SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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TRI-CITY, LLC,ENDOR CAR AND DRIVER, LLC

Petitioner,

- v -

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, MEERA JOSHI,

Respondent.

INDEX NO. 151037/2019

MOTION DATE 03/18/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

Upon the foregoing documents, it is

Petitioners Tri-City, LLC and Endor Car and Driver, LLC (collectively Lyft)[1] initiated this Article 78 special proceeding to challenge the Minimum Payment Rule (Rule) enacted by respondent the New York City Taxi and Limousine Commission (TLC), on December 4, 2018, to implement Local Law 150, the stated purpose of which is to ensure a livable wage of for-hire vehicle (FHV) drivers and to decrease traffic congestion.

> "Over 80,000 drivers now drive for the four largest FHV companies in New York City, which operate through apps Uber, Lyft, Gett/Juno, and Via . . . . These four companies account for 75% of FHV trips. Despite economic success of these companies, reflected in the massive growth in the number of trips in recent years

[1] Lyft is a technology firm located in San Francisco, California. (Doc. 1, Petition at ¶10; Doc. 44, *Lyft Sets Crucial Date in Race to IPO,* New York Times, Feb. 20, 2019 ["Lyft will list on the Nasdaq and expects to be valued between $20 billion and $25 billion, according to the people familiar with the company's plans."]).

from roughly 42 million trips in 2015 to nearly 159 million trips in 2017, the majority of drivers have not shared in this success." (NYSCEF Doc. No. [Doc.] 14, TLC Notice of Promulgation at 1).[2]

An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." (CPLR 7803 [3]).

Lyft challenges the TLC's company-specific utilization rate and rejection of an alternative calculation of the minimum amount using a weekly calculation pursuant to which payments to drivers are averaged out during the course of a week. Under Lyft's proposal, Lyft would benefit from any per-trip payments over the TLC minimum which would supplement per-trip payments under the TLC minimum by averaging the per-trip payments. (Doc. 56, Lyft's David Yassky's November 14, 2018 email). Under the TLC's formula, the driver gets the benefit of the payments over the minimum. The following examples crystalized the dispute for the court. (*See* March 18, 2019 Oral Argument Transcript [Tr.] at 79:12-96:14).

> Example I -two trips in one hour: For Trip 1, under Lyft's proprietary internal algorithm, from the amount the passenger pays Lyft, the driver is paid $8. For Trip 2, the driver is paid $16. Applying the TLC's per-trip calculation, the driver's minimum wage for the two trips is $10 per trip or $20. Lyft must pay an additional $2 or $8+$16+$2 or $26 to achieve the minimum of $10 per trip. Lyft cannot average or benefit from the additional $6 from the $16 trip. Under Lyft's theory, paying the driver $24 should satisfy its obligation to the driver. Instead, if Lyft were paying the driver $15 per hour, Lyft would owe the driver an additional $5 under the TLC Rule.
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> Example II - two trips in two hours: For Trip 1, under Lyft's proprietary internal algorithm, from the amount the passenger pays Lyft, the driver is paid $8. For Trip 2, the driver is paid $16. Applying the TLC's per-trip calculation, the driver's minimum wage is $10 per trip or $20. Lyft must pay an additional $2 or $8+$16+$2 or $26 to achieve the minimum of $10 per trip. Lyft cannot average or benefit from the additional $6 from the $16 trip. Under Lyft's theory, paying

[2] For comparison purposes, there are 13,587 yellow medallion taxis and green taxis are capped at 18,000. (Doc. 35, Heinzen aff at ¶11).

the driver $24 should satisfy its obligation to the driver. Instead, if Lyft were paying the driver $15 per hour or $30, Lyft would owe the driver an additional $0 under the TLC's Rule.[3]

On August 8, 2018, the New York City Council (the Council) passed Local Law 150 which provides:

"§ 19-549 Minimum payments to for-hire vehicle drivers and minimum fares.

a) Definitions. For purposes of this section, the term 'trip' means a transportation service that involves picking up a passenger at a location, and taking and depositing such passenger at a different location requested by such passenger.

