SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OMAHA LLC and VULCAN CARS LLC, Petitioners, v. 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, Respondents.	Index No. __________ **VERIFIED ARTICLE 78 PETITION**

Petitioners Omaha LLC and Vulcan Cars LLC ("Petitioners"), by and through their undersigned counsel, bring this Verified Article 78 Petition and allege the following.

INTRODUCTION

1. This Petition challenges a new rule passed by the New York City Taxi and Limousine Commission and Meera Joshi (collectively, "Respondents" or the "TLC") to establish a minimum pay standard for certain ride-hail drivers in New York City (the "Utilization-Based Rule" or "Rule"), which has been the subject of intense debate in New York City and garnered significant media attention throughout the country.[1]

[1] *See*, *e.g.*, Matthew Flamm, *TLC Approves Historical Pay Rules for App-Based Drivers*, Crain's New York Business, Dec. 4, 2018, https://www.crainsnewyork.com/transportation/tlc-approves-historic-pay-rules-app-based-drivers; Mike Snider, *Uber, Lyft Rides in NYC Could Cost More Under New Minimum Wage Rule*, USA Today, Dec. 5, 2018, https://www.usatoday.com/story/money/business/2018/12/05/uber-lyft-minimum-wage-nyc-rides-may-cost-more-under-new-rule/2212848002/; *see also* Editorial, *New York's War on Uber, Lyft and Other Ride-Sharing Companies*, Investor's Business Daily, Dec. 7, 2018, https://www.investors.com/politics/editorials/ride-sharing-uber-lyft-new-york/.

2. Petitioners are for-hire vehicle ("FHV") bases that support Juno USA LP ("Juno"), a ride-hail company that operates exclusively in New York City. From its inception, Juno has attempted to set itself apart from other ride-hail companies through its emphasis on, and commitment to, the fair and ethical treatment of its drivers.[2] Juno seeks to increase overall driver utilization in New York City by offering existing ride-hail drivers a way to provide trips when they would otherwise be idle. Juno also charges drivers 60-65% lower commissions than competitors in New York City so that more money from each ride goes to the drivers, rather than to the company.[3] Indeed, data obtained by the TLC demonstrates that Juno has paid its drivers more per trip than the two largest ride-hail companies operating in New York City.

3. Although the TLC's professed goal of ensuring that FHV drivers are paid fairly is well-intentioned in theory — and, indeed, the very goal upon which Juno has modeled its business — the mechanism by which the TLC has committed to do so is inherently flawed and fundamentally unfair; severely and disproportionately hurts smaller, socially-conscious companies like Juno; and will destroy competition in the New York City market, all to the detriment of the FHV industry, drivers and consumers alike. Moreover, the very foundation of the Rule is hopelessly unsubstantiated. As TLC Commissioner Nora Marino aptly decried in opposing the Rule, "I'd rather see a rule that makes sense to me that I can understand. I've gotten way too much feedback from people in the industry . . . [t]here's just too many unanswered questions and unknown variables in my opinion to have this rule as drafted."[4]

---

[2] Affidavit of Ronen Ben David in Support of Preliminary Injunction and Temporary Restraining Order ("Ben David Aff.") ¶¶ 4-5.

[3] Juno, https://gojuno.com/ (last visited Jan. 14, 2019).

[4] Video, NYC Taxi & Limousine Comm'n, Comm'n Meeting, YouTube (Dec. 4, 2018), https://www.youtube.com/watch?v=psjXqHKpelg&feature=youtu.be.

4. Dr. Ray Mundy, an expert with over 40 years of experience in the field of transportation, has studied the Rule and concluded that it not only "was hastily drawn" and "relies on faulty data," but that it "will have negative and potentially disastrous consequences for the ride-hailing industry and for the drivers the Rule seeks to protect."[5] Indeed, "in [his] more than four decades of working in the field of transportation regulation at the federal, state, and local level," Dr. Mundy has "never seen or heard of a regulatory board attempting to set minimum hourly wages for workers in the regulated industry, let alone with such a sweeping and apparently arbitrary rule."[6]

5. The TLC's Utilization-Based Rule, hurriedly passed on December 4, 2018, establishes driver pay for four ride-hail companies — Uber, Lyft, Juno and Via — premised on a complicated formula based on each base's own specific "utilization rate," which is calculated by dividing the amount of time its drivers spend transporting passengers ("trips") by the total time drivers are logged into the app. However, as explained below, the Rule actually will harm the very drivers it ostensibly was designed to protect, and adversely impact passengers by eliminating healthy competition in the industry. The Rule is arbitrary and capricious and should be annulled for at least the following separate and independent reasons.

6. *First*, the Rule's formula unfairly and arbitrarily imposes different minimum pay standards on competing ride-hail companies. Following a brief introductory period, the Rule will use a *company-specific* utilization rate for each company subject to the Rule, mandating that companies with lower utilization rates must pay drivers *more* than companies with higher utilization rates. This will require companies with lower utilization rates (as calculated by the

[5] *See* Expert Affidavit of Dr. Ray Mundy (the "Mundy Aff.") ¶¶ 29, 40.

[6] Mundy Aff. ¶ 38.

TLC), like Juno, to incur *higher* driver pay costs than their competitors for providing the *exact same service*.

7. In fact, while the "per-mile" rate purports to compensate drivers for their expenses per mile, Juno will be forced to pay its drivers *more* to cover per-mile expenses than a company with a higher utilization rate as calculated by the TLC for the same ride, even though there is no reason to believe — and certainly no evidence cited by the TLC to suggest — that the per-mile expenses for Juno's drivers would be higher for that ride.

8. In basing the driver pay formula on utilization rates, the TLC did not conduct any analysis regarding what factors may impact "utilization rate" — many of which are entirely outside of the ride-hail company's control and none of which were considered by the TLC. For example, the TLC ignores the role of drivers' *acceptance rates*. Drivers do not accept every ride they are offered by a given ride-hail company for a number of reasons. Indeed, virtually all of Juno's drivers also drive for other FHV bases or larger ride-hail companies such as Uber or Lyft,[7] and thus Juno attempts to increase the overall "utilization" of these existing drivers by providing more trip opportunities without adding new drivers to the pool. Yet the TLC arbitrarily punishes Juno for doing so by assigning it a lower utilization rate that causes it to have to pay its drivers more than its competitors — while at the same time rewarding its competitors by giving them the benefit (in terms of lower driver pay) of the increased utilization rate they enjoy because of *Juno* providing their drivers with more trip opportunities.

9. These counterintuitive and destructive results are the direct result of the TLC's

[7] Ben David Aff. ¶ 13.

reliance on a single study (the "Parrott Report"),[8] which was admittedly the "first of its kind" and derived its utilization rates from a unique driver population that represents the rare exception in the industry — *i.e.*, drivers who drive for only one company. This is arbitrary and capricious because the majority of the market consists of drivers who *drive using more than one app at a time*. The Rule's reliance upon an inapposite sample is particularly unfair because some ride-hail companies require their drivers to accept a number of trips or risk being kicked off their apps, while Juno does not.[9] Thus, the new Rule punishes companies who provide maximum flexibility and freedom to drivers. Again, this perverse outcome is the direct result of the TLC's reliance on a study performed by individuals with no experience in the market at issue based on a model — a one-app driver — that does not reflect the reality of the market.

10. On December 21, 2018 — weeks *after* the Utilization-Based Rule was passed — the TLC disclosed for the first time that, in instances where a driver is logged into more than one company's app, the TLC intends to split that driver's idle time evenly among such companies. Far from fixing the Rule's flaws, this new methodology exacerbates them by disproportionately harming companies like Juno, who seek to increase driver utilization in the industry by offering trips to drivers who are already working with other companies. By splitting "idle time" among companies, Juno's utilization rate will decrease simply for offering drivers new trips which may not be accepted, and at the same time, the "idle time" of incumbent ride-hail companies will be

