rigorous, privately administered background checks explicitly permitted by the TNC Act.

96. In supplemental comments, Rasier contends that Staff’s comments about whether fingerprints are a more or less accurate identification method says nothing about whether the

database that is accessed through fingerprints is a reliable tool for screening prospective workers. It contends that accuracy ultimately depends upon the database accessed.

97. In their joint reply comments, the Taxi Carriers refer to criticism of TNC background checks. If a privately administered, name based criminal history record check pulls inaccurate or incomplete criminal history records because the driver has provided an alias or other incorrect identifying information, then no greater level of public safety is achieved. *See e.g.*, Exhibits 1 and 2 to the Joint Reply Comments of the Taxi Carriers.

98. Although few are specifically addressed, several news articles reporting experience with background checks have been filed as comment.

99. On June 17, 2015, USHCC comments that fingerprinting is not a safety measure because it reports arrests, not convictions. It cautions that work opportunities should not be foreclosed based upon arrests not resulting in conviction.

100. Although the undersigned includes a discussion of the comments addressing need for requiring fingerprint based background checks, a further conclusion on the matter is not necessary at this time in light of the finding above that the plain language of the statute permits TNCs to:

> (I) Obtain a criminal history record check pursuant to the procedures set forth in section 40-10.1-110 as supplemented by the commission's rules promulgated under section 40-10.1-110 or through a privately administered national criminal history record check, including the national sex offender database; and
>
> (II) If a privately administered national criminal history record check is used, provide a copy of the criminal history record check to the transportation network company.
>
> C.R.S. 40-10.1-605(3)(a).

101. The consensus proposal in Hearing Exhibit 8 will be adopted.

H. 6713. Proof of Medical Fitness.

102. Staff initially commented that Proposed Rule 6713 is appropriate and consistent with the treatment of drivers in other industries. The required medical exam is intended to ensure a driver is medically safe to transport other individuals. In support of this position, Staff argues that there is substantial value in continuing with the existing nationwide program. By adopting this federal standard, nothing has to be recreated or reinvented. The exam is proven, examiner qualifications are established, the legal liability for examiners is limited, certification requirements and duration are established, and the medical cards are recognized nationally. Colorado should maintain the existing standards and not venture into creating a new program that would require the re-creation of all the above.

103. Rasier argues that the federal medical exam is excessive, was not intended to address TNC drivers driving their personal vehicles, and goes beyond determining whether a driver is "medically fit to drive" as required by the TNC statute. It argues that the federal rules were designed for long-haul truck drivers and concludes it would be inappropriate to apply them to TNC drivers. Application of federal standards would disqualify people with diabetes, heart condition, respiratory condition, high blood pressure, and hearing loss from being TNC drivers.

104. Rasier requests that cross-references to federal commercial carrier standards be eliminated and that a driver be allowed to confirm that he or she is medically fit to operate a TNC vehicle from his or her own medical professional. It would be onerous to require an examiner to be qualified pursuant to 49 C.F.R. § 391.43 will also prevent drivers from obtaining an exam from their personal physician and is too onerous.

105. Lyft agrees with Rasier that this rule is overly burdensome on drivers and unnecessary; it advocates for a rule that requires drivers to submit to the PUC a signed affidavit that they are medically fit to drive.

106. The Honorable Ted Harvey, Senator Cheri Jahn, Representative Dan Pabon, and the Honorable Libby Szabo, comment that medical fitness requirements for commercial truckers were rejected during debate and should not be applied to TNC drivers. Rather, fitness requirements should be tailored to TNC service.

107. At hearing, Rasier presented comments of John Stuart Hughes, MD. Since 1984, Dr. Hughes has been involved in all aspects of transportation medicine. He is a certified examiner under rules promulgated by in the United States Department of Transportation last year.

108. Dr. Hughes proposes that the Commission require an examination performed by a doctor of medicine or osteopathy, a physician assistant, nurse practitioner, or clinical nurse specialist working under the direct supervision of a physician. *See* Hearing Exhibit 4. The Affordable Care Act is at the heart of Dr. Hughes' proposal. Everyone who has insurance, and everyone is supposed to have insurance, is eligible for an annual wellness evaluation. This evaluation includes a number of medical screening components, including screening for Type 2 diabetes. Dr. Hughes supports using a medical history questionnaire that he developed. *See* Hearing Exhibits 4 and 5. It pertains to the things he opines that are important in screening passengers, the driver himself, and members of the general public against an incident. The basis of the questionnaire is cause for sudden losses of consciousness or control. He opines that integration with the Affordable Care Act provision for a wellness examination would increase public safety and provide for appropriate medically screening for TNC drivers.

He further opines that aspects of a medical examination in accordance with federal rules include extra encumbrances that are medically unnecessary.

109. Asked how the Commission could be assured that doctors would include the required questionnaire as part of the wellness valuation, Dr. Hughes explained that the Affordable Care Act wellness examination includes consideration of questionnaires that are generated by authoritative medical sources. Thus, he opines that doctors would be required to perform the review if the Commission adopts his proposal.