b) The commission shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such driver. In establishing such method, the commission shall, at a minimum, consider the duration and distance of the trip, the expenses of operation to the driver, any applicable vehicle utilization standard, rates of fare and the adequacy of for-hire vehicle driver income considered in relation to for-hire vehicle driver expenses. Such rule promulgated by the commission shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method, provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with the method established by the commission.

c) The commission shall study payments to for-hire vehicle drivers dispatched by bases other than through high-volume for-hire services for trips dispatched by such bases and may by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by any such base.

d) Following completion of the study required by section 19-550, the commission shall determine whether the establishment of minimum rates of fare to be charged by vehicles licensed by the commission would substantially alleviate any of the problems identified in such study. If the commission determines that such minimum rates of fare would have such an effect, the commission is authorized to establish by rule such minimum rates of fare. In setting such minimum rates of fare, the commission may consider the category of vehicle, the type of trip, including trips in which the vehicle is available for the transportation of two or more passengers, the rates of fare for other categories of vehicles carrying passengers for hire, including but not limited to taxicabs, the location of the trip, including trips originating, terminating or passing through the hail exclusionary zone, as defined in section 51-03 of title 35 of the rules of the city of New York, and any other factors the commission determines to be appropriate to achieve

[3] *See also* Doc. 56 for additional numerical examples.

> their intended result. Such minimum rates of fare shall not include any taxes, fees or surcharges imposed on trips made by vehicles licensed by the commission. The commission shall, on a periodic basis, but not less than once annually, review such minimum rates of fare in order to determine whether any amendment of such minimum rates of fare is warranted or necessary in order for such minimum rates of fare to continue to achieve their intended result. If the commission determines that such an amendment is warranted or necessary, it is hereby authorized, by rule, to promulgate such amendment."

(Doc. 11, Local Law No. 150).

Before promulgating the Rule, the TLC held a public hearing on April 6, 2017 inviting comments on the economics of operating taxis and FHVs, including the effects of industry growth on FHV drivers' income, expenses, bonuses, service incentives, fuel costs, insurance, fare commissions, tolls, taxes and vehicle financing. (Doc. 35, Heinzen aff at ¶23). The TLC commissioned James Parrott, Economic and Fiscal Policy Director of the Center for New York City Affairs at the New School, and Michael Reich, Professor of Economics and Chair of the Center on Wage and Employment Dynamics at the University of California, Berkley, to evaluate a pay standard for FHV drivers which resulted in a July 2019 report entitled "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment" (the P&R Report). (Doc. 8, P&R Report). Council Member Brad Lander, the prime sponsor of Local Law 150, highlighted the significant P&R findings:

> "85% of app-based drivers earn less than a living wage, (determined to be $17.22 an hour, which is the independent contractor equivalent of $15 per hour plus an allowance for paid time off). Most FHV drivers work full-time hours but suffer from low pay and high company mark-ups that generate huge returns for investors but leave drivers in poverty. Setting $17.22 as the floor will increase driver earnings by about 14 percent, equivalent to about $6,345 a year for those currently under the proposed threshold." (Doc. 56, October 3, 2018 Lander Written Testimony at 1).

Indeed, "forty percent of drivers have incomes so low that they qualify for Medicaid and another 16 percent have no health insurance; 18 percent qualify for federal

supplemental nutrition assistance (nearly twice the rate for New York City workers overall)." (P&R Report at 5). In addition, the TLC held public hearings, accepted written comments, hosted stakeholder meetings, and performed its own analysis. (*Id.*; *see also* Doc. 55, October 3, 2018 TLC Hearing Tr.). Lyft participated and repeatedly expressed its preferred calculation with a weekly aggregation and industry-wide utilization rate. (Doc. 15, September 13, 2018 Lyft memo; Doc. 16, September 21, 2018 Lyft email; Doc. 17, undated Lyft comments, submitted October 3, 2018).

