



Office of Policy Planning
Bureau of Competition
Bureau of Consumer Protection
Bureau of Economics

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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State of Colorado
Public Utilities Commission
1560 Broadway Suite 250
Denver, CO 80202

Re: Docket No. 13R-0009TR

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics¹ appreciate this opportunity to provide comments to the Colorado Public Utilities Commission ("CPUC") on three proposed changes to the Code of Colorado Regulations, contained in its Notice of Proposed Rulemaking *In The Matter of The Proposed Rules Regulating Transportation By Motor Vehicle*, 4 Code of Colorado Regulations 723-6.² Proposed Rule 6001(ff) would equate the advertisement or offering of the provision of transportation with being a "motor carrier." Proposed Rule 6301(a) would require charter contract transportation, which includes transportation provided by luxury limousines, including stretched limousines and executive cars and vans, to operate using a specific fixed price. Proposed Rule 6309(d) would prohibit luxury limousines from stationing within 200 feet of a hotel, motel, restaurant, bar, taxicab stand, or airport passenger pickup point without the service having been prearranged and the completed charter order being in the vehicle.

FTC staff is concerned that these three proposed changes may significantly impair competition in passenger vehicle transportation services, including innovative methods of competition enabled by new software applications ("applications") that allow consumers to arrange and pay for services in new ways that they might prefer, and thus harm consumers. In evaluating claims that the practices to be prohibited impose a genuine threat to consumer welfare, we recommend that CPUC be guided by the principle that any restriction on competition designed to address such potential harm should be narrowly crafted to minimize its anticompetitive impact.

Generally, staff recommends that a regulatory framework for passenger vehicle transportation should allow for flexibility and adaptation in response to new and innovative methods of competition, while still maintaining appropriate consumer protections. Given the recent introduction of new applications for arranging and paying

for passenger vehicle transportation services, CPUC may wish to consider whether there are ways to clarify or update existing rules on passenger vehicle transportation service to allow competition to flourish, while still maintaining appropriate, reasonably tailored consumer protections.

I. Interest and Experience of the Federal Trade Commission

The FTC is an independent federal agency that enforces laws prohibiting unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce.³ The Commission has wide-ranging responsibilities concerning nearly all segments of the economy. Pursuant to this responsibility, the Commission seeks to identify business practices and regulations that impede competition without offering countervailing benefits to consumers.⁴

Competition and consumer protection enforcement naturally complement and mutually reinforce each other, to the benefit of consumers. Consumers benefit from market competition. The U.S. Supreme Court has recognized that the benefits of competition go beyond lower prices: “The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain - quality, service, safety, and durability - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”⁵ At the same time, consumer protections promote informed consumer decision-making by requiring sellers to make truthful and non-deceptive representations about their offerings. In other words, competition pressures producers to be innovative and responsive to consumer preferences with respect to price, quality, and other options, while consumer protection policies reinforce competition by facilitating informed consumer choices and prohibiting firms from engaging in unfair or deceptive acts or practices.

In carrying out its mission, the Commission has developed considerable expertise in analyzing issues relating to passenger vehicle service markets. FTC staff previously has submitted a number of advocacy filings related to taxicabs with various local and state authorities.⁶ The FTC has also brought enforcement actions against two cities relating to taxicab regulation.⁷ Another major contribution in this area is an FTC staff report on taxi regulation.⁸ The report’s conclusions are still generally applicable today.⁹

II. The Passenger Vehicle Transportation Marketplace

Until recently, the passenger vehicle transportation marketplace in the United States remained largely unchanged since at least the early 1980s.¹⁰ However, in response to the introduction of smartphones around 2007, both incumbent passenger vehicle transportation service providers and other entrepreneurs have introduced new software applications that allow consumers to arrange and pay for passenger vehicle transportation service.¹¹ These software applications, also sometimes called digital dispatch services, make use of technologies such as mobile smartphone applications, Internet web pages, email messages, and text messages.

