

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1720
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540
E-mail: smarshall@ifpenn.org

Samuel R. Marshall
President & CEO

August 28, 2014

To: The Honorable Members of the Public Utility Commission

From: Samuel R. Marshall

Re: Insurance issues resulting from the advent of Transportation Network Companies

Thank you for this hearing on your regulations' ability to address the unique aspects and innovations of Transportation Network Companies (TNCs).

As a brief introduction: The Insurance Federation represents the insurance industry on legislative, regulatory and judicial matters in Pennsylvania. Our members include both personal and commercial auto insurers. Our interest in the insurance issues presented by TNCs is therefore all encompassing: Our members insure the TNC drivers and cars in their personal as well as their commercial use capacities; and we insure those passengers and third parties who may have claims against TNC drivers.

Think back to 1987, when the current insurance regulations were adopted for passenger carriers: Car phones were a bulky rarity; mobile phones, GPS systems, applications connecting and screening vendors and prospective customers, all the related technologies that make TNCs possible, weren't imagined, much less commonplace.

So the presumption is that the regulations must be outdated and should be revised to reflect and embrace the innovations TNCs offer. Given the speed of current market demands and future developments, the presumption is also that any new regulations need to be open to further change, and at a faster pace than we normally associate with the IRRRC's ponderous – some would say thorough and open – process.

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We've already seen the impatience of TNCs facing questions of insurance coverage. That's a disservice and danger to all, especially the drivers and consumers counting on TNCs: A business that deals with cars, passengers and the public on public roads should have insurance issues resolved at the outset, not only after the inevitable claims come in.

The insurance objectives and the PUC's role are set out in Section 512 of the Public Utility Code: The Commission's responsibility is to impose and enforce insurance requirements it "deems necessary for the protection of persons or property of their patrons and the public."

That is an affirmative responsibility for the PUC, once that requires the anticipation of insurance coverage issues, not a reactive or after-the-fact approach. It is also a responsibility that necessitates any insurance be available in practice, not just in theory: The true protection of insurance is measured by how readily accessible it is; insurance means little if it exists only through a complex maze of caveats and conditional triggers.

The statutory focus on the protection of passengers and the public bears emphasis. The TNCs have framed any questions about insurance as barriers to their innovations and the public's desire for their services. That obscures the Commission's sole objective with insurance, as stated by the General Assembly: The objective is passenger and public protection, not accommodating the profit and loss calculations of TNCs or serving as their protective incubator and getting them on the road quickly but without clarity.

The current insurance regulations, which give the Commission considerable discretion with the clear goal of passenger and public protection, may not need revision so much as clarification. Substantively, that is a distinction without a difference. But procedurally, it is significant: The IRRC process is a long one with input from all sides throughout the several tiers of revising a regulation; a clarification, in contrast, could be done by a Statement of Policy with immediate effect, although open to subsequent judicial review.

Whatever route you take, we urge you to adopt two key elements tied to your insurance requirements, elements set forth in your July 24 ETA Order and in various legislative measures introduced over these summer months.

1. The insurance provided by the TNC should apply from the time its driver turns on his application and is open for business.

A conventional cab has a light on top, and it says either “on duty” or “off duty” – with the public able to get rides only when the “on duty” is on. TNCs replace the light with a phone application, but the concept remains the same: When the application is on (when the TNC driver is “on app”), the driver is available and looking for business – and that’s when the TNC’s coverage should apply as primary coverage.

The TNCs have argued this imposes too much cost and liability exposure on them. Instead, they want to provide only contingent coverage until the driver has “found a match” – meaning accepted a passenger. They contend that during this “on app” period, the driver’s personal auto insurer should be the primary insurer.

They claim this lesser standard during the “on app” period is fair to them, because their drivers may often only be passively “on app”, available for business but not actively seeking it; and a driver enlisted with more than one TNC may have multiple apps on at the same time, thus creating coordination problems should there be a claim.

Those concerns are groundless. Whether one is passively or actively “on app” is a subjective test not appropriate to insurance distinctions. In any event, it could readily be monitored and controlled by the TNC (e.g., an app automatically shuts off if the driver takes no passengers after a certain period of time). And if a driver were simultaneously “on app” with several TNCs, any liability could be apportioned among them, or rules akin to “coordination of benefit” provisions in health policies could apply.