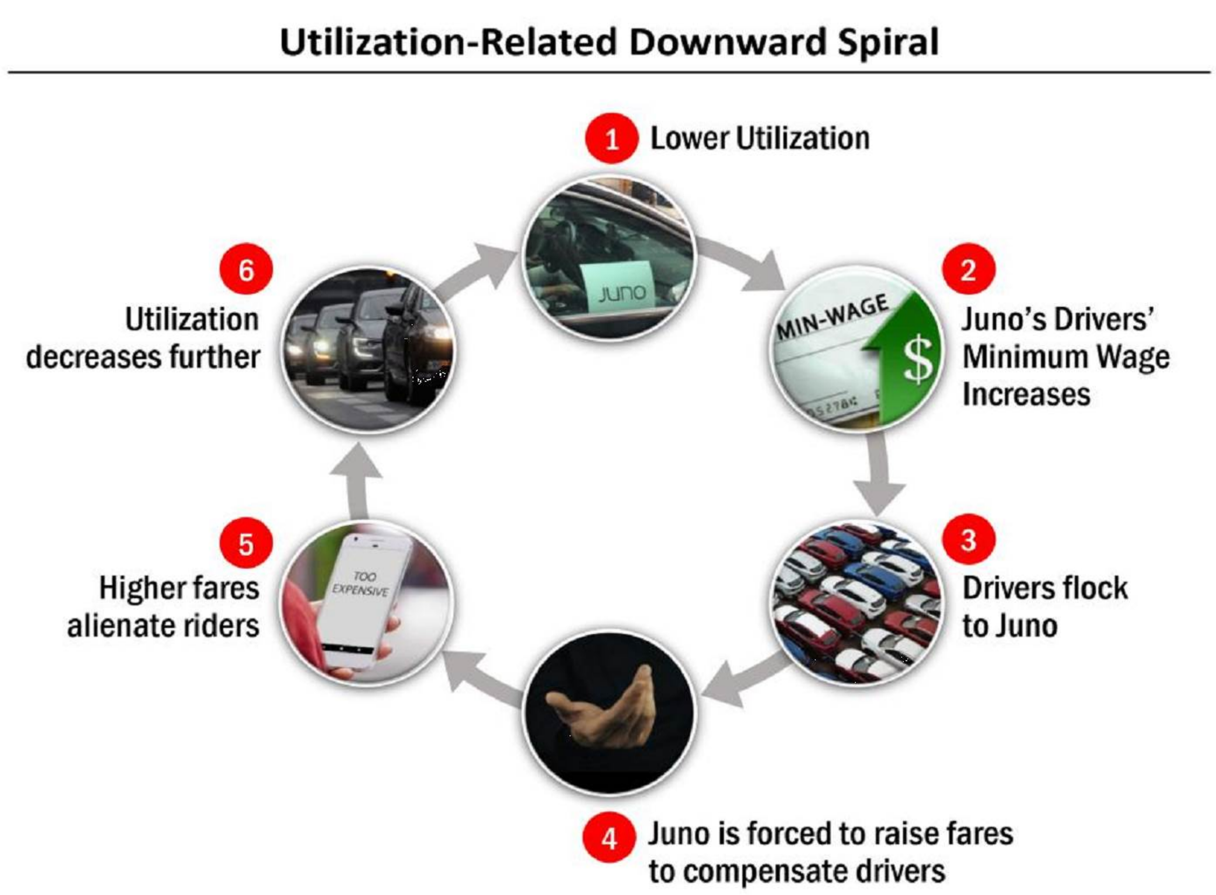
---

[8] James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment* at 22, 74 (July 2018), http://www.centernyc.org/an-earnings-standard (referred to herein as the "Parrott Report"). The Parrott Report is attached as Exhibit K to the Declaration of Alexander C. Drylewski, exhibits to which are cited herein as "Ex. __."

[9] *See* Mundy Aff. ¶ 29.

reduced (thus increasing their utilization rates and lowering the amount they must pay their drivers). This result is both irrational and unfair.

11. *Second*, the TLC has ignored the severe anticompetitive effects that the Rule will have on the New York ride-hail industry as a whole, including the disproportionate impact it will have on new entrants and smaller companies like Juno. The Rule will permit companies with higher utilization rates to pay their drivers less than smaller companies with fewer riders pay for the same service. And worse, as the minimum pay for smaller companies increases, more drivers will be incentivized to drive for them, further lowering their rider-to-driver ratio. In turn, those companies will inevitably be forced to increase their fares to make the higher mandated payments to their drivers, losing their already smaller customer bases. The result is that these companies' utilization rates will continue to drop, increasing the minimum pay each time they are calculated while alienating customers due to higher fares:



12. Thus, smaller companies with lower utilization will face a dilemma: they can attempt to increase their utilization rates by limiting their number of drivers — hurting drivers,

capping the companies' ability to grow, and harming their ability to compete in the process — or face disproportionate operating costs relative to their competitors. Even where a company may limit the number of drivers using its app, customers will likely move to other companies that can offer lower per-ride prices because of their lower driver pay under the Rule. This will cause an inevitable downward spiral for companies like Juno.[10]

13. Further, as set forth in the Affidavit of Steven Tenn, Ph.D. ("Tenn Aff."), a competition expert and former lead economist at the Federal Trade Commission, the Rule's effects will harm not only companies but also consumers, who will have fewer options when choosing a ride-hail company, and drivers as well, who will lose valuable money-making options and opportunities.[11] Additionally, with less competition for drivers, innovation in the ride-hail industry will fall.

14. *Third*, not only is the Utilization-Based Rule irrational on its face, but it is also arbitrary and capricious in light of its timing. If there were any doubt that the TLC does not fully understand the "utilization rates" upon which its Rule is based, the TLC and New York City Department of Transportation are currently conducting a study on utilization to be completed *by the end of summer 2019*. The definitive use of utilization in the Rule, *before* the study on utilization is completed, cannot have a rational basis, as the TLC admittedly does not understand its implications and has yet to determine whether appropriate utilization standards even exist.

15. Ironically, the Parrott Report expressly states that "the simplest policy to increase driver pay would limit the inflow of new app-based drivers and/or vehicles to a level consistent

---

[10] *See* Mundy Aff. ¶ 58; *see also* Parrott Report at 10 & n.7 (companies primarily compete on customer wait times and fares, as well as number of drivers), Ex. K.

[11] *See* Expert Affidavit of Steven Tenn, Ph. D. (the "Tenn Aff.") ¶¶ 34-42.

with growth in driver trips per hour and the growth of consumer demand."[12] And, in fact, after the Parrott Report was published, the City made efforts to apply precisely such caps. The TLC's Rule inexplicably fails to address this critical development which, according to the very Report underlying the Rule, is the "simplest way" to accomplish the goal of the Rule without the undesirable consequences that will accompany its implementation.

16. *Fourth*, the TLC's attempt to tether driver pay to "utilization rate" will disincentivize companies and drivers from operating in lower-demand areas — negating one of the most significant positive effects of ride-hailing apps and hurting consumers in underserved parts of New York.[13] Small businesses in those areas will inevitably suffer as well, as consumers find it increasingly difficult to access them, and an influx of drivers to high-demand areas will exacerbate congestion.

17. *Fifth*, the TLC's new mandate unsystematically applies to only four FHV ride-hail companies without any differentiation whatsoever. Any of the hundreds of other FHV companies, including livery, black car and limousine services, as well as green cabs and yellow taxis, are entirely exempt from its mandates. The TLC also utterly failed to account for the vastly varied size of the four companies that will be subject to the Rule. It is arbitrary and capricious to impose upon Juno, which dispatches *less than 10%* of the rides per day of larger ride-hail companies, the same (or even greater) burdens resulting from the Rule.

18. Even more broadly, the Rule arbitrarily imposes a "minimum wage" on only four companies representing one segment of one industry in New York City. While Juno's drivers are independent contractors, the Rule mandates an employment model that compensates drivers

---

[12] Parrott Report at 11, Ex. K.

[13] Tenn Aff. ¶ 37.

not only for work they perform (*i.e.*, trips they complete) but also for time spent idle — worse, it does so without accounting for time drivers spend idle because they have turned down trips.

19. *Finally*, the Rule should be annulled because the TLC enacted it *ultra vires*. N.Y.C. Local Law No. 150 empowered the TLC to establish minimum pay "*for a trip dispatched* by a high-volume for-hire service to such driver."[14] As defined, a "trip" does not include idle time, yet the Rule endeavors to compensate drivers based on trip time *and* idle time — and this compensation is not even tied to the driver's own idle time, but rather to the idle times of all drivers across the entire base for which s/he is driving. Additionally, the Rule sets a formula for payment on a per-ride basis only, in derogation of Local Law No. 150's requirement that the TLC "shall *not* prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis." *Id.* (emphasis added) (adding N.Y.C. Admin. Code § 19-549(b)).

* * * *

20. Juno fully supports a reasonable rule establishing a fair minimum pay standard for hard-working drivers, but the TLC's Rule cannot be allowed to stand where the TLC has failed to exercise the due diligence required of it in enacting such a standard. If implemented, the Utilization-Based Rule not only will disproportionately harm smaller ride-hail companies like Juno, but it will irreparably damage competition in the FHV industry of New York City, ultimately hurting consumers and the very drivers that the Rule purports to protect. Accordingly, the Utilization-Based Rule should be vacated.