These applications represent an innovative form of competition that may enable consumers to more easily arrange and pay for passenger vehicle transportation services, compared to traditional methods such as street hails or prearrangement by telephone through traditional service dispatchers.¹² For example, some applications use the Global Positioning System (“GPS”) technology incorporated into smartphones to enable consumers to locate nearby vehicles and track their arrival on an electronic map, thus facilitating matching between customers and service.¹³ Some applications also utilize the GPS and computing capabilities of smartphones to enable new fare calculation methods based on one or more factors such as distance, time, per trip fees, demand, additional services, or gratuities, which the application can then charge to a credit card.¹⁴ These technologies and methods may promote a more efficient allocation of resources (e.g., vehicles and drivers) to consumers seeking passenger vehicle transportation services. These technologies and methods may also raise novel consumer protection issues, for example, relating to consumers’ understanding of price information communicated via an application. Other potential areas of concern may include the collection, use, and retention of consumer trip data and the collection, use, and retention of consumer credit card data.

III. A Regulatory Framework Should be Responsive to New Methods of Competition

Staff recommends that a regulatory framework for passenger vehicle transportation should allow for flexibility and adaptation in response to new and innovative methods of competition, while still maintaining appropriate consumer protections. CPUC also should proceed with caution in responding to calls for change that may have the effect of impairing new forms or methods of competition that are desirable to consumers. Regulation of vehicle transportation should focus primarily on ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, and compliance with other applicable laws.¹⁵ Regulation of new computer and phone-based applications should focus primarily on ensuring the safety of customers and drivers, deterring deceptive pricing practices, and addressing other consumer protection issues.¹⁶

In general, competition should only be restricted when necessary to achieve some countervailing procompetitive virtue or other public benefit such as protecting the public from significant harm. This is because consumers benefit from competition among passenger vehicle transportation services, both new and traditional. In the case of passenger vehicle transportation services, competition takes place on a variety of dimensions, including price, availability, timeliness, convenience, quality, vehicle type, and other amenities. A regulatory framework should not restrict the introduction or use of new types of applications, or novel features they provide, absent some evidence of public harm. Generally, a regulatory framework should promote innovation and experimentation that benefit consumers. If CPUC receives evidence of harm from a particular act or practice, a restriction on competition should be narrowly crafted to minimize its anticompetitive impact.

Truthful, non-deceptive information about passenger vehicle transportation services is necessary for the passenger vehicle transportation marketplace to function efficiently.¹⁷ Software applications may provide a number of benefits to consumers, including helping them to compare passenger vehicle transportation services, but they also have the potential to confuse or mislead consumers if, for example, they fail to adequately disclose how fares are calculated or employ “drip pricing” practices.¹⁸ Nevertheless, to promote competition and consumer choice, CPUC should consider less restrictive alternatives to what may be *de facto* bans on new methods of competition facilitated by software applications.

IV. Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking contains three proposed amendments to the Code of Colorado Regulations that may unnecessarily restrict competition in the passenger vehicle transportation marketplace.

A. Proposed Rule 6001(ff)

Proposed Rule 6001(ff) would amend the definition of a “motor carrier,” so that “Without limitation, providing transportation includes advertising or otherwise offering to provide transportation.” According to the Notice of Proposed Rulemaking, this amendment would equate the mere advertisement or offering of providing transportation with being a motor carrier that provides transportation in intrastate commerce.¹⁹ Such an expansive definition seems overbroad. Merely communicating an advertisement or offer to provide transportation is not the functional equivalent of actually providing transportation service. This change would create an unwarranted barrier to the entry and operation of applications that are not also motor carriers, and may inhibit, impair or preclude new and innovative ways in which independent applications can affiliate with transportation service providers.