More important, the TNCs ignore the legislative goal of protecting passengers and the public. Personal auto insurance policies all come with livery exclusions, because that insurance is not intended to cover (and is not underwritten and rated to cover) driving strangers for hire. The policy language for these exclusions varies among insurers – the exclusions were written before TNCs were invented – but their purpose is clear: The personal auto insurer does not provide coverage when the insured is making himself and the car available as a cab, which is precisely what happens when a TNC driver goes “on app.”

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The TNCs suggest this is not big deal, that if the personal auto insurer invokes the livery exclusion, the TNC's contingent insurance will apply.

That doesn't hold up, certainly in fulfilling the protective role assigned to the PUC. It means confusion, uncertainty and a potentially protracted battle of whether the livery exclusion applies – these things are not always as clear-cut as one would think, which is why the TNCs speak of only contingent coverage. During that time, the passenger and the public are left in procedural limbo. If they are truly to be protected, they deserve clear identification of the proper insurer, not an argument between two insurers on the scope of an exclusion.

The proper insurer during the “on app” stage is that of the TNC. Being open for business is part of doing business, not distinct from it.

Further, the contingent liability the TNCs suggest for this “on app” stage would impose unanticipated costs on the driver's personal auto insurer – not just the cost of resolving livery exclusion issues with the claimants as well as the TNC, but also the cost of defending the action while the exclusion issues are being litigated.

Granted, insurers can adjust for those costs by raising rates. But that's not fair to the public in a broader sense: It means those insureds who are not TNC drivers are absorbing and subsidizing the costs of those who are. The PUC should avoid this unwarranted subsidy.

An important clarification: The TNC coverage we are talking about during this time is not “primary”, although we have all been guilty of using that word to distinguish it from the “contingent” or “secondary” coverage the TNCs have said they will provide. The TNCs' coverage will be exclusive – because their drivers' personal auto policies will have livery exclusions, which means no coverage while the drivers are “on app” and available for hire. That includes any “duty to defend” costs or obligations, and the Commission should incorporate that limit up front.

The Commission also needs to make sure the insurance offered by TNCs is more than a theoretical promise – that it is directly and readily accessible by claimants from the moment a TNC's drivers are on app. The Commission will need to look at more than the insurance policy the TNC submits to it: It needs to look at the contracts the TNC has with its drivers and with its passengers, and to

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make sure nothing in either of those contracts imposes unique and unreasonable terms or conditions to accessing the TNC insurance policy.

As an example: A TNC may have terms and conditions on passengers becoming part of its “app” process whereby they agree to first go through their own insurance, or to accept some unique form of arbitration. These types of conditions are often buried in the fine print of a click-on process of accepting an application, meaning consumers won’t be aware of any unique terms until after an accident.

The Commission should prohibit this: A TNC passenger should have just as direct a route to the TNC’s insurer in the event of a claim as would a passenger in any standard taxi scenario.

2. Notice should be given to the personal auto insurer of the TNC driver.

The TNCs acknowledge their accepting a driver and his car includes verification that the driver has proper personal insurance. That makes sense and isn’t unique to TNCs: Absent that insurance, the driver and the car would be operating illegally and possibly with a suspended license and registration, respectively. Nobody wants illegal cars and drivers on the road, much less serving as cabbies and cabs.

Proper personal auto insurance also protects the TNCs, especially with their concerns with providing coverage during the “on app” stage. They say a driver may be perpetually “on app” and therefore drop his personal auto insurance coverage to save money; but since doing so would disqualify him as a TNC driver, the TNC’s requirement of proper personal insurance protects the TNC.

That verification needs to come with notice to the TNC driver’s personal auto insurer that he is becoming a TNC driver – in fact, that notice is essential in making an accurate verification.

Auto insurers have different underwriting and rating criteria: Whether and how they will consider an insured’s becoming a TNC driver and using his insured car for that purpose will vary. But all auto insurers ask about their drivers’ intended use of their insured cars, and they require notification of any changes during the course of the policy. Failure to give notice, and a material change in the facts

from the insurance application, could result in termination of the policy, a change in the rate or even rescission ab initio.