[14] N.Y.C. Local Law No. 150, § 1 (2018) (emphasis added) (adding N.Y.C. Admin. Code § 19-549(a)), Ex. E.

PARTIES

21. Petitioners Omaha LLC and Vulcan Cars LLC are Delaware limited liability companies and wholly-owned subsidiaries of Juno USA, LP. Launched in 2016, Petitioners use proprietary technology and the Juno app to connect riders to drivers.

22. Respondent New York City Taxi and Limousine Commission is an administrative agency of the City of New York created and operating pursuant to Chapter 65 of the New York City Charter. The TLC's principal office is located at 33 Beaver Street, New York, New York 10004.

23. Respondent Meera Joshi is the Chair of the TLC, as well as a Commissioner and its Chief Executive Officer, and was so at the time the TLC promulgated the Rule. Chair Joshi's principal office is located at 33 Beaver Street, New York, New York 10004.

JURISDICTION AND VENUE

24. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR 7803(3), as the Rule was a final determination of the TLC and this Petition challenges that determination as arbitrary and capricious.

25. Venue is proper in New York County Supreme Court pursuant to CPLR 506(b) and 7804(b) because the challenged determination occurred in New York County and Respondents' principal offices are in New York County.

BACKGROUND

A. The FHV Industry

26. FHVs provide prearranged service through TLC-licensed bases, allowing passengers to contact companies that have networks of licensed drivers and vehicles that can pick them up.

27. There are three classes of FHV service in New York City: black cars, community

cars (aka liveries), and luxury limousines. All for-hire service must be arranged through a TLC-licensed base and performed by TLC-licensed drivers in TLC-licensed vehicles.

28. FHV bases provide dispatching capabilities and affiliation for FHVs. All FHVs are required to affiliate with an FHV base in order to provide safe and accountable service.

29. All FHV companies operating in New York City are regulated by the TLC as part of the FHV industry, which consists of for-hire bases, for-hire vehicles and for-hire drivers. *See* 35 R.C.N.Y. § 59B-03.

30. Petitioners are regulated by the TLC and the FHVs dispatched by Petitioners' bases are owned, leased or rented by independent contractor for-hire drivers, not by Petitioners. *See* 35 R.C.N.Y. § 59B-03(c)(2).

B. <u>Juno Enters the New York City Marketplace</u>

31. Since the ride-hail industry launched in New York City in 2011 with the arrival of Uber, it has created tens of thousands of jobs for New Yorkers. Driving for ride-hail companies affords a uniquely flexible and independent money-making opportunity. Drivers have the freedom to choose where, when and how often they want to drive.

32. Juno entered the New York City market in April 2016. In 2017, Juno was acquired by international ride-hail company Gett, which shares Juno's vision. Gett, like Juno, believes that "if you treat drivers better, they will treat riders better."[15] The companies have remained committed to operating in New York City through black car bases Omaha LLC and Vulcan Cars LLC.

33. Juno is committed to paying its drivers more, taking lower commissions on rides than larger ride-hail companies in New York City. In addition, Juno provides robust driver

[15] About Gett, Gett, https://gett.com/uk/about/ (last visited Jan. 14, 2019).

support through a hotline and was the first ride-hail company to provide an in-app tipping option.

34. Because Juno entered the New York City market so much later than its larger competitors and operates there exclusively, it currently has fewer riders.

C. <u>The TLC Hastily Introduces the Rule Based on Utilization Rate</u>

35. As the on-demand app-based FHV industry has become more popular in New York City, it has become the subject of increasing regulation. For example, the TLC sought to require that, by July 2023, one quarter (25%) of all trips dispatched each year by FHV bases in New York City take place in wheelchair-accessible vehicles. This rule was challenged as arbitrary and capricious and the TLC ultimately modified it.

36. Beginning in early 2017, the TLC began discussing regulating earnings for drivers of app-based FHV companies. On April 6, 2017, the TLC conducted a hearing during which testimony was taken on income and expenses for ride-hail drivers. One of the participants in the hearing was economist James Parrott. Mr. Parrott testified about trends he had identified in taxi driver earnings from 2012-2015.[16] Following the hearing, the TLC hired Mr. Parrott and Michael Reich to analyze the industry, and their findings were published in the Parrott Report in July 2018.[17]

---

[16] *See* N.Y.C. Taxi & Limousine Comm'n, Board Meeting Tr. 34:10-36:5 (Apr. 6, 2017), Ex. J.

[17] The authors of the Parrott Report openly admit that they only "provided a reasonable assessment of the most salient factors" concerning what they perceived to be the likely behavioral responses of the drivers, companies, and passengers to the pay increase, which is a core set of assumptions underlying the Rule. Parrott Report at 62, Ex. K. This admission is concerning because there is no indication that the authors, both labor economists, have any background in the industry or basis to determine the "the most salient factors" in the ride-hail market. Moreover, as Dr. Mundy observes, the authors appear to have generated many of their assumptions about the New York City ride-hailing industry from a study conducted by the TLC to which <u>*only 5.5%*</u> of all ride-hailing drivers voluntarily responded. *See* Mundy Aff. ¶ 57 n.2.

37. In early 2018, the New York City Council Committee on FHVs ("FHV Committee") proposed several bills to regulate the ride-hail industry. Among these bills was Introduction No. 890, the final version of which was titled "[a] Local Law to amend the administrative code of the city of New York, in relation to establishing minimum payments to for-hire vehicle drivers and authorizing the establishment of minimum rates of fare."[18] The bill, as summarized by the New York City Council, authorized the TLC to set minimum payments for FHV drivers for trips dispatched by high-volume for-hire services, study payments for other FHV trips and set payments for those trips, as well as set minimum rates of fare.[19]

38. On April 30, 2018, the FHV Committee held a public hearing concerning the multiple proposed bills, including Introduction No. 890. Notably, at the time of the hearing, the original version of the proposed legislation was not tied to, and made no mention of, any utilization rate.[20]

39. On August 8, 2018, the FHV Committee adopted several of the bills, including a revised version "B" of Introduction No. 890, the minimum pay bill.[21] On August 14, 2018, Mayor Bill de Blasio signed Introduction No. 890-B into law as Local Law No. 150. Local Law No. 150 provides, in relevant part:

> Section 1. Chapter 5 of title 19 of the administrative code of the city of New York is amended by adding a new section 19-549 to read as follows:
>
> § 19-549 Minimum payments to for-hire vehicle drivers and minimum fares.

---

[18] Intro. No. 890-B, Ex. D.

[19] Plain Language Summary, Intro. No. 890-B, Ex. B.

[20] *See, e.g.*, Committee Report of the Human Services Division, Council of the City of New York at 37 (Apr. 30, 2018), Ex. C.

[21] Intro. No. 890-B, Ex. D.

> 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. . . . [22]

40. Within days of Local Law No. 150's enactment, the TLC published the Utilization-Based Rule. The Rule requires FHV bases that dispatch 10,000 or more trips per day to pay drivers a minimum amount based on pre-determined per-mile and per-minute rates. At that time, the Rule provided that (1) "[b]eginning January 1, 2019, for each mile a Driver transports a Passenger on a trip dispatched by the Base, the Base must pay the Driver no less than $0.580 per mile for a trip dispatched to a non-Accessible Vehicle and $0.803 for a trip dispatched to an Accessible Vehicle, *divided by the Base's Utilization Rate*," and (2) "[b]eginning January 1, 2019, for each minute a Driver transports a Passenger 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*."[23]

41. The TLC subsequently revised the Rule to increase the per-mile and per-minute rates as follows, depending on whether the vehicle dispatched is a wheelchair-accessible vehicle

---

[22] N.Y.C. Local Law No. 150, § 1 (2018) (emphasis added), Ex. E.

[23] Proposed Rule, 145 City Rec. 4709 (Aug. 28, 2018) (codified at 35 R.C.N.Y. § 59B-24(a)(1), (2)) (emphasis added), Ex. F.