110. Lyft proposes a new rule regarding medical fitness:

> (a) Before permitting a person to act as a driver authorized to use a TNC's digital network, and every two years thereafter, a TNC shall confirm that the person possesses proof that he or she is medically fit to drive.
>
> (b) To prove that a person is medically fit to drive on a TNC's digital network, the person must certify by sworn statement on forms provided by the PUC that he or she is physically and mentally fit to be a driver on a TNC's digital network. Such certification shall be effective for two years.

111. Lyft comments that the proposal assures the suitability of drivers on TNC platforms without subjecting them to invasive, and often cost prohibitive, examinations that are required under Federal Standards designed for drivers of inherently more dangerous vehicles. This proposed rule well serves the purpose of the TNC Act by proportionally addressing issues presented by drivers of personal vehicles using TNC platforms; which issues are much less significant than those raised by drivers of major commercial vehicles. Lyft contends that federal standards are too strict to apply to TNC drivers driving their personal vehicles. Further, Lyft comments that self-attestation by drivers on TNC platforms that they are medically fit, with a requirement that they reaffirm that attestation every two years, will enhance public safety while minimizing barriers to choice in transportation. However, Lyft generally would not oppose a more detailed PUC-designed self-attestation form that adequately balances public safety with the

burdens imposed on drivers on TNC platforms (so long as it minimizes the obligations imposed on such drivers). Specific comments address such a form and summarize medical requirements adopted by other jurisdictions. Lyft also comments that those licensed to operate a personal vehicle are charged with assessing his or her ongoing medical fitness to drive.

112. Lyft also comments that the proposed rule will unreasonably burden TNC drivers without providing commensurate public benefits. It contends that requiring TNC drivers to have an independent medical exam will not measurably increase the number of healthy drivers on the public roads.

113. At hearing, Lyft opposed any proposal to incorporate herdic requirements because local licensing applies regardless of whether it is included in the Commission decision and coordination of changing requirements over time would be difficult.

114. During the final hearing, Mr. Jack commented in support of the consensus proposal regarding medical fitness to drive, which departs materially from Staff's earlier position. He explained that the intent of the proposal was to duplicate the existing federal medical examination, but to permit use of the driver's existing medical provider. *See* Hearing Exhibit 8.

115. The Commission opened Proceeding No. 14M-1014TR intending to streamline this proceeding. By Decision No. R15-0223, issued March 10, 2015, the undersigned expressed concern, in part, that Rasier's proposed medical qualifications were not sufficiently developed for inclusion in the NOPR at that point. Through further efforts supported by Dr. Hughes, Rasier, Staff and Lyft now support a consensus proposal that will be adopted with some modification.

116. Medical fitness of drivers directly impacts the safety of the traveling public. The TNC Act specifically contemplates "proof that the person is medically fit to drive." C.R.S. 40-10.1-605(d). Integration of medical examination requirements with the Affordable Care Act provision for an annual wellness examination will increase public safety while minimizing the burden imposed by regulation.

117. The Commission does not lightly depart from existing medical standards that have proven to protect safety of the traveling public. The Commission has long incorporated federal standards requiring drivers providing passenger transportation for hire to demonstrate medical fitness to drive. The State of Colorado has also long regulated medical providers.

118. Staff's comment during hearing makes clear that the proposal continues medical standards and requirements of federal regulations currently incorporated by the Commission, but modifies those qualified to perform examinations to rely upon Colorado Law. As such, a balance can be struck to preserve protections of the traveling public with ensuring those seeking to drive can work with existing medical providers performing preventative care under the Affordable Care Act. Federal regulations may inform interpretation and application of medical standards, if necessary.

119. The consensus proposal enumerates medical doctors, nurse practitioners, or physician's assistants as being qualified to conduct examinations. When asking clarification as to the omission of doctors of osteopathy, it was clear that the omission was unintentional and there was no intention to remove them as they are equally regulated by the Medical Board. Inclusion is also consistent with Dr. Hughes proposal in Hearing Exhibit 4 and places a more comprehensive focus upon primary care providers. The rule will be adopted consistent with Dr. Hughes recommendation.

120. The consensus proposal further provides that medical certificates issued shall be valid for not more than two years, consistent with federal standards. *See* Hearing Exhibit 8. This is also consistent with Dr. Hughes proposal. *See* Hearing Exhibit 4. At the final hearing, the consensus group offered no basis for the two year term.

121. The consensus proposal, as modified, is reasonable and strikes an appropriate balance. The proposal in Hearing Exhibit 8 will be adopted.

I. 6714. Vehicle Inspections.

122. The Taxi Carriers propose limiting vehicles providing TNC service to a maximum of four doors, excluding rear hatches or tailgates, as designed by the original manufacturer and no older than eight model years.

123. Rasier has no objection to the proposed rule and does not believe any additional "points" need to be inspected.

124. Lyft supports the proposed rule and does not believe additional points are necessary. A proposal to limit vehicles to those not more than eight model years old is unnecessary because the TNC Act and the proposed rules require annual safety inspections, ensuring that personal vehicles will continue to be safe even if more than eight model years old. Additionally, vehicles used to provide TNC services are likely to have much less wear and tear than commercial vehicles of the same age. Further the proposal to limit the number of doors is unnecessarily as limits already control the number of passengers. Lyft is unaware of any five or six-doored vehicles designed to carry eight or fewer passengers.