To the extent that CPUC finds that software applications may harm consumers, it should craft any necessary regulations to minimize their anticompetitive impact. Otherwise, CPUC should allow for flexibility and experimentation in the ways that applications and motor carriers can affiliate with each other.

B. Proposed Rule 6301(a)

Proposed Rule 6301(a) would require that charter contract transportation, which includes transportation services provided by luxury limousines, including stretched limousines and executive cars and vans, be based on a “specific fixed price.”²⁰ This change seems overbroad, as it would effectively preclude variable pricing for charter transportation, including new types of application-based demand pricing, which might potentially benefit consumers and competition. Demand pricing can be an efficient way to allocate resources (e.g., vehicles and drivers) to consumers, particularly during times of peak demand (e.g., during particular times of day, periods of traffic congestion, around the time of special events). That is to say, price increases signal increased consumer

demand for goods and services, while price declines can signal the opposite.²¹ Demand-based pricing, therefore, can be more responsive to consumer preferences than some traditional flat-rate models.

FTC staff believes that, absent some specific compelling evidence that pricing models other than a “specific fixed price” will harm consumers, this change should not be adopted. To the extent that CPUC does receive evidence of such harm, any restriction designed to address that harm should be narrowly crafted to minimize its anticompetitive impact. For example, CPUC may wish to consider requiring applications to disclose certain price information to consumers before purchase,²² expressly allowing or requiring applications to provide an electronic receipt to customers for verification purposes, or requiring applications to maintain a trip log or manifest for verification purposes.²³ Otherwise, CPUC should allow for flexibility and experimentation in charter contract pricing in order to facilitate innovative forms of pricing that may benefit consumers.

C. Proposed Rule 6309(d)

Proposed Rule 6309(d) would prohibit luxury limousines from stationing within 200 feet of a hotel, motel, restaurant, bar, taxicab stand, or airport passenger pickup point without the service having been prearranged and the completed charter order in the vehicle. This proposed change also seems overbroad, as it would likely impede the ability of consumers to quickly obtain luxury limousine service using an application in many cases, particularly in areas having high concentrations of covered locations, such as downtown areas and other “urban village” areas that have a mixture of residential areas and businesses close to each other. This change would appear to require that luxury limousines depart such areas after dropping off passengers and before completing another order.

FTC staff believes that, absent some specific compelling evidence that the presence of luxury limousine vehicles in proximity to typical passenger pick-up areas will harm consumers, this change should not be adopted. To the extent that CPUC may be concerned about potential queue problems or congestion issues in certain areas, it could consider using a less restrictive means to deal with these problems.²⁴ Staff is aware that special issues have sometime arisen regarding the regulation of passenger vehicle transportation services, as in the case of first-in first-out taxicab queues at airport, rail station, or downtown taxicab stand areas.²⁵ But these problems alone do not support this proposed broad restriction. Generally, there are likely to be more passenger transportation vehicles stationing in particular areas only if there is demand for such vehicles in those areas. Also, passenger vehicle services can potentially reduce traffic congestion because increased use of those services can mean reduced use of private automobiles, especially in downtown and other densely populated areas. Consequently, absent evidence of queue problems or congestion issues, CPUC should avoid unnecessarily restricting the ways that consumers can be picked up by passenger vehicle transportation services.

V. Conclusion

FTC staff appreciates this opportunity to provide views in regard to this matter and would be happy to address any questions you may have regarding competition and consumer protection policy in the passenger vehicle transportation marketplace.

Respectfully submitted,

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¹ This staff letter expresses the views of the Federal Trade Commission’s Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

² CPUC Docket No. 13R-0009TR (Open Date Jan. 7, 2013), *available at* https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=13R-0009TR.

³ Federal Trade Commission Act, 15 U.S.C. § 45.

⁴ Specific statutory authority for the FTC’s competition advocacy program is found in Sections 6(a) and (f) of the FTC Act, under which Congress authorized the FTC “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” and “[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest. . . .” 15 U.S.C. § 46(a), (f).