("WAV") or a non-wheelchair-accessible vehicle ("non-WAV"):

Non-WAV Formula

$$\frac{(\$0.631 \text{ x Trip Miles})}{\text{Company Utilization Rate}} + \frac{(\$0.287 \text{ x Trip Minutes})}{\text{Company Utilization Rate}} + \text{Shared Ride Bonus} = \text{Gross Per Trip Driver Pay}$$

WAV Formula

$$\frac{(\$0.818 \text{ x Trip Miles})}{\text{Company Utilization Rate}} + \frac{(\$0.287 \text{ x Trip Minutes})}{\text{Company Utilization Rate}} + \text{Shared Ride Bonus} = \text{Gross Per Trip Driver Pay}$$

Utilization Rate =

$$\frac{\text{Total time transporting passengers for the base}}{\text{Total time available to accept dispatches from the base}}$$

42. The Rule requires bases to collect and transmit to the Commission extensive information concerning the drivers' activities and trips. This includes (1) the date and time at which the driver became available and unavailable to accept dispatches from the base, (2) the total driver earnings paid to the driver for the period in which the driver was available to accept dispatches from the base, (3) the total number of passengers picked up and dropped off during each dispatched call, and (4) the amount of time each trip takes, starting with the time the passenger entered the vehicle and ending when the passenger exited the vehicle.[24]

D. During the October 3, 2018 Hearing before the TLC, Ride-Hail Companies and Others Express Concerns about the Rule

43. The written comment period for the Rule closed on September 28, 2018. Thereafter, a public hearing was held on October 3, 2018. During the hearing, many speakers expressed concerns about how the TLC's Rule would seek to effectuate its policy of mandating minimum FHV driver pay.

44. Remarkably, Council Member Brad Lander — the original proponent and prime sponsor of the City legislation authorizing the TLC to promulgate a minimum payment rule —

[24] Notice of Promulgation, 145 City Rec. 6654 (N.Y.C. Taxi & Limousine Comm'n Dec. 11, 2018), Ex. I.

expressed significant concerns with the Rule. Notably, he proposed providing FHV companies with an alternative compliance option whereby they could employ a flat rate model and pay their drivers a predictable hourly pay of $17.22.[25]

45. Mr. Lander's written testimony went even further, stating that "at the moment, company-based utilization rates raise very real concerns about monopolization in the sector."[26] He told the TLC that Uber accounted for 92% of drivers and 72% of trips in the high-volume sector as of June 2018. Relying on those figures, Lander stated: "At the current moment, given Uber's near monopoly status in this sector, a company-specific utilization rate <u>*may increase Uber's share of this market even further in the short-term, creating a monopoly that will drive out competitive compensation and fare for drivers and riders, alike*</u>."[27]

46. Significantly, Mr. Lander recognized the dearth of relevant information on utilization. He expressed his belief that "we will learn much more about competition and utilization in the industry <u>*as a result of TLC's forthcoming study and data collection*</u>, as required by the proposed rules."[28] Mr. Lander strongly urged the TLC to consider his suggestions and emphasized that his ideas "would support the diversity and competition that is critical to creating a healthy market in the for-hire vehicle sector, while achieving the goal of more stable, predictable, and adequate driver pay."[29]

---

[25] *See* NYC Taxi & Limousine Comm'n, Comm'n Meeting/Public Hr'g Tr. 44:8-45:16 (Oct. 3, 2018), Ex. G.

[26] Written Testimony of NYC Council Member Brad Lander to the New York City Taxi and Limousine Commission Regarding Proposed FHV Pay Regulations, at 2 (Oct. 3, 2018), Ex. H.

[27] *Id.* at 3. (emphasis added).

[28] *Id.* (emphasis added).

[29] *Id.*

47. Lyft's VP of Government Policy, Joseph Okpaku, expressed similar concerns in his testimony. Mr. Okpaku criticized the use of company-specific utilization rates because they create a "winner-takes-all-scenario." He explained that the Utilization-Based Rule as currently drafted "would allow the company with the deepest pockets to take advantage of an equitable situation to the detriment of the smaller industry players," an "inherently inequitable" outcome.[30] Mr. Okpaku explained that preserving competition between the high-volume FHV companies "is in the best interest of both drivers and passengers."[31]

48. Lyft's written testimony expanded on the negative impact that company-specific utilization rates will have on the market. Lyft warned:

> Under the Proposed Rules, the company with the highest utilization rate is given immediate and perpetual advantage over companies with lower utilization. This institutional inequality would compound over time, as companies with lower utilization would struggle to improve against a competitor who can charge lower prices or spend more on driver incentives. Given that there are only four high-volume for-hire vehicle companies, the player with the highest initial utilization could quickly monopolize the market.[32]

49. A spokesperson for Via also encouraged the TLC to change the Rule and implement pay requirements on a weekly or monthly basis. Mr. Andrei Greenawalt, Via's Head of Public Policy, explained that the current Rule "would make it more difficult to balance trips in higher-demand areas [and times] and those in lower-demand areas and times."[33]

50. In a written comment submitted to the TLC on September 14, 2018, another

---

[30] Comm'n Meeting/Public Hr'g Tr. 100:14-24, Ex. G.

[31] *Id.* at 100:18-101:5.

[32] Lyft, Inc.'s Comments on the Taxi and Limousine Commission's Proposed Regulations Regarding Driver Income & Vehicle Lease Transparency, Ex. H.

[33] Comm'n Meeting/Public Hr'g Tr. 81:9-12, Ex. G.

individual commenting as Dave MetroBuggy called the new Rule a "very risky strategy," and wrote: "[t]he proposed Minimum Per-trip Payment Formula will drive out of the market companies with relatively low utilization rates, such as Juno. The demise of a $200 million company, such as Juno, may not be in the best interests of consumers or drivers if only Uber and Lyft remain."[34] He also warned the TLC to be cognizant of how its litany of new rules interact with each other, particularly in light of their hasty adoption, explaining that he has "concerns about analyzing FHV and passenger data after the industry has been 'disrupted' by the proposed Minimum Per-trip Payment Formula."[35]

E. <u>The TLC Adopts the Utilization-Based Rule</u>

51. On November 30, 2018, the TLC published a Notice of Promulgation reflecting the version of the rules upon which it intended to vote during its December 4, 2018 meeting. The TLC made certain changes to the Rule from its original version published in August 2018, all of which failed to address many of the problems with the Rule described herein.

52. First, the amended Rule provided for an "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.

Rule § 59B-24(b)(1). In addition, it provided that the TLC would perform annual evaluations:

---

[34] Dave (MetroBuggy) Written Comments to the Taxi and Limousine Commission, Potential Problem with Parrott Reich Methodology, Part II, Sept. 14, 2018, Ex. H.

[35] *Id.*

> 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.

Rule § 59B-24(d).

53. On December 4, 2018, the TLC voted 7-1 to approve the Utilization-Based Rule. In dissent, TLC Commissioner Nora Marino strongly criticized the TLC's decision to pass the Rule, which she characterized as "incredibly complicated." Citing the numerous identified problems with the Rule and the hurried nature of its passing, Commissioner Marino stated:

> Frankly, I think I'm fairly intelligent, I can't even understand them. I'd rather see a rule that makes sense to me that I can understand. I've gotten way too much feedback from people in the industry – from drivers saying that the rules don't take into account the monthly expenses accurately to companies saying that they give Uber an unfair advantage – which is the last thing I want to see. There's just too many unanswered questions and unknown variables in my opinion to have this rule as drafted.[36]

54. The Rule was subsequently published in the City Record on December 11, 2018, and was scheduled to go into effect 30 days later, on January 10, 2019.[37]

55. However, in recognition that the Rule had myriad problems, the TLC continued to attempt to rework it in the weeks after its passage.[38] Days after the Rule was published, on

---

[36] N.Y.C. Taxi & Limousine Comm'n, Comm'n Meeting, YouTube (Dec. 4, 2018), https://www.youtube.com/watch?v=psjXqHKpelg&feature=youtube.

[37] Notice of Promulgation, 145 City Rec. 6654 (N.Y.C. Taxi & Limousine Comm'n Dec. 11, 2018), Ex. I.

[38] After first adopting the Rule on December 4, 2018, the TLC delayed its implementation and altered or supplemented the formula for calculating minimum driver pay, which created uncertainty regarding the Rule's scope and effect. For example, on December 21, the TLC stated that the effective date of the Rule would be extended from January 10 to February 1, and continued to make substantive changes to the minimum pay formula. It was only when the February 1, 2019 effective date was memorialized in a public Industry Notice on January 11, 2019, and the TLC published a supplemental report by Parrott and Reich on January 12, 2019,

(cont'd)

December 21, 2018, the TLC disclosed that it had calculated the following utilization rates (and corresponding driver pay rates) for each of the four companies[39]:

		Utilization Rate	Per-Mile Rate	Per-Mile Rate (WAVs)	Per-Minute Rate
Industry-wide		58%	$1.088	$1.410	$0.495
Company specific	Via	69%	$0.914	$1.186	$0.416
	Uber	58%	$1.088	$1.410	$0.495
	Lyft	56%	$1.127	$1.461	$0.513
	Juno	53%	$1.191	$1.543	$0.542

56. The TLC also disclosed that it "used log-on/log-off data from each company instead of using trips as a proxy to capture breaks drivers took during their work days," adding that "[l]og-on data also allowed [the TLC] to see when drivers' available times overlapped to account for multi-app drivers since half of all drivers work for more than one company in a given week."[40] Where there were "instances of overlapping idle time," the TLC intends to "split the time evenly between each company."[41]

57. The TLC provided an illustrative example of how the Rule would work in practice: "if a driver were logged into Company A's and Company B's app concurrently for 15 minutes, 7.5 minutes of idle time was attributed to each company. If a driver were logged into

(cont'd from previous page)
that it became clear that the TLC likely would no longer be changing the Rule or providing new information about its enforcement. *See* Ex. M.