The Rule went into effect January 11, 2019[4] and provides:

"35 RCNY §59B-24 Minimum Driver Payment Requirements

(a) A Base that, on average, dispatches ten thousand or more trips per day, or a Base that is part of a group of Bases operating under the same public-facing trade, business or operating name that collectively dispatches more than ten thousand trips per day, must pay Drivers, at a minimum, the following amounts for each trip dispatched by the Base:

(1) *Per Mile Rate*. Beginning January 1, 2019, for each mile a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than $0.631 per mile for a trip dispatched to a Vehicle that is not an Accessible Vehicle and $0.818 for a trip dispatched to an Accessible Vehicle, divided by the Base's Utilization Rate, and for trips that begin in the City but end outside of the City, the Base must pay the Driver no less than $1.262 per mile for a trip dispatched to a vehicle that is not an Accessible Vehicle and no less than $1.636 per mile for a trip dispatched to an Accessible Vehicle for each mile a Driver transports a Passenger outside of the City;

* * *

(2) *Per Minute Rate*. Beginning January 1, 2019, for each minute a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than $0.287 per minute, divided by the Base's Utilization Rate, and for each minute a Driver transports a Passenger outside of the City on a trip dispatched by the Base that began in the City and ended outside of the City, the Base must pay the Driver no less than $0.574 per minute, and

(3) *Shared Ride Bonus*. For each separate pick up on a trip where a Passenger shares the Vehicle for part or all of the trip with a Passenger from a separately

[4] The TLC chose not to enforce it until February 1, 2019. (Heinzen aff at 21 n 14).

dispatched call, the Base must pay the Driver the Shared Ride Bonus, in addition to the per mile and per minute rates.

(4) *Consumer Price Index Adjustments*. Beginning January 1, 2020, and continuing each calendar year thereafter, the dollar amounts in the per mile rates and per minute rates contained in this subdivision will be adjusted using the 12-month Percentage Change in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the NY-NJ-PA metro area. The Consumer Price Index adjusted per mile and per minute rates will be posted on the Commission's website.

(5) *Hourly Payments*. If a Base subject to this section pays drivers on an hourly basis, the payment the Driver receives for each hour the Driver accepts dispatches from the Base must be at least the sum of the Per Mile Rate for all miles the Driver transported Passengers during the hour, the Per Minute Rate for all minutes the Driver spent transporting Passengers during the hour, and the Shared Ride Bonus for each applicable pick up performed during the hour.

§59B-24(a) Fine: $500 per instance of under payment. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the amount not paid to the Driver in violation of this rule. Appearance REQUIRED

(b) *Utilization Rate*: The Commission will assess, and post on its website, the Utilization Rate for each Base subject to this section every six months. A group of Bases operating under the same public-facing trade, business, or operating name will be assessed one Utilization Rate, applicable to each individual Base in the group, calculated using the collective Driver availability and passenger trip times for all Bases in the group.

(1) *Initial Utilization Rate*. For the twelve (12) months following the effective date of section 59B-24 of these Rules, the Utilization Rate for all Bases subject to subdivision (a) of this section will be the aggregate Utilization Rate of all Bases subject to subdivision (a), as calculated by the Commission. A Base subject to subdivision (a) may petition the Commission to calculate a Utilization Rate specific to the Base prior to the expiration of the twelve month Initial Utilization Rate period, but in no event will a Base subject to subdivision (a) of this section have a Utilization Rate lower than the aggregate Utilization Rate of all Bases subject to subdivision (a) for the twelve (12) months following the effective date of section 59B-24 of these rules.

(c) *Daily Average Trip Volumes*: The daily average trip volume for each Base and each group of Bases operating under the same public-facing trade, business or operating name will be assessed every six months. Bases that average over ten thousand trips per day over the most recent assessment period, and Bases that are parts of a group of Bases operating under the same public-facing trade, business or operating name that collectively average over ten thousand trips per day over the

most recent assessment period, will be subject to the requirements of subdivision (a) of this section until such time as the next assessment occurs.

(d) *Evaluation by the Commission*. No less than annually, the Commission will review Driver, Vehicle Owner, and Base expenses, Driver earnings, the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases, service levels, and any other information it deems relevant to determine if adjustments need to be made to the rates set forth in subdivision (a) of this section." (Doc. 14 at 28-30).