125. Further vehicle restrictions will not be adopted at this time, although need may be reconsidered in the future based upon experience gained. The consensus proposal does not include such limitations. The Taxi Carriers failed to demonstrate sufficient need or benefit to

impose additional limitations in light of the safety inspection requirements applicable to personal vehicles used to provide TNC service.

J. 6715. Vehicle Inspectors.

126. The Taxi Carriers argue for a consistent standard certification for those performing vehicle inspections. Analogous to qualifications for medical professionals, they argue that the proposed rule is too broad and does not provide an administratively enforceable standard. Because safety of vehicles is a concern for all of the traveling public, the Taxi Carriers advocate that that individuals performing initial vehicle inspections or periodic vehicle inspections by or for a TNC should have the certifications described in 49 CFR § 396.19.

127. Rasier and Lyft have no objection to the proposed rule and state that (c) is sufficient to ensure that the inspection is performed by a qualified person. Lyft disputes comments that the proposed rules are ambiguous. It argues that vehicle inspections performed by capable persons working for companies in the business of providing vehicle maintenance are more than capable of assessing whether their mechanics and technicians can perform the inspection required by Proposed Rule 6714. Lyft opposes requiring compliance with federal standards applicable to long-haul semi-trailer trucks and other large commercial vehicles because those vehicles are significantly and meaningfully different from the personal vehicles driven by TNC drivers.

128. Additional restrictions on those qualified to conduct vehicle inspections will not be adopted at this time, although need may be reconsidered in the future based upon experience gained. The Taxi Carriers have not shown sufficient to require additional specificity or standards.

129. The proposed rule requires documentation of an inspector's capability when not certified by a federal or state sponsored training program, but requires no record of the federal or state sponsored training program certifying an inspector. A parallel requirement will be implemented to maintain a record or such program certifying the inspector.

K. 6718. Inspection Process.

130. The Taxi Carriers recommend adding the criteria in Rule 6103(d)(II) and (IV) to guidelines for enforcement officials to determine when a driver or vehicle should be placed out of service.

131. Lyft responds that the proposal contravenes the TNC Act and no showing has been made that enforcement officials are not capable of assessing whether a vehicle or its driver is likely to cause an accident.

132. Further specificity of inspection criteria will not be adopted at this time, although need may be reconsidered in the future based upon experience gained. The proposed rule is reasonable and will be adopted with reliance upon expertise of enforcement officials.

L. 6719. Vehicle Markings.

133. The Taxi Carriers support marking requirements. However, they support a requirement that markings be displayed at all times to aid enforcement and ensure that only a personal vehicle that was inspected and approved for use by the Commission is used to provide TNC service. In absence of such a requirement, the Taxi Carriers contend that a TNC driver could evade enforcement by removing any TNC vehicle markings.

134. Rasier argues that TNC drivers should have some flexibility in determining the location of the markings and drivers should not have to display TNC markings when they are not providing TNC services. Particularly because personal vehicles are used to provide

TNC services, drivers should not be required to display vehicle markings when not offing to provide TNC services. According to Rasier, the inherent elements of the mobile app further reduce the possibility of customer confusion: passengers matched are given the license plate number, make and model of the car, and the driver's name.

135. In supplemental comments, Rasier comments that permanent vehicle markings have a greater potential to confuse customers of TNC services because the vehicle is not available to serve. Because accepting hails is unlawful, Rasier comments that buffer zones provide no useful purpose.

136. Lyft supports the proposed rule but thinks the TNC should have the flexibility to determine the location of vehicle markings. Lyft argues that drivers should not have to display vehicle markings when not logged in to the TNC's digital network. It counters the Taxi Carriers' proposal as lacking adequate basis. Because Lyft provides matched passengers a description of the approved vehicle (including color, make, and model) along with a photo of the approved vehicle and driver, Lyft comments that a requirement to always post markings is unwarranted.

137. Lyft also contends that a vehicle used to provide TNC services should not give rise to inspection when used solely for personal reasons. Thus, permanent markings would hamper enforcement officials because they could not identify vehicles subject to inspection. Countering arguments that permanent vehicle markings will combat illegal street hails, Lyft contends that one hailing a vehicle will have no basis to hail a vehicle not displaying any trade markings.

138. Further comment addresses the Commission's question included in the NOPR.

139. Cowen contends that the rules should specify the location and size of required exterior markings. Further, markings should only be in place when the driver is logged on to the TNC network.

140. Consistent with Rule 6015, the Taxi Carriers suggest that the rules specify the location and size of the required exterior markings that identify a vehicle used to provide TNC services in order to achieve greater uniformity and assist with identification of personal vehicles providing TNC service. Addressed above, they advocated that markings should be required at all times.

141. Rasier comments that the proposed rule provides a clear and workable standard that promotes safety and minimizes the possibility of consumer confusion, while at the same time recognizing that TNC drivers use their personal vehicles. Sixty-nine percent of Rasier's driver partners in Colorado provide TNC services for less than 20 hours per week. When they are not providing TNC service using their personal vehicles, drivers should have a right to privacy and need not be identified with the TNC. Requiring display of trade dress when not in service may also increase the possibility of consumer confusion. As a final confirmation, customers requesting a ride can use trade dress as one means to identify the TNC vehicle.