The Commission should therefore require that TNCs take reasonable steps to ensure their drivers' personal auto insurance will remain valid not just before but after a person becomes a TNC driver. As the Commission set forth in its July 24 ETA Order, it should require that a TNC direct its drivers to notify their personal auto insurers of their affiliation with the TNC, and to keep copies of the drivers' notifications for a set period of time.

As with requiring that the TNC provide direct coverage during the "on app" stage, this requirement will fulfill the PUC's duty of protecting passengers and the public.

The TNCs' insurance coverage comes with a myriad of caveats, conditions and limits – including that the TNC driver be properly licensed, that his car be properly registered and that the driver and car fulfill the personal auto insurance requirements of the law. All that is understandable – but also necessitates this notice requirement. Otherwise, the insurance the TNC is providing may be inoperative, and the passengers and public will have claims against an uninsured driver and car.

Even with this notice, there may be gaps in coverage for passengers and the public, gaps the Commission should at least tighten. The most glaring one is what happens when a TNC driver's personal insurance lapses and he gets in an accident while serving as a TNC driver. Are passengers and the public without recourse or any coverage in that situation, unless they happen to have uninsured coverage of their own?

The Commission should not allow for such randomness in coverage. This goes to the importance of a TNC actively monitoring and enforcing the personal auto insurance of its drivers, so it can "turn off the app" if a driver's insurance lapses.

It also goes to the Commission's need to be immersed in the details of each TNC's insurance coverage and any conditions attached to it. So long as the TNC driver is accepting rides and payment through the TNC, the TNC's insurance shouldn't be conditioned on the driver's personal auto insurance, at least as to claims from passengers and the public.

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Granted, the TNC might have a claim against its driver. But the Commission's statutory responsibility is the protection of passengers and the public – and that means the TNC's insurance should apply without being limited by whatever private insurance woe its drivers may have.

Both of these elements are in the Commission's July 24 ETA Order dealing with the two TNCs with Applications before the PUC – Lyft and Uber. Both Lyft and Uber have subsequently filed with the PUC to satisfy the ETA requirements – and both say they are willing to revise their underlying Applications to do the same.

That should resolve concerns that insurance not be a barrier to TNCs entering the market, and we look forward to seeing the revised Applications. We are troubled that the hearings are going forward without filed revisions, as verbal assurances can only go so far when dealing with the nuances and variations noted above.

In any event, the Commission needs to examine a TNC's professed compliance with the above two conditions by looking not just at the insurance coverage a TNC purports to provide, but any possible limits on access to it through the TNC's contracts and service agreements with passengers as well as drivers. And the Commission needs to look at not just the original notices a TNC's drivers will give their personal insurers, but also how that is to be monitored moving forward - and how the Commission intends to deal with claims where a TNC driver's personal coverage has lapsed but he is still accepting rides on behalf of the TNC.

Make sure insurance requisites both protect the public and passengers and open the market – this can't be a balance or an "either/or" decision.

We are sensitive to the charge that any conditions TNCs don't readily accept come across as barriers to their entry into the public transportation market. We've seen the rallies and public relations campaigns from both TNCs and conventional taxi services, and we've seen conditions on TNCs framed as political issues cutting across the spectrum.

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Insurance requirements shouldn't be lumped into that. Requiring TNCs to have adequate and accessible insurance for the public and passengers isn't an artificial barrier, and it isn't something to be balanced against possible concerns that TNCs won't operate if this is required. Proper insurance protection is an absolute, not a "cost/benefit" consideration, under Section 512 of the Public Utility Code.

We strongly support market innovations and new efficiencies, whether that be the insurance market or any other one. As insurers, we're not protecting a particular market or market share. In fact, a number of insurers are embracing TNCs as a potential new market for coverage.

Our commitment is to protecting our policyholders – those who are TNC drivers and passengers, and other third parties with potential claims. That means making sure TNCs have coverage for the risks and liability exposure they create, and that the coverage is readily accessible to potential claimants. The elements we're advocating are integral and practical parts of that, and we urge the Commission to incorporate them in any revised regulations or conditions applying to TNCs.

Again, thank you for considering all this. More than you may have wanted, but insurance issues are nuanced and best thought through in advance of rather than after claims and coverage disputes arise.