In its January 30, 2019 petition, Lyft seeks to vacate or annul the Rule because (1) "imposing the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option directly conflicts with Local Law 150 and its requirement that the TLC 'not prevent payments to for-hire vehicle drivers **from being calculated on** an hourly or **weekly basis**'" (Doc. 1, Petition at ¶137); (2) "adoption of the [Council's] required per-hour calculation option but *not* the similarly required per-week calculation was arbitrary and without basis in the record" (*id.* at ¶140); (3) the Study neither analyzes the effects of the per-trip calculation requirement on driver earnings, FHV bases and the industry in general, nor provides quantitative support of a per trip calculation over per week calculation (*id.* at ¶¶143-144); (4) there is no rational relationship between the purpose of the Rule and the calculation selected to achieve it (*id.* at ¶147); (5) the P&R Report is fundamentally flawed (*id.* at ¶149); and (6) the utilization rate was not analyzed and has a severely anti-competitive effect within the ridesharing industry (*id.* at ¶151).

In its February 26, 2019 answer, the TLC asserts (1) laches[5] (Doc. 34, Answer at ¶164); (2) that its promulgation of the Rule is within its statutory authority, supported by the record, and thus rational and reasonable (*id.* at ¶¶167-175); and (3) the Rule

[5] The laches argument was addressed in the court's decision denying a preliminary injunction.

comports with Local Law 150 (*id.* at ¶176). The TLC objects to a permanent injunction as unsupported by law or fact and to an evidentiary hearing as unnecessary.

Under Article 78, "[a]dministrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991] [citation omitted]). "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact." (*Ahmed v City of New York*, 44 Misc 3d 228, 236 [Sup Ct, NY County 2014] [internal quotation marks and citation omitted]). An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or "a rational basis" in the record. (*Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co.*, 34 NY2d 222, 231 [1974], citing *Matter of Colton v Berman*, 21 NY2d 322, 329 [1967]).

First, Lyft attacks the Rule as conflicting with Local Law 150. A regulation must be vacated and annulled if an agency promulgates a regulation that conflicts with a local law or a statute. (*See e.g. Matter of Leone v Blum*, 73 AD2d 252, 257 [2d Dept 1980], *affd sub nom. Delmar v Blum*, 53 NY2d 105 [1981] [holding that agency determinations must be annulled because they violated state and federal statutes]). Lyft's argument is based on Admin. Code §19-549(b) which provides:

> "The commission shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such driver. In establishing such method, the commission shall, at a minimum, consider the duration and distance of the trip, the expenses of operation to the driver, any applicable vehicle utilization standard, rates of fare and the adequacy of for-hire vehicle driver income considered in relation to for-hire vehicle driver expenses. Such rule promulgated by the commission shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method, **provided that the actual payments made to such drivers are no less than the**

minimum payments determined in accordance with the method established by the commission." (Emphasis added).

Nothing in the Rule prevents Lyft from paying drivers on a weekly basis or calculating wages on a weekly basis "**provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with"** the Rule. (*See* P&R Report at 36 [discussing payment on a weekly or monthly basis compared to the TLC standard requiring the companies to make up the difference if there is a shortfall]). Basic statutory interpretation principles require the court to read Local Law 150 in its entirety, with all clauses given their plain meaning. (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120 [2012]). The statute could not be clearer. The Council invited the TLC to "establish a method for determining the minimum payment;" the Council did not create the formula, as Lyft's argument implies. Rather, unless Lyft adopts the TLC's formula as its own to calculate drivers' wages - the minimum wage - under the Rule, Lyft must conduct two calculations. First, using its own algorithm, Lyft would calculate wages due to a driver. Second, Lyft would calculate the wages for the same driver using the TLC's formula and compare them to determine whether the Lyft wage is over or under the TLC minimum.[6] Lyft's focus on the Council's use of "paid" versus "calculated" is a distinction without a difference. Whether Lyft performs one calculation or two is entirely for Lyft to determine. The Rule does not prevent that.

Second, Lyft complains that the TLC adopted an alternative hourly calculation, but not Lyft's weekly calculation. Lyft representative David Yassky admitted that a per-week calculation is economically better for Lyft, yielding a "bigger pie" so the drivers win

[6] See examples, supra, at page 2.

too, but Lyft fails to explain why there would be more revenue, and thus, a bigger pie, creating a win for the drivers. (Doc. 56, November 14, 2018 3:36 PM email). Yassky also fails to consider whether a price increase by Lyft would increase or decrease the "pie." (*see also* Doc. 66, March 12, 2019 Ferracane aff at ¶¶4-5). According to Lyft, the price increase caused a decrease in rides. (Id. at ¶6).