142. Lyft contends that Rule 6719 establishes appropriate requirements and that TNCs should be given the flexibility to develop the specific vehicle markings and display requirements as a business decision.

143. The proposed rule, supported by the consensus group, only requires display of vehicle markings while logged into the TNC's digital network. The undersigned is convinced that the rule should be adopted as proposed. The Taxi Carriers' proposal for permanent markings will not be adopted.

144. TNC services are only provided through a TNC's digital network. No need has been shown to require display of markings when not logged into the digital network. Regarding enforcement concerns, it is noteworthy that Staff supports the rule and use of technology that permits alternative means to determine when a TNC driver is logged in to the TNC's digital network. Finally, for drivers using their personal vehicles for personal use, there is no purpose served by displaying markings that could potentially confuse customers or inappropriately encourage solicitation of transportation.

145. There is also comment that the location of the marking should be proscribed. While some might argue this is a business matter, there is some effect on the safety of the traveling public in being able to identify the personal vehicle used to provide TNC services among other vehicles. Thus, some specificity is reasonable and will be incorporated in rule. Illustratively, markings displayed in the rear window behind the driver are least likely to be visible to a customer as the driver approaches a customer waiting for service. At this time, the location will generally be left to the discretion of the TNC, but the location will be required to be visible from the front or passenger side of the vehicle.

M. 6722. Hours of Service.

146. The Taxi Carriers support adoption of Rule 6722. In addition to equivalent hours of service rules, the Taxi Carriers address concerns that drivers may circumvent hours of service limitations applicable to other regulated carriers by driving for TNCs. Consistent rules will help protect drivers, passengers, and public in general from the risks associated with driver fatigue. A proposal is also made to clarify that, because drivers are able to drive for more than one TNC at a time, hours of service limitations apply to all time spent logged in to any TNC's digital network.

147. In earlier comment, Staff encouraged that Proposed Rule 6722 should more explicitly detail the requirements to eliminate the possibility of interpretive differences and potential confusion. As written, the rule addresses two aspects of driver fatigue: daily and cumulative. It does not, however, include explicit data and TNC record keeping requirements for purposes of tracking hours of service. It also does not describe the methodology to calculate cumulative hours of service over an extended period. Establishing data and record keeping requirements, along with the calculation methodology, will avoid future disagreements and litigation. Staff contends that TNCs should be required to log and maintain a record for each driver's on duty time, including but not limited to a record of every time a driver logs in and out of its digital network. Additionally, Staff contends the rules should plainly require that the time a driver spends logged out of a digital network counts toward the hours of service restrictions for both the daily and cumulative restrictions, unless that logged out time exceeds eight hours.

148. Staff supplemented initial comments to address Proposed Rule 6722(c). Staff illustrates a scenario where a driver can spend unlimited time behind the wheel of their vehicles. Staff contends this outcome is inconsistent with the Commission's duty to protect the health, safety, and welfare of the traveling public. Further, regulating drivers' eight-day hours of service by only counting the hours a driver is "logged in" undermines the Commission's well-addressed concerns about transportation safety, and its incorporation of rules prohibiting fatigued drivers.

149. Rasier argues that the rule is in conflict with the letter and spirit of the TNC Act. The TNC Act addresses the prohibition to the driver, rather than the TNC, and the only prohibition is based on 12 consecutive hours. Rasier argues the rule improperly imposes an obligation on the TNC, imposes additional time restrictions, and expands the prohibition to being

logged into a mobile application. Rasier comments that it is not accurate to equate "logged in" with "offering or providing service" because in many cases, a TNC driver is logged in to the TNC's digital platform without actually offering or providing service. Finally, Rasier advocates for an addition to this rule that provides the driver an opportunity to contest any alleged violation. In sum, opportunity is sought to rebut based upon actual circumstance that a driver may or may not have actually been offering the service when logged into the application on the smartphone (e.g., forgetting or not wanting to log out). It contends a TNC driver or TNC should have an opportunity to present evidence showing that the TNC driver was not offering or providing service for the TNC and therefore should not be considered to be "logged in" to the TNC's digital network. In addition to issues regarding that distinction, Rasier proposed modifications to the proposed rule consistent with its comments.

150. Rasier acknowledges that a driver cannot offer or provide TNC service when not is not logged in to a digital network; however, penalties are proposed on drivers and TNCs when logout periods do not exceed eight hours. It argues the proposed rules are actually more stringent than federal requirements applicable to commercial carriers because commercial carriers do not count time spent resting in or on a parked vehicle. The proposed rules count time as logged-in time regardless of what a driver was doing during that time.

151. Rasier proposes hypothetical scenarios where the proposed rules would dramatically limit the flexibility enjoyed by TNC drivers:

> • **The commuter's friend:** On weekdays, this driver logs on from 7-9 a.m., logs out from 9 a.m. to 4 p.m., and logs back in at 4-6 p.m. This driver's per-hour earnings are maximized because he or she is providing service during the periods when demand is the highest. Under Staff's proposed rule, this driver will have been deemed to have worked for 11 **hours** every day that they follow this pattern, even though the driver is only on the road offering or providing service for 4 hours.