⁵ Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978); *accord*, FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 423 (1990).

⁶ *E.g.*, FTC Staff Comments Before the Colorado Public Utilities Commission Concerning Application of Union Taxi Cooperative for Permanent Authority to Operate a Taxi Service (Nov. 3, 2008), *available at* <http://www.ftc.gov/os/2008/11/V090000cotaxis.pdf>.

⁷ The FTC sued the cities of New Orleans and Minneapolis in 1984, charging both cities with unfair competition by combining with taxicab operators to impose regulations that limited the number of taxicab licenses, increased fares, and eliminated competition in violation of the federal antitrust laws. The complaint against Minneapolis was withdrawn after the city revised its ordinance to permit more competition. The complaint against New Orleans also was withdrawn after the state authorized the conduct in question by a new law. *See generally* FTC, 1985 ANNUAL REPORT 5 (1985), *available at* <http://www.ftc.gov/os/annualreports/ar1985.pdf>.

⁸ MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION (1984) (FTC Bureau of Economics Staff Report), *available at* <http://www.ftc.gov/be/econrpt/233832.pdf> (“Staff Report”).

⁹ OECD, Directorate for Financial and Enterprise Affairs, Competition Committee Working Party No. 2 on Competition and Regulation, Taxi Services Regulation and Competition – United States (Oct. 15, 2007), *available at* <http://www.ftc.gov/bc/international/docs/ustaxis.pdf>.

¹⁰ *Id.* at 2 (“As of 2007, the general description of the taxicab industry and taxicab regulation in the United States remains much as it was when Frankena and Pautler described it in 1984. That is, nothing dramatic has happened to alter the U.S. industry in the interim.”).

¹¹ *See generally* Lauren Goode, *Worth It? An App to Get a Cab*, WALL STREET J. (June 17, 2011), *available at* <http://blogs.wsj.com/digits/2011/06/17/worth-it-an-app-to-get-a-cab/>.

¹² See generally *id.*

¹³ See generally *id.*

¹⁴ See generally Brian X. Chen, *Uber, an App That Summons a Car, Plans a Cheaper Service Using Hybrids*, N.Y. TIMES, July 1, 2012, available at <http://www.nytimes.com> (discussing charging by time, distance, consumer demand, and gratuities); Michael B. Farrell, *Taxi App Hailo to Expand Service*, BOSTON GLOBE, Feb. 5, 2013, available at <http://www.bostonglobe.com> (discussing booking fees, service fees, and gratuities).

¹⁵ See generally Staff Report, *supra* note 8, at 1-2.

¹⁶ For example, under the Washington, D.C. Public Vehicle-for-Hire Innovation Amendment Act of 2012 (D.C. Council B19-0892) (adopted Jan. 18, 2013) (amending D.C. Official Code § 50-329.02), “A digital dispatch service shall be exempt from regulation by the [District of Columbia Taxicab] Commission, other than rules and regulations that are necessary for the safety of customers and drivers or consumer protection.” See also generally Press Release, California Public Utilities Commission, CPUC Enters Into Operating Agreement With Uber (Jan. 31, 2013), available at <http://www.cpuc.ca.gov/NR/rdonlyres/F013B3B9-ED4E-4554-9C34-E468C9DAED88/0/CPUCEntersIntoOperatingAgreementwithUber.pdf> (describing an interim agreement allowing Uber Technologies, Inc. to operate pursuant to certain safety requirements, while a California Public Utilities Commission rulemaking on innovations in passenger vehicle transportation services is underway). The details of this agreement are contained in Term Sheet for Settlement Between the Safety and Enforcement Division of the California Public Utilities Commission and Uber Technologies, Inc. Re Case PSG-3018, Citation F-5195 (Jan. 2013) (available via the California Public Utilities Commission).