The TLC incorporated many comments in the Rule and reasonably rejected others, including Lyft's. (Heinzen aff at ¶¶67-72). Other FHV's supported hourly and weekly calculations too. (*See* Doc.18, Via's Comments on Driver Pay). Their advocacy as to hourly calculations was apparently successful. However, the TLC is concerned that Lyft's approach would turn the minimum pay standard into a pay ceiling, as opposed to a pay floor. TLC Commissioner Joshi stated, "[m]y concern with a per-week is that you will then have incentives that are used to help you reach the minimum, rather than when you're judged on a per-trip you have to pay incentives on top of the minimum." (Doc. 55, October 3, 2018 Public Hearing Tr. at 104:17-23; *see also* Doc. 56, Lander Written Testimony and 32BJ SEIU Written Comments). As to the hourly calculation, however, the TLC determined that it is the functional equivalent of the per-trip calculation. (Heinzen aff at 23 n 18). The court is required to accept this judgment which is not unreasonable. (*Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979]).

As to Lyft's third and fourth arguments, in addition to lacking factual support for the TLC per-trip formula, Lyft complains that the TLC fails to show the relationship between the TLC selected calculation and how it achieves the stated purposes: higher driver compensation and less congestion. First, it is for Lyft, the petitioner, to overcome the presumption of regularity that attends to the TLC's Rule by showing it is without

reasonable foundation, not the TLC's burden. (*Matter of Kayfield Constr. Corp. v Morris*, 15 AD2d 373, 379 [1st Dept 1962]). Again, the TLC is concerned that Lyft's approach would turn the minimum pay standard into a pay ceiling, as opposed to a pay floor. Indeed, Lyft complains that the per-trip calculation "overshoots" the mark. (Petition at ¶117). Rather, the TLC seeks to incentivize the FHVs to use bonuses to supplement drivers' income, and not to use bonuses to reach the minimum pay.[7] (March 18, 2019 Oral Argument Tr. at 9:9-25; 10:22-11:1; 32:8-15; 57:8-11; Heinzen aff at ¶¶58, 62). Regardless of which pay period Lyft selects, the TLC asserts that its per-trip calculation provides a measure of consistency and reliability for the drivers. (e.g., 8 hours at $17.22/hour is $137.76). Again, the court is required to accept this judgment which is not unreasonable.

Lyft asserts that the TLC failed to analyze the effect of the per-trip calculation on the industry. Lyft's argument relies on its bare assertion that the TLC's Rule will cost Lyft an additional $2.5 million per week if calculated on a per-trip basis and $2.3 million per week if calculated on an hourly basis. (Doc. 5, January 30, 2019 Ferracane aff at ¶6). Initially, Ferracane, the general manager of Lyft in New York and New Jersey, failed to provide any basis for her statement. Subsequently, she explained the prediction is based on 16 weeks of Lyft data prior to January 30, 2019. (March 12, 2019 Ferracane aff at ¶¶4, 5). However, the lack of documentary support still exists and is not addressed. Moreover, Ferracane states that Lyft was compelled to raise its prices

[7] Contrary to Lyft's statement at argument (March 18, 2019 Oral Argument Tr. 13:25-14:1), the TLC does not permit incentives to be counted when FHVs are paying hourly. Indeed, that is the point of the TLC's Rule, to change the behavior of FHVs from using incentives as compensation. (*Id.* at 47:8-15; 49:4-9; 52:17-18). First, FHVs must pay drivers a minimum wage after which incentives may be paid to impact driver behavior, e.g., to encourage driving in less congested areas.

after the Rule went into effect on January 11, 2019 which resulted in a "decrease in the frequency with which passengers requested rides, the total number of rides in the market, and consequently drivers' utilization rates and earning opportunities" impacting the calculation. (*Id.* at ¶6). In addition to failing to explain her qualifications for making such assessments of economic forces, she fails to explain her omission of other causes for the decrease in demand such as backlash against Lyft for initiating this action. While facially shocking, increasing payments to drivers by $2.5 million per week without explanation or context is meaningless and the court cannot rely on it.