> • **The working parent:** To make extra money and contribute to household income, this driver logs on from 9 a.m. to 1 p.m. while the kids are in school, then again from 8 p.m. to 10 p.m. after they are put to bed. Under Staffs proposed rule, this driver likewise will have been deemed to work **11 hours** for these 4(sic) hours of service.
>
> • **The weekend warrior:** This driver works as a TNC driver on the weekends to earn extra money for the family. The driver logs on from 10 p.m. to 2 a.m. every Saturday night when demand is high as restaurants, bars, and other social events come to a close. Then, on Sunday mornings, the driver logs back on from 8 a.m. to Noon to serve high demand to airports and weekend events like concerts and NFL football games. The weekend warrior is a key partner in the State's efforts to reduce drunk driving. Under Staffs proposed rule, this this driver will have been deemed to have worked 14 hours for these 8 hours of service.

152. Lyft also comments that statutorily offering to provide TNC services does not equate with being logged in and suggests that the language be changed back to prohibit a driver from offering or providing service for more than 12 consecutive hours. Lyft understands the importance of a driver being off the system for eight hours a day. It supports the consensus rule terminology requiring a driver to be log off the system for eight hours at the end of 16 hours. The proposed rule raises concern because a driver with their app on, but doing other things, counts against maximum hours. Ultimately, Lyft joins in the concept that an ability to debate should be available rather than solely relying on being logged on for a period of time. While one must necessarily be logged in to actually use the system, one logged into the systems is not necessarily providing or offering to provide TNC services. Lyft contends the statute does not count hours logged into the application as hours providing or offering to provide TNC services.

153. In supplemental comments, Lyft comments that the proposed rules are unworkable because they limit the hours a TNC driver may provide services for any TNC. Having no way to know whether a driver operates for another TNC, Lyft agrees with the written comments submitted by Rasier concerning the Commission's efforts to shift the driver hour’s obligation from drivers to TNCs.

154. At hearing inquiry was made of Raiser regarding caution against equating being logged in to a TNC's digital network and providing or offering to provide TNC service. Counsel for Rasier stated that being logged in to the application on their smartphone does not necessarily mean that they are on duty (i.e., if the application is opened in the background). Being logged in to the application does not reflect what that person was actually doing. However, no clarification was provided to distinguish a driver being logged into the application as opposed to the driver being logged into the TNC's digital network (e.g., comparing to financial services applications that time out inactive connections). Asked how the Commission might determine when TNC services are offered, Counsel responded that a driver would be out on the street actively accepting requests.

155. Rasier admitted that it is not possible for a TNC driver to be matched with a TNC customer without being logged in to the TNC's digital network.

156. A hypothetical scenario was stated where a driver logs into the TNC's digital network, gets in his car and drives for twenty minutes roaming around downtown Denver. Not having been matched with a passenger, has he been in service or offered service? Rasier comments that one would have to compare it to actual data on a case-by-case basis without any bright-line rule. Because requests come in on a second-by-second basis, he would conclude that a driver in downtown Denver driving around logged in 20 minutes without having accepted a single ride is not offering or providing TNC services.

157. In reply comments, the Taxi Carriers address comments at hearing regarding providing or offering to provide TNC services. While a driver might be logged into a TNC's digital network but be away from his or her vehicle or engaged in an "off duty" activity, from an enforcement standpoint, the Taxi Carriers point out that it would be nearly impossible to track or

calculate TNC hours of service in any meaningful way. They contend that whether a driver is logged in or out of a TNC's digital network should be the determining factor for calculating on- and off-duty time.

158. The Taxi Carriers also contest Staff's comments, contending that Proposed Rule 6722(a) and (b) prohibit drivers from being logged in to a TNC's digital network for more than 12 consecutive hours, and further require a driver to log out for eight consecutive hours at the end of the 16th hour after logging in to the TNC's digital network. Counting all time logged off of a TNC's digital network that is less than eight consecutive hours toward the driver's hours of service totals, places an additional, arbitrary restriction on drivers' hours of service. They recommend adoption of Rule 6722, but reject Staff's proposed modifications to Rule 6722(c).

159. The Taxi Carriers contend that Staff's modifications to Proposed Rule 6722(c) will deter TNC drivers from taking breaks rather than combat driver fatigue. Staff's proposed language would penalize drivers for logging off of a TNC's digital network for a break by subtracting break time from a driver's available hours of service. Finally, they argue that Staff has not presented any evidence that its proposed change will reduce driver fatigue, or that the existing language of Commission Rule 6103(c)(II)(C), from which proposed TNC rule 6722(c) is patterned, has resulted in any issues with driver fatigue that warrant further modification.

160. The Honorable Ted Harvey, Senator Cheri Jahn, Representative Dan Pabon, and the Honorable Libby Szabo, comment that the TNC Act prohibits TNC drivers from offering or providing TNC services for "more than twelve consecutive hours." They contend that the proposed rules should not be adopted because they "reverse the onus of compliance from the driver to the TNC" and "shift limits that apply to taxicab drivers and other motor carriers

for TNCs." Third, they contend that reliance upon being logged in to a TNC's digital network should not be used to enforce limitations on a driver's time based upon offering or providing service. They comment that such reliance "disregards the Bill and suggests unfamiliarity with how app-based technology operates on mobile devices."