¹⁷ From the perspective of consumer protection, information relating to the provision of passenger transportation vehicle services communicated to consumers should be evaluated on a totality of the circumstances approach. FTC Policy Statement on Deception, Appended to Cliffdale Assoc., Inc., 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. The FTC’s approach to deception consists of a three-part test. First, there must be a representation, omission, or practice that is likely to mislead the consumer. Practices that have been found to be misleading or deceptive in specific cases include false written representations, misleading price claims, use of bait and switch techniques, and failure to perform promised services. Second, the practice is examined from the perspective of a consumer acting reasonably in the circumstances. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond. If the representation or practice affects or is directed primarily to a particular group, the FTC examines reasonableness from the perspective of that group. Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary. Thus, the FTC will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.

¹⁸ Drip pricing is a pricing technique whereby firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process. The additional charges can be mandatory charges, such as hotel resort fees, or fees for optional upgrades and add-ons. Drip pricing is used by many types of firms, including internet sellers, automobile dealers, financial institutions, and rental car companies. *See generally* Fed. Trade Comm'n Conference on the Economics of Drip Pricing (May 21, 2012), available at <http://www.ftc.gov/be/workshops/drippricing/index.shtml>.

¹⁹ In addition, if Proposed Rule 6001(ff) were adopted, a software application would, apparently, then also be covered by Proposed Rule 6010(a), (c) (concerning motor carrier authority and permit applications and motor carrier use of trade names). CPUC may wish to consider whether, in this scenario, a software application might be unnecessarily restricted from using certain words, due to it being subjected to existing traditional motor carrier classifications. For example, CPUC may wish to consider whether, pursuant to Proposed Rule 6010(a), (c), a software application covered as a motor carrier might be unnecessarily restricted from using the phrase "limousine taxi" to describe a luxury limousine service. Staff further recommends that CPUC also more generally evaluate the use of such terms regarding motor carrier service based on a totality of the circumstances approach, as described above, and consider whether there is evidence of consumer confusion regarding different types of motor carrier services that warrants adopting Proposed Rule 6010(a), (c). CPUC may also wish to consider whether there are specific ways to clarify or update existing motor carrier classifications, so as to avoid unnecessarily inhibiting the use of applications that might facilitate passenger vehicle transportation service across different traditional classifications.

Because Proposed Rule 6010(a), (c) would implement certain restrictions on commercial speech, it may also raise First Amendment issues. *See generally* Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) (articulating four-part test for evaluating whether government restrictions on commercial speech are constitutional).

²⁰ 4 COLO. CODE REGS. 723-6 § 6001(ee) ("Luxury limousine service' means a specialized, luxurious transportation service provided on a prearranged, charter basis as defined in rule 6301(a)."); § 6001(dd) ("Luxury limousine' means a motor vehicle, for compensation to transport passengers in luxury limousine service."); § 6308(a) (I)-(III) (Luxury Limousine Categories).

²¹ *See generally* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 37 (2010).

²² *See generally, e.g.*, 4 COLO. CODE REGS. 723-6 § 6252 (requiring taxicabs to post certain information, including certain fare information).

²³ *See generally, e.g.*, 4 COLO. CODE REGS. 723-6 § 6256 (requiring taxicab carriers to maintain certain data for each trip, for a minimum of one year from the date a customer requested taxicab service).

²⁴ Consumers appear to be better off when regulators pursue alternatives for such locations that are less restrictive, such as redesigning taxicab stands, increasing taxicab line user fees, or entering into contracts with operators. Staff Report, *supra* note 8, at 1, 50-51, 123-24, 156; OECD, *supra* note 9, at 6-7.

²⁵ It appears that in some cases first-in first-out taxicab queues have inhibited price competition, that drivers sometimes bickered over their places in line as queues of waiting cabs lengthened, and that drivers also sometimes refused service to passengers wanting only a short trip. Staff Report, *supra* note 8, at 1, 50-51, 123-24, 156; OECD, *supra* note 9, at 2.