Lyft is also factually incorrect; the TLC's Rule is based on facts and an analysis of many factors including its economic impact on the FHV industry. The TLC began its investigation with a public hearing on the economics of the FHV industry at which drivers and others testified to drivers' per-trip expenses. (Doc. 46, Tr. of April 6, 2017 Hearing). While the TLC asked the industry for data, and the industry provided it, some of it was incomplete or incorrect. (March 12, 2019 Ferracane aff at ¶ 7). The P&R Report analyzed per-trip data and likely responses of drivers, companies and passengers. (*See* P&R Report 53-62). In response to the public testimony, written comments and stakeholders' comments, the TLC modified the Rule. (Heinzen aff at ¶¶ 66-67). For example, drivers complained that the driver expenses were underestimated in the P&R Report. (*Id.*). The TLC adjusted the utilization rate. (*Id.*). In January 2019, P&R published a supplemental report including a revised expense analysis based on driver surveys, actual car models, actual financing costs, which is outside of administrative record, but corroborates the Rule with more accurate data and finding that 73% of all trips fall below the TLC's minimum. (Heinzen aff at ¶73; Doc. 61, Supplemental Report at 5). Rejecting Lyft's proposed formula is not the same as having

done no analysis. (*See Metropolitan Taxicab Bd of Trade v New York City TLC*, 18 NY3d 329 [2011]). Therefore, the court is compelled to reject Lyft's third and fourth arguments.

Fifth, Lyft asserts that fundamental flaws in the P&R Report preclude the TLC from relying on it. "[J]udicial review of an administrative determination is limited to the ground invoked by the agency . . . . If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (*Matter of Scherbyn v Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]) [citation omitted]). This includes post-hoc rationalizations not contained in the administrative record. (*Matter of Jan Jan Realty Corp. v NYC Envtl. Control Bd.*, 160 AD3d 421, 422 [1st Dept 2018]; *Matter of Molloy v New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]). If an agency bases a regulation on a flawed study, the regulation must be vacated and annulled as arbitrary and without basis in the record. (*Matter of Schur v New York State Div. of Hous. & Community. Renewal*, 169 AD2d 677 [1st Dept 1991] [finding agency action arbitrary and capricious where based on a flawed inspection report lacking relevant data]).

To challenge the P&R Report, Lyft offers the January 29, 2019 report of Dr. Catherine Tucker (Tucker Report) (Doc. 7, Tucker Report). Tucker asserts that everything in the P&R Report is flawed. For example, she accuses P&R of not knowing the difference between supply and capacity and that no matter how many vehicles are on the road, the number of trips supplied cannot exceed the number of trips demanded. (Petition at ¶¶64-65; Tucker Report at ¶7). Tucker, the Sloane Distinguished Professor of Management Science at MIT, whose academic specialty is how digital technologies

have changed the economy with a particular interest in understanding how new digital technologies that help management of platform business affect their performance, has been teaching about pricing since 2006 and currently teaches about platform strategy. (Tucker Report at ¶2). Yet, Lyft did not submit her report when Council Member Brad Lander proposed legislation on April 26, 2018. It also did not submit it in response to the July 2018 P&R Report. It also did not submit it to the TLC during its review period beginning August 28, 2018 to TLC's final public hearing on December 4, 2018. Instead, Lyft submitted a five-page memo with attachments dated September 13, 2018 (Doc. 15), a three-paragraph email from its senior counsel (Doc. 16), and seven pages of comments submitted October 3, 2018 from Lyft's regulatory compliance counsel (Doc.17). Lyft's submission of the Tucker Report in January 2019, six months after the P&R Report, is particularly confounding since it attacks the economic underpinnings of the P&R Report. While Lyft claims it "is merely a tool, an aid, that assists in identifying already existing flaws in the record," (March 18, 2019 Oral Argument Tr. 20:25-21:2), the Tucker Report sets the stage for a battle of the experts too late. For example, the experts' disagreement about market growth is a classic battle for economists which should have occurred during the rule making stage. Regardless of how Lyft describes the Tucker Report, the court cannot consider this impressive work which is outside of the administrative record. (*Metropolitan Taxicab Bd. of Trade v TLC*, 18 NY3d 329, 333 [2011]).