161. On July 13, 2015, Staff filed comments including prior Commission decisions addressing hours of service regulation and Federal Register, Vol. 75, No. 249, proposing regulations for hours of service. Finally, the filing included a study entitled: "Patterns of performance degradation and restoration during sleep restriction and subsequent recovery: a sleep dose-response study" as reported in the Journal of Sleep Research. The summary of the study concludes: "These results suggest that the brain adapts to chronic sleep restriction. In mild to moderate sleep restriction this adaptation is sufficient to stabilize performance, although at a reduced level. These adaptive changes are hypothesized to restrict brain operational capacity and to persist for several days after normal sleep duration is restored, delaying recovery."

162. On July 31, 2015, Metro Taxi, Yellow Cab, Union Taxi, and Freedom Cabs responded to counter Staff's comments. The taxi companies contend the 80 in 8 Rule has been in effect and adequately addressing driver fatigue for over fifteen years. No evidence shows that the existing hours of service rules are insufficient to prevent driver fatigue such that would warrant Staff's modifications to proposed Rule 6722(c). Further, the taxi companies argue that no showing has been made that the proposed expansion of Rule 6722(c) would minimize driver fatigue and the proposal would force drivers to choose between choose between getting rest or earning money.

163. During the final hearing, the consensus group departed from previous comment to encourage adoption of modifications to the proposed rule. *See* Hearing Exhibit 8.

164. "When construing a statute, courts and agencies must look first at the plain language of the statute. *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997). The courts may not resort to the rules of statutory construction and must apply a statute as written if its plain language is clear and unambiguous. *Id*. Additionally, the courts and administrative agencies should presume that the legislature passed a statute with deliberation and with full knowledge of all existing law applicable to the same subject. *In re Questions Submitted by United States District Court*, 499 P.2d 1169, 1171 (Colo. 1972)." Decision No. C08-1182, issued November 14, 2008 at ¶24. *See also* Goldy v. Crane, 167 Colo. 44, 445 P.2d 212 (1968); Husson v. Meeker, 812 P.2d 731 (Colo. App. 1991).

165. Similarly, the Supreme Court summarized:

> In interpreting a statute, we must give effect to the intent of the lawmaking body, see Gambler's Express Inc. v. Public Utils. Comm'n, 868 P.2d 405, 410 (Colo. 1994), and there is a presumption that the General Assembly intends a just and reasonable result, see 2-4-201(1)(c), 1 C.R.S. (1997); Colorado-Ute Elec. v. Public Utils. Comm'n, 760 P.2d 627, 635 (Colo. 1988). Thus, a statutory interpretation that defeats the legislative intent or leads to an absurd result will not be followed. See Conte v. Meyer, 882 P.2d 962, 965 (Colo. 1994). A statute must be read and considered as a whole and should be construed to give consistent, harmonious, and sensible effect to all of its parts. See Gambler's Express, [**18] 868 P.2d at 410. Finally, although we must give effect to the statute's plain and ordinary meaning, see Colorado Office of Consumer Counsel v. Public Utils. Comm'n, 752 P.2d 1049, 1052 (Colo. 1988), the intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result, see Rodriguez v. Schutt, 914 P.2d 921, 925 (Colo. 1996); People v. Bowman, 812 P.2d 725, 728 (Colo. App. 1991).
>
> AviComm, Inc. v. Colorado PUC, 955 P.2d 1023, 1031 (Colo. 1998).

166. The TNC Act states: "A driver shall not offer or provide transportation network company services for more than twelve consecutive hours." §40-10.1-605(e), C.R.S.

Application of the plain and unambiguous language would lead to an absurd result. TNCs raise concern about obstacles deterring new drivers from entering the market in various comments, much less if a successful driver beginning to provide service were to be limited to a career of 12 hours. The statute does not address any time period beyond a 12 consecutive hour period.

167. TNCs represent a new model of transportation. The Commission has recognized: "Senate Bill 14-125 is landmark legislation recognizing TNCs and TNC services in Colorado, subject to limited regulation. This Commission historically has regulated motor carriers; however, TNCs represent a different model for providing transportation through digital networks and individuals using their personal vehicles." Decision No. C14-1246, issued October 17, 2014, at ¶5.

168. The federal government has regulated maximum hours of service at least since implementation of The Motor Carrier Act of 1935: "The Motor Carrier Act of 1935 provides that 'The Secretary of Transportation may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and, (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation' (Section 31502(b) of Title 49 of the United States Code (49 U.S.C.))." 75 Fed. Reg. 82172 (2010).

169. Commission rules have incorporated federal motor carrier hours-of-service regulations, with limited modification, to comprehensively regulate hours of service. Although the earliest date is not readily accessible to the undersigned, Commission rules have been in effect in Colorado at least since 1970 regulating hours of service in safety regulations of commercial carriers by motor vehicle. *See* Decision No. 76076, issued October 16, 1970, Case No. 5146.

170. Staff proposes adaptation of existing regulation to the TNC Act and TNC services in order to address driver fatigue for the protection of public safety. Comment addresses historical regulation, including some supporting basis therefor.

171. Rules of statutory construction instruct the undersigned to presume that the legislature passed a statute with deliberation and with full knowledge of all existing law applicable to the same subject. In the past, the Commission has used three separate measures of hours of service to address driver fatigue, generally stated as: on duty not more than 16 hours without an eight hour break; driving time not more than ten hours, following eight consecutive hours off duty; and not more than 80 hours of service in any rolling eight consecutive day period.