39 Email from Ryan Wanttaja (TLC) (Dec. 21, 2018), Ex. L.

40 *Id.*

41 *Id.* The TLC also stated that the utilization rates it derived were based only on analysis of "drivers who worked exclusively for the four high-volume companies in the week." Id. But this TLC-selected sample still excludes a significant number of drivers who also drive for non-app FHV companies. As the Parrott Report explains, "a significant proportion of drivers driving for a non-app FHV base also drive part-time for the app services." Parrot Report at 15 n.10, Ex. K. The TLC's revised methodology utterly failed to account for this reality or its impact on driver utilization rates.

three companies' apps concurrently for the 15 minutes, 5 minutes of idle time was attributed to each company."[42] The TLC stated that the Rule would become effective on February 1, 2019.

ARGUMENT

I. THE UTILIZATION-BASED RULE IS ARBITRARY AND CAPRICIOUS

58. 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." N.Y. C.P.L.R. 7803(3). 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. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co.*, 34 N.Y.2d 222, 231 (1974) (quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)). "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991).

59. In particular, when an agency fails to properly take into account the evidence presented or reaches a conclusion contradicted by that evidence, the determination should be reversed as arbitrary and capricious. *See, e.g.*, *Trump on the Ocean, LLC v. Cortez-Vasquez*, 76 A.D.3d 1080, 1083-87 (2d Dep't 2010). Moreover, an "action may be declared null and void 'upon a compelling showing that the calculations from which [it is] derived [are] unreasonable.'" *Axelrod*, 78 N.Y.2d at 166 (alterations in original) (citations omitted); *see also St. James Nursing Home v. DeBuono*, 12 A.D.3d 921, 923–24 (3d Dep't 2004) (holding reimbursement rates set by the Department of Health invalid because there was "ample evidence supporting [the] finding

---

[42] *See* Email from Ryan Wanttaja (TLC) (Dec. 21, 2018), Ex. L.

that respondents' regression analysis produced a statistically invalid and, thus, unreasonable formulation").

60. Here, notwithstanding the TLC's well-intentioned goal of ensuring minimum pay for FHV drivers in New York City, the TLC ran afoul of these proscriptions in passing the Rule because, among other things: (i) the TLC's decision to base the minimum pay on what the TLC has determined to be a "utilization rate" unfairly imposes different minimum pay mandates on competing ride-hail companies, lacks a rational basis and ignores the realities of the ride-hail industry; (ii) the Rule was established without reasoned consideration or analysis of its anticompetitive consequences; (iii) the Rule was passed before the TLC completed its study on utilization or assessment of the effects on its efforts to cap the number of FHV drivers in New York as required by Local Law No. 150; (iv) the Rule will disincentivize companies and drivers from operating in lower-demand areas; (v) the Rule's applicability only to FHV companies dispatching 10,000 or more daily trips without any differentiation or accounting for the fact that Juno dispatches a fraction of the rides that the other high-volume for-hire service companies dispatch is arbitrary and lacks any analytical support; and (vi) the TLC enacted the Rule *ultra vires*. Each of these infirmities independently warrants annulment.[43]

A. The Utilization Component of the Utilization-Based Rule Unfairly Imposes Different Minimum Pay Mandates on Competing Companies, Lacks a Rational Basis and Ignores the Realities of the Industry

61. First, the use of a company-specific "utilization rate" as a basis to calculate driver minimum pay, which results in differing minimum pay mandates to competitors, lacks a rational

[43] *See also* Mundy Aff. ¶ 72 (discussing the Parrott Report and opining that "it is obvious that the Rule was developed hastily, using limited available data, and applying overly broad (and often incorrect) assumptions. It is clear that, at a minimum, the TLC should have collected more data and used a more step-by-step approach in applying the formulas and theories advanced in the [Parrott] Report before using 72,000 workers in this economic wage floor experiment.").

basis and is wholly unsupported by the record. This failure alone is grounds for annulment. *See Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 333 (2011) (stating that "a change in [a policy] does have to be justified by something — and that is where the rule at issue in this case fails" because none of the TLC's justifications for its rule were supported by record evidence); *see also Jewish Mem'l Hosp. v. Whalen*, 47 N.Y.2d 331, 341-43 (1979) (setting aside an "unsupported determination" that 10% of compensation for interns and residents would be excluded from hospital cost reimbursement calculations as "wholly arbitrary"); *McCann v. N.Y.C. Emps. Ret. Sys.*, 60 Misc. 3d 1224(A) at *3 (Sup. Ct. Kings Cty. 2018) (medical board's decision was arbitrary and capricious where "its report mainly consist[ed] of summaries and conclusions but the report [was] devoid of a discussion and sufficient rational analysis of the medical and evidentiary findings"); *see also St. James Nursing Home*, 12 A.D.3d at 923-24 (challenged reimbursement rate lacked a rational basis because "while regression analysis is a well-accepted statistical tool, it was used improperly by respondents").

62. As explained above, following a twelve-month "Initial Utilization Rate" period, the TLC will calculate driver pay using a company-specific utilization rate. Companies with lower utilization rates (as calculated by the TLC), like Juno, will be required to pay drivers *more* than companies with higher utilization rates — even if one of Juno's drivers completes *the exact same trip* as a driver for one of its competitors. Based on the TLC's calculations, the four companies subject to the Rule will be required to pay their drivers as follows:

FHV Company	TLC-Calculated "Utilization Rate"	Per-Mile Rate	Per-Mile Rate (WAVs)	Per-Minute Rate
Via	69%	$0.914	$1.186	$0.416
Uber	58%	$1.088	$1.410	$0.495
Lyft	56%	$1.127	$1.461	$0.513
Juno	**53%**	**$1.191**	**$1.543**	**$0.542**

63. This unfair result is not surprising, as the TLC's Utilization-Based Rule is premised upon a single study (*i.e.*, the Parrott Report) that fails to even consider various facts and realities about the FHV industry in New York City. Chief among these failures is that the Rule — despite two revisions — does not properly account for the fact that the majority of app-based drivers make themselves available to accept trips on more than one app at a time. This is especially problematic because all or virtually all of Juno's drivers also drive for other FHV bases or ride-hail companies such as Uber or Lyft. Although, as discussed below, the TLC belatedly tried to patch over this gaping hole in the Rule, its efforts still fall short.

64. Less than a week before voting to adopt the Rule, the TLC added a provision that requires it to review at least on an annual basis "the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases."[44] This provision is a tacit admission that despite recognizing the importance of the impact multi-app drivers have on companies' utilization rates, the TLC had not yet meaningfully analyzed the very segment of the industry that accounts for the most drivers. The TLC's fundamental failure to study and understand the industry its Rule governs makes the Rule arbitrary and capricious.

65. Moreover, the Rule lacks a rational basis because the TLC has not conducted any serious analysis as to the factors that cause or contribute to any company's utilization — including whether those factors are within the company's control or the effect of drivers' <u>*acceptance rates*</u> on utilization.

66. For instance, Juno has a lower overall ridership compared to its larger competitors, operates exclusively in New York City (and thus does not enjoy the same popularity or

[44] Notice of Promulgation, 145 City Rec. 6655 (N.Y.C. Taxi & Limousine Comm'n Dec. 11, 2018), Ex. I.

awareness among riders, especially visitors) and does not require its drivers to accept a minimum percentage of dispatched rides while logged into the app. Some larger companies, on the other hand, may require that drivers accept a certain number of rides or risk being kicked off the app. For this reason, if a driver is working for both Juno and such a competitor at the same time, the driver may be incentivized to accept more trips from the competitor than from Juno — potentially increasing that competitor's utilization rate while at the same time decreasing Juno's utilization rate, thereby increasing Juno's expenses. The Rule completely ignores the impact of driver acceptance rates, making it both illogical and unfair.

67. At the TLC's October 3, 2018 public hearing regarding the Rule, Respondent TLC Chair Meera Joshi appeared surprised to hear that drivers worked for multiple apps at the same time — in some cases, all four major apps. ("Ms. Joshi: You have four apps on your phone? Ms. Amores: I have four apps on my phone. Ms. Joshi: Wow.").[45] This is not surprising given the TLC's general failure to understand or account for the realities of the ride-hail industry in the Rule, including its failure to reflect driver acceptance rates or give credit to ride-hail companies for offering their drivers bonuses and promotions.[46]

68. The flaws with the Rule are even more egregious in light of the fact that the TLC's own study on utilization in New York City is ongoing and will not be complete for at least half a year. *See Williamsburg Charter High Sch. v. N.Y.C. Dep't of Educ.*, 36 Misc. 3d 810, 830-31 (Sup. Ct. Kings Cty. 2012) (overturning agency decision that "was not based on a complete and accurate picture of the facts" as arbitrary and capricious); *Metro. Taxicab Bd*, 18 N.Y.3d at 332, 334 (annulling rule as arbitrary and capricious that was "not based on any

[45] Comm'n Meeting/Public Hr'g Tr. 223:15-19, Ex. G.

[46] *See* Ben David Aff. ¶¶ 14-15.

economic analysis"); *Thomas v. Blum*, 88 A.D.2d 601, 602 (2d Dep't 1982) (affirming decision to overturn agency's denial of public assistance due in part to "no evidence that the agency ever investigated or offered to investigate" petitioner's claims).

69. The authors of the Parrott Report also appear to have generated many of their assumptions about FHV drivers from a study to which *only 3.75%* of ride-hail drivers responded.[47] There is nothing in the Parrott Report that breaks down driver profiles (if they can even be gleaned from the data gathered), according to the companies for which they work, nor does it account in any way for differences in driver populations or business models among those companies.[48] Given these analytical flaws, as Dr. Mundy explains: "[t]he result is a sweeping Rule that is based entirely on incomplete, anecdotal evidence that simply does not account for or reflect the realities of the ride-hailing industry in New York City."[49]

70. The TLC's latest revisions to the Rule have only exacerbated its inequitable effects. Weeks *after* the Rule had already been passed, the TLC belatedly introduced a new methodology for splitting idle time among multiple companies for drivers who make themselves available to more than one high-volume FHV company at a time. This new methodology arbitrarily harms smaller companies like Juno by further increasing its larger competitors' utilization rates. For example, if a driver is "on-duty" for one larger FHV company for 40 hours a week and has a passenger in his car for 30 hours, this implies a 75% utilization rate under the TLC's Rule (calculated as 30 hours with a passenger divided by sum of 30 hours with a passenger plus 10 idle hours). But that driver may also decide to drive for a smaller company,

---

47 *See* Parrott Report at 23 n.20, Ex. K; Mundy Aff. ¶ 57.

48 *See* Mundy Aff. ¶ 58.

49 Mundy Aff. ¶ 58.

like Juno, because they think it may help increase the number of potential rides (and thus decrease the driver's idle time without a passenger). Assuming that also driving for Juno provides that driver with 2 hours of additional passenger time, the driver is now with a passenger for 32 hours and idle for only 8 hours. But the TLC's "utilization rate" calculation arbitrarily splits those 8 idle hours equally between the larger FHV company and Juno.[50]

71. The result is that the larger FHV company now gets credit for 88% utilization (30 hours with a passenger divided by the sum of 30 hours with a passenger plus 4 idle hours), even though Juno was responsible for filling that idle time with trips. Under the Rule, not only does Juno receive a lower utilization rate (leading to a higher minimum pay requirement), but with this split of idle times, the larger FHV company actually has its utilization rate *increased* at the same time (leading to an even lower minimum pay requirement for that company). Thus, even where Juno was responsible for an overall reduction in the driver's idle time (and thus an increase in utilization for that driver), it is punished under the Rule while its competitor is rewarded. Such a result is arbitrary and capricious.

72. This problem is particularly pronounced for Juno because it has exclusively recruited drivers who *already drive* for larger ride-hail companies.[51] In other words, Juno's business model is to *increase* overall driver utilization in New York City by offering existing drivers another way to find trips while they would otherwise be idle. But Juno gets no credit under the Rule for increasing driver utilization generally, and instead is penalized by having to pay its drivers more while the Rule rewards Juno's competitors by splitting their drivers' idle time with Juno, increasing the larger companies' utilization rates and allowing them to pay their

[50] Tenn Aff. ¶ 31.

[51] Ben David Aff. ¶ 13.

drivers less.

73. Moreover, the TLC's introduction of an "Initial Utilization Rate" period to apply to all FHV companies subject to the Rule does not solve these fatal problems. It only applies for the first twelve months following the Rule's effective date and expressly allows companies to opt out and use their own company-specific utilization rates during that period.

74. In short, the TLC's belated, patchwork effort to fix its hurriedly-passed Rule is a far cry from a reasoned determination. *See Dorfman v. City of Salamanca Bd. of Pub. Utilities*, 138 A.D.3d 1424, 1425 (4th Dep't 2016) ("[B]ecause the record is silent with respect to facts supporting the Commission's determination to double the rates charged for water for those consumers who have a one-inch or larger meter," the determination lacked a rational basis); *see also Mantione v. Lavine*, 42 A.D.2d 834, 835 (1973) (finding a determination denying a structural waiver to a nursing home operator arbitrary and capricious because "[n]o support for [the] conclusion [was] contained in the record, except bare statutory structural requirements and the opinion of an expert who [had] not seen petitioner's Home").

B. The Utilization Component of the Rule Was Established Without Reasoned Consideration or Analysis of Its Anticompetitive Impact

75. Relatedly, the TLC's Utilization-Based Rule is arbitrary and capricious because it was passed "without first considering whether its benefits justify its societal costs," specifically its significant anticompetitive effects. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 697 (2014). The ultimate consequences of the Rule will be to harm drivers as competition in the market shrinks, increase

congestion in high-traffic areas, and limit transportation options in areas that rely on ride-hailing.[52]

76. Indeed, even if their low utilization rates are caused by factors totally beyond their control, smaller companies like Juno will be required to pay their drivers more than their competitors. As the minimum pay for these drivers increases, drivers will be incentivized to drive for those smaller companies, lowering the companies' rider-to-driver ratios, which, in turn, will drive down their utilization rates. As a result, they will be forced to increase fares, alienating riders and causing them to patronize other companies that can afford to offer lower fares. This, of course, will only further drive down the smaller companies' utilization rates, which will further drive up their minimum pay mandate, and so forth.

77. This dynamic will harm not only smaller ride-hail companies, but also consumers and the very drivers the Rule seeks to protect. As smaller companies with lower utilization rates are penalized under the Rule, they may be forced to downsize or the fares they are forced to charge may be so high that they are essentially priced out of the market. As a result, consumers will lose options for finding a ride, and the level of service from ride-hail companies may decrease, as larger companies are no longer forced to deal with smaller competitors. Perhaps even worse, drivers will lose money-making opportunities from apps that would otherwise help them fill their idle time. Additionally, with less competition for drivers, the surviving companies will be less incentivized to treat their drivers well.[53] The Parrott Report even acknowledges that "the larger companies — with more economies of scale — set fares that are above, and pay drivers at rates below, the level that would obtain under conditions of greater competition," but

---

[52] *See* Tenn Aff. ¶¶ 34-42.

[53] *See id.* ¶¶ 40-42.

the TLC made no effort in the Rule to account for or even reflect this reality.[54] On the contrary, the Rule would exacerbate this undesirable scenario.

78. The TLC failed to address the anticompetitive effects that its Rule will have on the ride-hail industry in New York City, including the inevitable impact on driver pay. Indeed, although the Parrott Report acknowledges the important role that competition plays on driver earnings in the FHV market, neither the Parrott Report nor the TLC analyzed how the Rule will affect this key element of the market's dynamics. By ignoring these consequences, the TLC failed to give reasonable consideration to the economic and social impact the Rule will have on the industry and ride-hail companies, drivers and riders. This failure to account for the anticompetitive economic impacts of the Rule renders it arbitrary and capricious.

C. <u>The Timing of the Rule Underscores its Arbitrariness</u>

79. The timing of the TLC's rule highlights its arbitrary and capricious nature. The TLC and New York City Department of Transportation are currently conducting a study on utilization that is scheduled to be completed <u>*months after*</u> the Rule goes into effect. *See* N.Y.C. Admin. Code § 19-550. In other words, the TLC premised the Rule on a metric that it does not—and indeed cannot possibly—understand before its own study is complete. The Rule therefore cannot possibly have a rational basis, and is arbitrary and capricious. As Dr. Mundy has concluded:

> [T]he authors of the [Parrott and Reich] Report provide no examples of how utilization rates have been applied in other similar or even dissimilar industries either here or elsewhere. In other words, the whole concept of using utilization rates (and company-specific utilization rates at that) as a basis for determining base hourly wage rates in an industry that uses independent contractors is purely speculative and experimental.[55]

[54] Parrott Report at 44, Ex. K.