While the Tucker Report would have bolstered Lyft's pre-enactment arguments and thin documentary support, which was admittedly incomplete and inaccurate, Lyft's advocacy was identical to Tucker's conclusions: weekly calculations, not per-trip, and industry-wide utilization rate, not company-specific utilization rates. Moreover, Tucker's

assertions may also be flawed. For example, she claims P&R overstated expenses incurred by drivers. Drivers, however, reported that P&R underestimated expenses with documentary proof. (Doc. 55, Testimony of Bhairavi Desai, Executive Director of NY Taxi Workers Alliance, October 3, 2018 Hearing Tr. at 71). Tucker also argues that the P&R Report understated driver earnings by not incorporating bonuses and incentives into the analysis. (Tucker Report at ¶¶69-72). However, Lyft reported to the TLC that for the second half of 2017, the total number of incentive payments to its entire driver fleet was $2,000, and for the first half of 2018, there were only two reported incentive payments.[8] (*See* Heinzen aff at ¶¶6-7). In addition to the industry's failure to provide the TLC with complete or correct data, since bonuses and incentives are discretionary, the TLC cannot mandate such payments to drivers.

Based on the Tucker Report, Lyft hypothesizes that the TLC's Rule incentivizes drivers to drive into high traffic areas to maximize their earnings. (Petition at ¶77). The court cannot look at this arbitrage theory[9] in isolation. Rather, it fails to recognize that passengers review the drivers and will report drivers who slow down the trip. (Doc. 55, Tr. at 260-61). A collection of such bad reviews would result in less rides for that driver, and perhaps, termination. (*Id.* at 197-98).[10] It also fails to recognize the growth FHVs

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[8] Lyft's admission that it inadvertently submitted incomplete data and provided the TLC with corrected data on March 12, 2019 is outside of the record and the data cannot be considered by the court. (March 12, 2019 Ferracane aff at ¶ 7).

[9] Driver arbitrage - "whereby drivers will have a preference to drive in higher than average utilization rate areas if driver pay is tied to a single utilization rate for each provider." (Doc. 20).

[10] *See also* Doc. 43, *Uber Drivers Up Against the App*, New York Times, Feb. 21, 2016. The article noted that Uber drivers "are independent contractors who buy their own cars, pay for gas and maintenance, and provide their own insurance. Although they get no benefits, they remit to Uber 20 to 25 percent of what they make as a fee to use the service." The article further noted that Uber "reserves the right to 'deactivate' its drivers, sometimes for little more than a subpar rider rating."

have experienced in the Bronx and Queens; the effect of congestion pricing surcharge; and available transportation alternatives. (Heinzen aff at ¶¶17, 18). Therefore, the court would be compelled to give less weight to the Tucker Report if it were part of the record.

Finally, Lyft asserts that the utilization rate was not analyzed and will have severe anticompetitive effects in the industry. P&R proposed a formula that factors in per-mile rate to compensate drivers for their expenses and per-minute rate to compensate for their time. (P&R Report at 34). The rates are divided by a "utilization rate" (UR) that compensates "drivers for work related time and expense when a passenger is not in the vehicle."[11] (*Id.* at 35). A higher UR lowers a company's per-mile and per-minute rates and increases a driver's average hourly earnings. (*Id.).* P&R created their UR to address the following concerns: a majority of drivers are working full time; drivers' pay is decreasing; and drivers bear expenses to operate FHVs.[12] The company specific UR seeks to "align[] the interests of the drivers with that of the companies" by incentivizing higher URs that would lower a company's per-mile and per-minute rates and increase driver's average hourly earnings. (*Id.* at 35). Significantly, the industry model relies on "persistent excess capacity" of drivers which allows FHVs to compete with each other for passengers by providing short wait times, "even beyond the value to the

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[11] The formula for non-WAV (Wheelchair accessible vehicle) Per Trip Driver Pay = ($.631 x trip miles/company utilization rate) + ($.287 x trip minutes/company utilization rate) +shared ride bonus. The formula for WAV Per Trip Driver Pay = ($.818 x trip miles/company utilization rate) + ($.287 x trip minutes/company utilization rate) +shared ride bonus.