172. The Act expressly permits the Commission to promulgate rules regarding safety requirements consistent with the Act. With awareness, the Legislature restricted a TNC driver from offering or providing transportation network company services for more than 12 consecutive hours.

173. The proposal implements the statutory restriction by prohibiting a TNC driver from being logged in to a TNC's digital network for more than 12 consecutive hours, while also adapting those safety measures to address driver fatigue that are not inconsistent with the Act.

174. Returning to the Act, it does not define a period of time within which the 12 consecutive hour period occurs. Illustratively, does it address 12 consecutive hours within a lifetime, a year, a month, a week, a day, or any previous 12 -hour period?

175. The consensus group supports adoption of Rule 6722 as modified in Hearing Exhibit 8. The proposal retains the explicit statutory limitation. The proposed changes go on to leverage the use of available technology and adapt standards that have been utilized for years for the safety and protection of the traveling public.

176. It is notable that hours of service standards cannot provide black and white distinctions in safety. Illustratively, the rule can neither make it safe for a driver to drive for 11 hours in a day nor avoid it being unsafe for a driver to drive 13 hours in a day. The standards are adopted based upon years of experience and Commission expertise, as well as previous studies supporting years of experience.

177. The proposal reasonably interprets and applies the statutory provision as the maximum number of continuous hours per day that a driver can offer or provide TNC services per day. But for the addition of other protections for the traveling public, another continuous 12 hour period could begin after a sufficient break of an undefined continuous time period.

178. The consensus establishes a presumption that a driver logged in to a TNC's digital network is offering or providing TNC service, consistent with the very purpose of the relationship that can be accurately and reliably logged. An opportunity is then provided to rebut the recorded information. The consensus reflects the reality that TNC services cannot be provided without the driver connecting to the TNC's digital network and that available technologies can be leveraged to broadly and efficiently enforce Commission rules. The balance struck addresses safety concerns associated with driver fatigue that also coordinate with the statutory provisions. The consensus proposal will be adopted and proposals to extend application of existing hours of service will not be adopted at this time.

179. Notably, the consensus proposal obligates TNCs to monitor available data at least once per week for all drivers and impose discipline in accordance with a policy maintained on file with the Commission. While the undersigned has some concern as to the lack of standards specified for such a policy, the rule as a whole offers a comprehensive means to efficiently administer and enforce obligations upon drivers, rather than being limited to those selected for a

more manual audit effort that must be undertaken by Staff. This approach has the greatest potential to maximize safety through compliance rather than focusing on penalizing failure to comply. Should unexpected outcomes be experienced, the matter may be revisited.

N. 6723. Prohibitions.

180. The Taxi Carriers note that the proposed rules do not address TNCs' disclosure of users' personally identifiable information as addressed in §40-10.1-605(m), C.R.S. A prohibition on any TNC disclosure of personally identifiable information in contravention of §40-10.1-605(m), C.R.S. is proposed to be added to Rule 6723. A corresponding penalty for violation should be adopted.

181. The undersigned joins the Taxi Carriers' concern that the rules do not address the explicit statutory prohibition against disclosure of personally identifiable information. The Commission has supported protection of similar information and adopted protections for other regulated industries. Recent rules adopted will guide adaptation to the rules regulating TNCs, including without limitation adoption of penalties and recordkeeping requirements. Although the Commission may address data privacy in more depth in a future proceeding, at least initial prohibitions will be implemented at this time.

182. Proposed Rule 6723(a) changes the language from "No TNC shall require or permit…" to "No TNC shall permit…" Staff notes that the phrase "require or permit" is used throughout these rules as well as those governing other types of transportation. Striking it from one rule and leaving it elsewhere will give rise to a future argument that the phrasing is different and therefore a TNC could require, but not permit. This change should not be adopted as proposed. If the Commission wishes to modify the phrase to remove "require or" it should do so throughout the entirety of these rules.

183. The undersigned agrees with Staff's comment and clarifying modifications will be adopted.

184. Many of the prohibitions under Rule 6723 require a TNC to take action against a driver either upon being notified of a violation, or after confirming a violation through another means. The required action is disconnection from a TNCs digital network. Depending upon the nature of the violation, each prohibition carries a different duration of disconnection. What is not contemplated is when the disconnection should occur. To eliminate future confusion and disagreement in interpretation, the rule should specify both the timing of the disconnection and the duration. For safety violations, Staff proposes disconnection immediately upon notification. For violations not posing an immediate threat to the public safety, disconnections should be required after the driver is provided the opportunity to dispute the allegation before the Commission.

185. Rasier does not object to a rule requiring policies regarding prohibitions in Rule 6723, communicating them to drivers, monitoring driver performance, and imposing discipline (including a reasonable disconnection from the digital network period) when credible breaches of these requirements are brought to its attention. At hearing, Rasier comments that the statute imposes core requirements on drivers. The TNC's role is to impose rigorous policies, communicate them clearly to the drivers, and to respond to circumstances brought to the TNC's attention. Upon notice, corrective action would be taken. The TNC has no direct control over drivers and can only be expected to enforce policies requiring driver compliance.

186. Rasier requests a hearing process before a TNC driver is disconnected or penalized to ensure they are not unfairly punished for reasonable conduct. Rasier objects to the considerable discretion granted enforcement officials to require immediate disconnection

without drivers having some protection against unsubstantiated claims of misconduct. Except driver fatigue, a driver should not be disconnected or be penalized based upon enforcement official action. If a driver condition that would likely cause the unsafe operation of the personal vehicle, Rasier requests a 24 hour disconnection period be adopted. It contends this is a reasonable time for automatic disconnection without opportunity for hearing. As to non-safety matters, the period of disconnection could be determined at hearing based upon the level of culpability.

187. Rasier argues that (c) should state that a driver whose ability to operate a vehicle is impaired by illness or fatigue should be required to disconnect for a period not to exceed 24 hours, not until the condition is no longer present. Paragraph (f) should prohibit texting while the vehicle is in motion, rather than while the driver is operating the vehicle.

188. If the driver does not contest the finding by the enforcement official, the penalty may be imposed immediately; however, if the driver contests the finding, Lyft contends the disconnection penalty should only be imposed after hearing. So long as the alleged defect or impairment has been cured, the delay in imposing any penalty does not raise a safety concern. Language should be added to the rules to cover both situations—the immediate disconnection for safety reasons and the subsequent disconnection penalty, if any. Generally, if a driver contests an allegation that he or she has violated a rule, then the driver is entitled to a hearing before a penalty is imposed. In several instances, the right to a hearing does not raise a safety issue if the penalty found to be appropriate is not imposed until after the hearing. In other instances, however, the steps taken at the time of the alleged infraction cannot be delayed until after a hearing (e.g. immediate threat to public safety). Lyft suggests that Rule 6723(a), (b), (c), (d), (e),

and (l) pertain to a defect or impairment that requires immediate disconnection until the defect or safety concern is remedied.

189. Despite earlier comments to the contrary, Rasier, Lyft, and Staff support adoption of the proposed rule, as modified in Hearing Exhibit 8. The compromise reached in the consensus proposal is reasonable and will be incorporated in the rule adopted.

O. 6724. Violations, Civil Enforcement, and Enhancement of Civil Penalties.

190. The Taxi Carriers support the proposed rule and recommend additional revisions. First, a penalty of $10,000 per violation is recommended for a TNC permitting a driver to operate any personal vehicle if the driver is under the influence or uses any drug or substance that renders the driver incapable of safely operating a personal vehicle (prohibited by Rule 6723(d)). Such a penalty is argued to be consistent with federal standards as well as penalties imposed on other regulated carriers. Secondly, a penalty of $10,000 per violation is recommended for a TNC permitting a driver to operate any personal vehicle if the driver has consumed alcohol within four hours of logging in to the TNC network, or is under the influence of alcohol while logged in to the TNC network as set forth in Proposed Rule 6723(e). The violation is analogous to requirements of other regulated carriers, which are subject to a $10,000 penalty. In absence of adopting the proposals, the Taxi Carriers argue that these violations would be subject to a maximum penalty of $250 per violation, per Rule 6724(h)(II).

191. In supplemental comments, Lyft contends that it is inappropriate to assess penalties against a TNC for driver conduct violating TNC policies prohibiting such conduct.

192. The undersigned finds the comments of the Taxi Carriers quite compelling; however, TNC's contest the Commission's jurisdiction to enforce obligations imposed by the Act. Drivers of for hire passenger transportation providing service under the influence or using

any drug or substance that renders the driver incapable of safely operating a personal vehicle goes to the heart of public safety, specifically including the safety of passengers transported. Based upon comment presented, the undersigned sees no basis to distinguish the safety of drivers, passengers, or affected members of the public based upon a vehicle being driven by a TNC driver or a driver for a motor carrier. Based upon uncertainty of Commission jurisdiction, the scope of consensus reached, the fact that other laws prohibit the specific conduct at issue, and Staff supports adoption of the consensus proposal without specifically requiring resolution of the issue at this time, the consensus proposal will be adopted without modification, except as addressed above.

P. Questions seeking additional comment

193. The Commission included several questions in the NOPR seeking additional comment. Many of the responsive comments affected other rule provisions addressed above or look to other aspects of implementing the TNC Act. Particularly in light of the scope of consensus reached, notably supported by Staff, the undersigned recommends deferral of further consideration at this time to expedite implementation. The comments filed failed to convince the undersigned that additional rules, further delay in adoption of rules, or broadening the scope of the rules is necessary at this time. Adoption of rules will permit implementation to proceed and so that experience may be gained to better inform future proceedings as necessary.

III. CONCLUSIONS

194. Attachments A to this Recommended Decision represents the TNC rules adopted by this Decision with modifications to the prior rules being indicated in redline and strikeout format (including modifications in accordance with this Recommended Decision).

195. Attachment B to this Recommended Decision represents the TNC rules adopted by this Decision in final form.

196. It is found and concluded that the proposed rules as modified by this Recommended Decision are reasonable and should be adopted.

197. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

IV. ORDER

A. The Commission Orders That:

1. The Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* 723-6, contained in redline and strikeout format attached to this Decision as Attachment A, and in final format attached as Attachment B, are adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts

set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director