[55] Mundy Aff. ¶ 55.

80. Beyond not understanding utilization in the FHV industry on the whole, as explained above, the TLC made no effort before passing the Rule to determine the impact on utilization rate of drivers completing trips for multiple apps or FHV bases. In recognition of this failure, the TLC first amended its Rule to provide that it "will review" among other things, "the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases." Rule § 59B-24(d). The TLC then hurriedly attempted — after the Rule had already been passed — to account for multi-app drivers in the utilization-based formula, with a result that only causes more damage to smaller FHV companies like Juno.

81. The TLC's failure to complete its study of utilization and its impacts on the Rule is particularly egregious in light of the fact that the City Council has recognized the key role that utilization plays in the industry. Indeed, Local Law No. 150 contemplates that a utilization standard should be taken into account in developing the minimum pay formula.[56] Despite the City Council's mandate that it consider such utilization standards, the TLC has failed adequately to do so and indeed *cannot* do so because the study that could produce such standards will not be complete for at least six more months. For these reasons, definitive use of utilization in the driver pay formula cannot possibly have a rational basis. The TLC Rule is thus not only ill-advised, it is also fatally ill-timed.

82. Further, as the Parrott Report explains and as described above, many of the issues that the TLC is seeking to address through the Rule may potentially be solved more simply and efficiently through caps on the number of cars and drivers. It is unclear how the recently-enacted

[56] *See* N.Y.C. Local Law No. 150, § 1.b (2018) ("In establishing such method [for determining the minimum payment], the commission shall, at a minimum, consider . . . any applicable vehicle utilization standard . . . ."), Ex. E.

freeze on the issuance of new FHV licenses will impact drivers' ability to get more trips, which the Parrott Report acknowledges would increase driver income without the need for the Utilization-Based Rule. The TLC thus proceeded blindly in promulgating the Rule even though it lacked admittedly relevant information and ignored major regulatory developments.

83. The Rule also fails to comport with the City Charter's mandate that the drafting process of a rule should include "analysis sufficient to minimize compliance costs for the discrete regulated community or communities, to the extent one exists, consistent with achieving the stated purpose of the rule."[57] Because the TLC lacks sufficient information about utilization and driver behavior, it could not possibly have satisfied this analysis. The Mayor's Office of Operations' Certification that "[t]he Taxi and Limousine Commission believes that the economies of scale achieved by the large companies will enable them to make the financial, operational or other adjustments necessary to accommodate the proposed driver earnings policy" is wholly insufficient.[58] *See St. James Nursing Home,* 12 A.D.3d at 923-24 (reimbursement rates were arbitrary and irrational due to an "unreasonable formulation of the relationship between Medicaid revenue and nursing home costs"); *see also Jewish Mem'l Hosp.*, 47 N.Y.2d at 343.

D. The Utilization-Based Rule Will Disincentivize Companies and Drivers from Accepting Trips in Historically Underserved Areas

84. As explained in the Tenn Affidavit, the anticompetitive effects of the Rule will also lead to another consequence that the TLC failed to consider or ignored altogether: the negative effect that the use of "utilization rate" in the Rule will have on congestion and historically underserved areas.

[57] *See* N.Y.C. Charter § 1043(d)(1).

[58] Proposed Rule, 145 City Rec. 4709-10 (N.Y.C. Mayor's Office of Operations, Certification/Analysis Pursuant to Charter Section 1043(d) (Aug. 28, 2018)), Ex. F.

85. Data from the 2018 TLC Factbook demonstrate that, from 2016 through June 2018, medallion taxis accounted for a mere 0.1% of pickups in the Bronx, 1.1% in Queens, and 1.5% in Brooklyn. In contrast, app companies like Uber, Lyft and Juno accounted for 6.9% of pickups in the Bronx, 11.6% in Queens, and 25% in Brooklyn.[59]

86. Because the TLC calculates "utilization rate" across a company's entire platform, a decrease in the minimum pay due to an influx of riders to larger app companies is likely to have a disparate impact on drivers who operate in areas with lower demand. For instance, a driver operating in the Central Business District in Manhattan, where driver demand is high, will be able to offset any decrease in minimum pay by virtue of the increased number of riders. However, a driver operating in an area with lower demand, like the outer boroughs, is unlikely to be able to offset the lower minimum pay by increasing the number of fares, and would therefore see a decrease in earnings.

87. Moreover, the Rule encourages companies to focus their services in areas of high-demand to increase utilization. The end result is to disincentivize companies and drivers from operating in lower-demand areas, to the detriment of consumers and small businesses in already underserved parts of New York City. Further, an influx of drivers to Manhattan and other high-demand areas in such a scenario will exacerbate the congestion in high-traffic areas, including the notoriously crowded Central Business District. All this is in derogation of the TLC's stated mission of "ensur[ing] that New Yorkers and visitors to the City have access to taxicabs, car services, and commuter van services that are safe, efficient, sufficiently plentiful, and provide a

[59] *See* N.Y.C. Taxi & Limousine Comm'n, 2018 Factbook 5, http://www.nyc.gov/html/tlc/downloads/pdf/2018_tlc_factbook.pdf (last visited Jan. 28, 2019).

good passenger experience,"[60] and render the Rule arbitrary and capricious. *See N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 697 (rule is arbitrary and capricious where it is passed "without first considering whether its benefits justify its societal costs").

E. <u>The TLC's 10,000 Daily Trip Threshold Is Arbitrary and Capricious</u>

88. The TLC's Rule also arbitrarily applies only to "high volume" ride-hail companies that dispatch more than 10,000 trips daily. It does not take into account that, within that small group of companies, there is an extremely wide range of trips dispatched per day. *See Metro. Taxicab Bd*, 18 N.Y.3d at 333-34; *see also Kelly v. Kaladjian*, 155 Misc. 2d 652, 655-57 (Sup. Ct. N.Y. Cty. 1992) (bright-line test for benefit was arbitrary and irrational because it lacked "any evidentiary foundation" and the record contained no study, analysis or report used to arrive at the established guideline).

89. Juno dispatches only approximately 35,000 trips daily — far fewer than its two larger competitors that are subject to the Rule.[61] It is unfair for the Rule's mandate to apply as it does to all three companies — at a minimum, the TLC must provide some reasoned basis for doing so. Because the 10,000-trip threshold, which makes no effort to account for very differently-situated high-volume FHVs — lacks any rational basis or evidentiary support, it is arbitrary and capricious and is further grounds for annulment of the Rule. *See Metro. Taxicab Bd*, 18 N.Y.3d at 333-34; *see also Jewish Mem'l Hosp.*, 47 N.Y.2d at 343; *McCann*, 2018 N.Y.

---

[60] N.Y.C. Taxi & Limousine Comm'n, TLC Mission Statement, http://www.nyc.gov/html/tlc/html/about/mission.shtml (last visited Jan. 28, 2019).

[61] According to TLC data, as of November 30, 2018, Uber drivers were making nearly 500,000 trips per day, Lyft drivers were making approximately 140,000 trips per day and Juno drivers were making approximately 35,000 trips per day. *See* Todd W. Schneider, Taxi, Uber, and Lyft Usage in New York City (summarizing TLC data) (last visited Jan. 16, 2019), http://toddwschneider.com/posts/taxi-uber-lyft-usage-new-york-city/.

Slip Op. 51223(U), at *3 (medical board's decision was arbitrary and capricious where its "report mainly consist[ed] of summaries and conclusions but the report [was] devoid of a discussion and sufficient rational analysis of the medical and evidentiary findings").

90. The fundamental unfairness of the Rule is compounded by the fact that the TLC is essentially forcing a minimum wage (and thus a mandated employment-based model) on only four companies in a single market. Although drivers for Juno are independent contractors,[62] the Rule forces these four companies to pay drivers for the time they spend idle, not working. This is antithetical to the independent contractor model, in which contractors are paid exclusively for the work they actually complete (here, completed trips). This dramatically transforms the driver-company relationship for the high-volume companies arbitrarily regulated by the Rule, creating a significant disadvantage as compared to other FHV companies not governed by the Rule.

F. The TLC Acted *Ultra Vires* by Passing a Rule That Conflicts with the Enabling Local Law

91. Not only is the Utilization-Based Rule arbitrary and capricious, but the TLC also acted *ultra vires* in adopting it. It is well-settled that although "an agency can adopt regulations that go beyond the text of [the agency's enabling] legislation," it may only do so "provided the [regulations] are not inconsistent with the statutory language or its underlying purposes." *Gen. Elec. Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004). The TLC has violated two separate mandates of Local Law No. 150.