[12] A.R Mavero, a driver, submitted written testimony, dated October 22, 2018, listing his weekly expenses: $442, car rental; $120 fuel; $160 parking; $33 licensing; $17 tickets; $12 car wash; $38 mobile phone service; $100 other totaling $992 per week. (Doc. 56).

passengers" which contributes to drivers' long work hours and low pay. (*Id.* at 46). "Uber wants your grandma, your grandpa to drive, your friend to drive. They don't care. They just want to put more drivers on the street." (Doc. 46, April 6, 2017 Hearing Tr. at 119:11-21). Based on simulations, P&R predicted that "pay increase likely can be readily absorbed through a combination of utilization increases, commission reductions [to FHVs], and modest fare increases." (P&R Report at 53-62). Instead, Lyft increased fares; it did not reduce its commission. (March 12, 2019 Ferracane aff at ¶6). While P&R's predictions of market participants' behavior is not perfect, it cannot be said that the Rule is without a factual basis and analysis.

Specifically, Lyft asserts that company-specific URs give Uber, the largest company with the largest market share, a perpetual advantage because it can undercut its competitors on price. (Petition at ¶2). Higher UR means lower operating costs. (P&R Report at 35). However, Via, not Uber, has the highest UR. (P&R Report at 37). Therefore, Lyft's fear of Uber domination based on a better UR is factually incorrect. Indeed, it is possible for a smaller company to beat Uber in the UR category, using a different business model focused exclusively on shared rides. The court cannot accept Lyft's assertion that the TLC's use of company-specific UR was without any analysis when P&R acknowledged the risk of monopolization. (P&R Report at 42).

Lyft complains that the TLC overlooked that utilization can also increase by decreasing the number of hours worked by drivers. Indeed, that is the TLC's goal: for drivers to be deployed efficiently instead of the industry model which relies on "persistent excess capacity" of drivers which allows FHVs to compete with each other for passengers by providing short wait times.

Based on the public comments, including Lyft's, the TLC refined the company specific UR based on data from FHVs. (Heinzen aff at ¶¶ 66-72). For the first year, TLC will apply an industry-wide UR and regular reviews thereafter so that timely adjustments can be made as appropriate. (*Id.*). To address overlapping multiple platform use, TLC will split the time drivers spend idling on multiple apps evenly between each company. (*Id.*). Therefore, the court rejects Lyft's final objection as lacking any factual basis. Indeed, the TLC incorporated Lyft's specific objections.

Finally, the Rule provides for evaluation "no less than annually." (35 RCNY 59B-24 [d]). P&R acknowledged that "all forecasts are inevitably uncertain and note that the predicted behavioral responses of the drivers, passengers, and companies will not conform precisely to their expectation. (P&R Report at 61). Accordingly, reviews are built into the Rule. As the first regulation of its kind based on the first study of its kind, the Rule is an experiment. This is an industry that uses technology and compensation to change behavior. (Doc. 38, *How Uber Uses Psychological Tricks to Push Drivers' Buttons*, NY Times, April 2, 2017, Noam Scheiber [stating that "[t]he company has undertaken an extraordinary experiment in behavioral science to subtly entice an independent work force to maximize its growth."]). As previously noted, with Local Law 150, the Rule seeks to impact FHV behavior. For example, the Rule rewards decreasing the time that drivers are idly waiting for passengers. The TLC's regular evaluation using real time data and input from drivers, FHVs, riders, with the world watching ensures that the TLC can tweak the formula as economic forces change instead of relying solely on predictions, as Lyft insists.

Any other arguments raised but not addressed by this decision were considered but would not yield a different result.

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondents the New York City Taxi and Limousine Commission and Meera Joshi, in her official capacity as Chair, Commissioner, and Chief Executive Officer of the New York City Taxi and Limousine Commission, having an address at 33 Beaver Street, New York N.Y., do recover from petitioners, Tri-City, LLC and Endor Car and Driver, LLC, having an addresses at _____ and _____, costs and disbursements in the amount of $_____, as taxed by the Clerk, and respondents have execution thereon.

4/30/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE