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NYSCEF DOC. NO. 101

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **IAS MOTION 52EFM**

Justice

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ZEHN-NY LLC,ZWEI-NY LLC,ABATAR, LLC,UNTER LLC,UBER TECHNOLOGIES INC.,UBER USA, LLC,

Petitioner,

- v -

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, BILL HEINZEN, THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 159195/2019

MOTION DATE 12/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 47, 48, 50, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioners[1], commenced this Article 78 proceedings seeking an order of the Court vacating and annulling the rules enacted in August 2019 codified at Title 35 of the Rules of the City of New York ("RCNY"), §§ 51-03, 59A-06, 59D-06, and 59D-21, 59A-11(e), 59B-17(c)-(d) which, among other things, require that the City's high-volume FHV bases maintain their company-wide Manhattan core cruising time at a maximum of 31 percent of their total vehicle hours travelling in the core of Manhattan (the "Core".)[2]

This Court finds that the rules adopted by the Taxi and Limousine Commission (TLC) on August 7, 2019 as they relate to a cruising cap are arbitrary and capricious, specifically §59D-21 of the Rules of the City of New York. This decision does not impact any other rules promulgated on August 7, 2019.

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[1] The Court includes the petitioners in the Tri-City matter, index number 159941/2019, for the purposes of this decision, as both Article 78 petitions seek the same relief.

[2] Pursuant to the RCNY §59D-21, beginning in February 2020 the cruising percentage is capped at 36 percent until August 2020 when the cap will be lowered to 31 percent.

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Standard of Review

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (see CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). Article 78 review is permitted, where it is alleged 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…." NY *CPLR* §7803(3).

"Arbitrary" for the purpose of the statute is interpreted as "when it is without sound basis in reason and is taken without regard to the facts." *Pell* 34 NY2d at 231.

A court can overturn an administrative action only if the record illuminates there was no rational basis for the decision. *Id.* "Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." *Id.* If the court reviewing the determination finds that "[the determination] is supported by facts or reasonable inferences that can be drawn from the records and has a rational basis in the law, it must be confirmed." *American Telephone & Telegraph v State Tax Comm'n* 61 NY2d 393, 400 [1984]. Likewise, "[i]f the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that

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would have been adequate if cited by the agency." *Nat'l Fuel Gas Distribution Corp. v Pub. Serv. Comm'n of New York*, 16 NY3d 360, 368 [2011].

Discussion-arbitrary and capricious

This Court takes issue with the calculation of "Cruising" as defined in Section 51-03 of Title 35 of the Rules of the City of New York. Specifically, it is problematic that the time a driver is travelling to pick up a passenger in the "Congestion Zone"[3], after a fare has already been agreed upon and a car has been dispatched, is included in the calculation of "cruising." The Statement of Basis and Purpose to the rules promulgated not only does not support the TLC's argument, that the time travelling to a passenger should be included for the purposes of calculating "Cruising", but in fact undercuts that argument. According to the Statement of Basis and Purpose, there is no indication congestion is caused by the time a driver drives to pick up a passenger, but rather is caused by the "roughly 8 minutes a driver spends waiting for the next trip, either parked, double parked or driving to an area where the driver *expects* to get another trip. Because of high demand for on-street parking in the Manhattan core, most drivers are either double-parked or driving, both of which contribute to congestion." (emphasis added) As such, the TLC has not shown any rational basis for why "Cruising" should include the time that vehicles head to pick up identified passengers.

Moreover, *any* review done by TLC would be suspect if the time a driver is en route to a passenger is included in "cruising." It is likely that pursuant to the new rule that vehicles would be less likely to pick up passengers the further one goes into the Congestion Zone (the "Zone"), as that would require more time within the Zone to pick up a passenger, since there would be

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[3] The "Congestion Zone" is defined by 35 RCNY § 51-03 as the area of Manhattan south of and excluding 96th Street. This area is also defined as the "core" in the Local Law 147 study. *See* https://www1.nyc.gov/assets/tlc/downloads/pdf/fhv_congestion_study_report.pdf

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fewer vehicles in the Zone at any one time. Therefore, the increase in wait times of about 13% that TLC has anticipated would likely be higher the further one got from the boundary of the Zone.

In addition, it is of concern that the economic modeling requested by the petitioners has not been provided to them, especially since they were apparently relied on by the TLC in its determination on the new rules promulgated. That the record for the basis of TLC's actions is incomplete simply works against the TLC when it comes to the promulgation of rules. Consequently, the Court does not have a full record to evaluate the action taken by the TLC and whether such action was rational.

Moreover, the Court notes that many stakeholders expressed concern with the proposed new rules, representing many diverse interests, among then both the Manhattan and Queens Chambers of Commerce, the New York Building Congress, the National Action Network, the Black Institute, the Brooklyn Pride Center, and the Stonewall Community Development Corporation. The TLC was in no way required to adopt what these entities suggested, but their testimony was required to be addressed by the TLC before promulgation of the rule in question. Because it was not, this Court has an incomplete picture of the reason for the TLC rejection of their concerns. *See Barry v O'Connell* 303 NY 46, 51-52 [1951].

Additionally, the petitioners correctly point out that there is scant rationale for why the 31% number was chosen to be the number in the promulgation of the rules. The closest the respondents come to giving reason for that number is in the affidavit of Rodney Stiles, the TLC Assistant Commissioner who provided an affidavit for the record. In paragraph 56 of his affidavit, Mr. Stiles indicates the percentages studied by TLC were 31%, 26% and 21%. There is simply no indication where the numbers came from, except that Mr. Stiles states that the industry

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has cruising rates of 34% in non-core areas and Via, a different kind of service, has a cruising rate of 13% within the Zone. Mr. Stiles said that 31% was chosen because it will provide "meaningful results without unduly impacting the [relevant] companies." Mr. Stiles then goes on to note that there will be a regular review of cruising rates required in the new rule. The Court agrees with the petitioners that this rationale is simply insufficient is simply insufficient, as the numbers should have been derived at as a result of the review undertaken, and not as a starting point.

Finally, the affidavit of Mr. Stiles, in discussing the "elasticity coefficient," notes that that the "study team used the .060 coefficient discussed in the Driver Pay Report… The Driver Pay Report, however, incorrectly cites the source for this estimated value; the authors of the pay report set this value after consulting with Jonathan Hall, Chief Economist at Uber, in May 2018." This calls into question the methodology relied upon, especially where Mr. Hall strongly disputes the reasonableness of the elasticity coefficient used.

Preemption, Delegation and Donnelly Act

As to the other issues addressed by the petitioners, the Court notes that it has previously reviewed the arguments by the petitioners regarding the issues of preemption and improper delegation and finds them unavailing. As to the issue of state preemption, the Court relies on its prior decision under index number 151730/2019, dated October 28, 2019. To reiterate, the Court does not find that the state laws in question act to preempt Local Law 147 or the rules promulgated therefrom. These laws and rules are meant to reduce congestion, just as the state laws purport to do. The Court again agrees, the state laws could have had language to preempt local laws and rules but does not. Any impact it has on the monies meant to be used to fund mass transit are merely incidental to the reach of the laws and rules.

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