92. First, the enabling law explicitly states that the TLC's rule "shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by

[62] The City Council recognized as much in the earliest version of the enabling legislation, which required the TLC to "set minimum prices for services provided by for-hire vehicle drivers *who are independent contractors*." Intro. No. 890, Ex. A; *see also* Parrott Report at 9, Ex. K.

any other method."[63] The Rule violates this mandate, as it allows for calculation of minimum pay based purely on the utilization-driven formula, which does not even take into account hourly or weekly calculations, let alone allow the minimum pay to be calculated on that basis. For this reason, the TLC acted *ultra vires* in enacting the Rule, and it should be annulled. *See McNulty*, 70 N.Y.2d at 791; *Riccelli Enters.*, 30 Misc. 3d at 578-79, 584.

93. Second, the enabling legislation provides that the TLC's rule had to establish minimum driver payments "for a trip." The enabling legislation made clear that a "trip" is "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," *i.e.*, a fare not including idle time.[64] If there were any question that this was the City Council's intended meaning, subsection (b) erases it. That subsection provides that the TLC's method must compensate drivers for "a trip *dispatched*." *Id.* (emphasis added) (adding N.Y.C. Admin Code § 19-549(b)). While a driver is waiting to pick up a fare, no trip has been dispatched. That happens only once a passenger requests a ride and the ride-hail company connects the rider with the driver via the app.

94. Because of the utilization rate formula, however, the Rule compensates drivers not just based on fares, or "trips," but also based on idle time. What is more, the utilization rate does not reflect any one particular driver's idle time, but rather the idle time of every driver using the app. Indeed, the TLC itself has acknowledged that under the Rule, drivers are paid not just for trips but also for idle time: "The companies with lower utilization rates would be required to pay higher driver compensation per trip *to offset the time their drivers are waiting for a*

[63] N.Y.C. Local Law No. 150 § 1, Ex. E.

[64] *Id.*

dispatch."[65] As the Parrott Report admits, "[t]he pay formula is thus constructed to compensate drivers for work-related time and expense when a passenger *is not in the vehicle*."[66]

95. That is not what the City Council authorized the TLC to do, and thus the Rule is the result of *ultra vires* action and should be annulled. *See McNulty v. N.Y. State Tax Comm'n*, 70 N.Y.2d 788, 791 (1987) ("[I]t is elementary that '[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute.'") (citations omitted); *see also Riccelli Enters., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 30 Misc. 3d 573, 578–79, 584 (Sup. Ct. Onondaga Cty. 2010) (striking down regulation because the agency expanded the definition of who would be covered by the regulation beyond what was listed in the enabling legislation).

FIRST CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803(3) and 7806)

96. Petitioners repeat and reallege the allegations made in paragraphs 1 through 95 above as if fully set forth in this paragraph.

97. The record does not support the use of utilization rate to determine and mandate minimum pay, a standard that was arbitrarily selected in haste and without proper analysis, before the TLC's own utilization study is complete, and which is at odds with evidence in the record.

98. Rather than fulfill its statutory mandate and carefully consider the facts and the realities of the industry, the TLC hastily adopted a rule not grounded in the record.

---

[65] Proposed Rule, 145 City Rec. 4702 (Aug. 28, 2018)) (emphasis added), Ex. F.

[66] Parrott Report at 35 (emphasis added), Ex. K.

99. The fact that the TLC has not completed its study on FHV utilization in New York City before using it as the primary factor in determining ride-hail driver minimum pay illustrates that it has made an insufficient effort to analyze or gather information needed for a proper consideration of the issue.

100. Basing the Rule on utilization rate, an approach made without reasoned consideration or analysis, is completely divorced from the realities of the ride-hail industry and is unreasonable to meet the TLC's stated goals for the Rule.

101. By imposing the Rule on FHV companies, which may have no ability to control their drivers' utilization and where the Rule has a disparate impact on smaller ride-hail companies, the TLC failed to account for the way the ride-hail industry actually operates.

102. Further, the Rule threatens to drive smaller ride-hail companies out of the industry, stifling competition and ultimately hurting drivers in the absence of competition.

103. An agency acting reasonably would have given consideration to the damaging economic impact the Rule will have on the ride-hail industry and ride-hail drivers and passengers, which the TLC did not do.

104. For example, the TLC failed to consider the anticompetitive consequences of the Rule, and that smaller companies would be forced to incur disproportionate costs and risk being driven out of the marketplace entirely.

105. The TLC also completely failed to consider the negative effects the Rule will have on drivers, limiting their choices in apps, driving down the drivers' minimum pay as smaller companies are forced out of the market or decreasing their flexibility as smaller companies are forced to regulate individual drivers' utilization to stay afloat.

106. The TLC also ignored the real threat of disincentivizing companies and drivers from providing trips in already underserved, low-demand areas by tying minimum pay to utilization rate, as well as the negative effects an attendant influx of drivers to high-demand areas would have on congestion.

107. For at least these reasons, the Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR 7806 vacating and annulling it.

SECOND CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803(2) and 7806)

108. Petitioners repeat and reallege the allegations made in paragraphs 1 through 107 above as if fully set forth in this paragraph.

109. Administrative agencies can promulgate rules only to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute.

110. The TLC acted *ultra vires* by promulgating and passing a Rule that is inconsistent with the law by which the City Council authorized the TLC to enact a minimum pay rule, Local Law No. 150.

111. First, the TLC ignored Local Law No. 150's mandate that the Rule "shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method."[67]

112. Second, the TLC ignored Local Law No. 150's mandate that the Rule must establish minimum driver payments for drivers "for a trip" when it enacted a Rule that also compensates drivers for idle time when they are not transporting any passengers.

---

[67] N.Y.C. Local Law No. 150, § 1, Ex. E.

113. For at least these reasons, the Rule was enacted *ultra vires*. Petitioners are entitled to a judgment under CPLR 7806 vacating and annulling it.

THIRD CAUSE OF ACTION
(For Declaratory Judgment)

114. Petitioners repeat and reallege the allegations made in paragraphs 1 through 113 above as if fully set forth in this paragraph.

115. There exists an actual, substantial and immediate controversy with respect to the recently adopted Utilization-Based Rule.

116. The controversy is the result of Respondent's past and present conduct and threat of future conduct consistent therewith, which severely threatens the interests of Petitioners.

117. For all the reasons set forth above, Petitioners are entitled to a judgment declaring that the Utilization-Based Rule is arbitrary and capricious and should be vacated and annulled.

PRIOR APPLICATION

118. No prior application has been made for the relief requested herein.

TRIAL DEMAND

119. Petitioners demand a hearing on all causes of action so triable.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter an Order:

A. Issuing a judgment pursuant to CPLR 7806 vacating and annulling the Utilization-Based Rule, codified at 35 R.C.N.Y.§ 59B-24, in its entirety;

B. Issuing a judgment declaring that the Utilization-Based Rule is arbitrary and capricious and should be vacated and annulled;

C. Holding an evidentiary hearing to resolve material factual disputes, if any;

D. Ordering Respondents to pay Petitioners their costs, fees, and disbursements incurred in connection with this action pursuant to CPLR 8101; and

E. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 28, 2019

Respectfully submitted,

SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP

By: /s/ George A. Zimmerman
George A. Zimmerman
Alexander C. Drylewski
Abigail E. Davis
Four Times Square
New York, New York 10036
Phone: (212) 735-3000
Fax: (212) 735-2000
george.zimmerman@skadden.com
alexander.drylewski@skadden.com
abigail.sheehan@skadden.com

KAPLAN RICE LLP
Joseph A. Matteo
142 West 57th Street, Suite 4A
New York, New York 10019
Phone: (212) 235-0300
Fax: (212) 235-0301
jmatteo@kaplanrice.com

Attorneys for Petitioners

VERIFICATION

Ronen Ben David, being duly sworn, deposes and says:

I am the Chief Executive Officer of Juno USA LP, and an agent of the Petitioners, which are wholly-owned subsidiaries of Juno USA, LP, and pursuant to CPLR § 3020(d)(3) and 3021 make this verification. I have read the foregoing Petition and know the contents thereof; the same are true to my knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe them to be true. To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

____________________ [SIGNED]
Ronen Ben David
Chief Executive Officer of Juno USA LP

Ronen Ben David [TYPED]

Sworn to me before this
28 day of January, 2019.

____
Notary Public

BRIAN SUNBERG
Notary Public-State of New York
No. 01SU6379271
Qualified in New York County
My Commission Expires August 13, 2022

BRIAN SUNBERG NOTARY PUBLIC STATE OF NEW YORK