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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC.,
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC,

Petitioners-Respondents,

-against-

THE NEW YORK STATE DEPARTMENT OF STATE
and CESAR A. PERALES,
Secretary of the New York State Department of State,

Respondents-Appellants.

**BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA AND THE BUSINESS COUNCIL
OF NEW YORK STATE, INC. IN SUPPORT OF
PETITIONERS-RESPONDENTS**

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Dated: August 30, 2016

CORPORATE DISCLOSURE STATEMENT¹

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals for the State of New York, the Chamber of Commerce of the United States of America and the Business Council of New York State, Inc.:

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies, state and local chambers, and trade associations of every size, in every industry, sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Business Council of New York State, Inc. is the leading business organization in New York State, representing the interests of large and small firms throughout the state. Its membership is made up of thousands of member companies, as well as local chambers of commerce and professional and trade associations. All told, the Council’s members employ more than 1.2 million New Yorkers. The Council has no parent corporation, and no publicly held company has 10% or greater ownership in the Council.

¹ No party other than counsel and amici have contributed financially to this brief, nor have they authored portions of the brief.

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WORLD DEVELOPMENT REPORT, A BETTER INVESTMENT CLIMATE FOR EVERYONE 95, (The World Bank and Oxford University Press, 2005) *available at* <http://documents.worldbank.org/curated/en/2004/01/17409144/world-development-report-2005-better-investment-climate-everyone>10, 11, 12

STATEMENT OF AMICI INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents the interests of more than three million businesses of every size, in every industry sector, from every region of the country, including New York. An important function of the Chamber is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files amicus curiae briefs in cases—such as this one—that raise issues of concern to the Nation's business community.

The Business Council of New York State, Inc. is the leading business organization in New York State, representing the interests of large and small firms throughout the state. Its membership is made up of thousands of member companies, as well as local chambers of commerce and professional and trade associations. All told, the Council's members employ more than 1.2 million New Yorkers. As advocates for employers in New York, the Council has a strong interest in ensuring that business investment in New York remains uninhibited by the dangers of legal and regulatory uncertainty.

SUMMARY OF ARGUMENT

The Appellate Division correctly held that the State of New York lacks authority under both federal and state law to invoke the “consistency” review provisions of the State’s Coastal Management Plan (“CMP”) in order to block the continued operation of the Indian Point power plant. *See Entergy Nuclear Operation, Inc. v. N.Y. State Dep’t of State*, 999 N.Y.S.2d 207, 210 (3d Dep’t 2014), *leave to appeal granted*, 25 N.Y.3d 908 (N.Y. 2015). This court should affirm that judgment for two reasons.

First, by its terms the CMP developed by the State under the Coastal Zone Management Act (“CZMA”) does not vest the New York Department of State (“NYDOS”) with unilateral authority to block continued operation of Indian Point power plant. Under the CMP adopted by the NYDOS on September 30, 1982, an applicant for a federal license must certify that proposed activities affecting the coastal zone will be conducted in a manner “consistent with” that program. In recognition that a “substantial amount of time, money and effort have been expended” on projects that have received prior regulatory approvals, New York’s CMP explicitly grandfathers from “consistency” review “those projects for which a final Environmental Impact Statement has been prepared prior to the effective date

of [that program].”² Indian Point received a final Environmental Impact Statement (“EIS”) in 1972 for Unit 2 and 1975 for Unit 3.³ Thus, the terms of the CMP plainly bar New York’s attempt to subject Indian Point to consistency review. *Entergy Nuclear Operation, Inc.*, 999 N.Y.S.2d at 210. Moreover, nothing in the CZMA authorizes the State to judge the safety of a nuclear plant; that authority is reserved to the Nuclear Regulatory Commission (“NRC”).⁴

Second, reversing the Appellate Division’s judgment and allowing the State unilaterally to block the continued operation of the Indian Point power plant would have significant economic implications for the State. Nuclear power facilities like Indian Point play an important role in the Nation’s overall energy mix, and in this State’s economy. The federal scheme developed by Congress for licensing and regulating new and existing nuclear plants has helped facilitate the development of the American nuclear power industry for nearly 60 years. Authority to license new and existing nuclear plants and to regulate the industry to ensure safe operation is

² Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Office of Coastal Zone Mgmt., *New York State Coastal Management Program and Final Environmental Impact Statement*, Part II-9 at 1 (Aug. 13, 1982), www.dos.ny.gov/opd/programs/pdfs/NY_CMP.pdf (“CMP & Final EIS”); 19 N.Y. Code, Rules & Regulations 600.3.

³ Br. for Pet’rs-Resp’ts Entergy Nuclear Operations, Inc., et al. at 6 (Jan. 19, 2016) (“Pet’rs’ Br.”).

⁴ See *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, at 426 (2d Cir. 2013) (“We have conducted a review that reflects the Supreme Court’s specific directive that a ‘state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC . . . and would be preempted for that reason.’”).

entrusted solely to the NRC.⁵ Nuclear plants are initially licensed for 40 years, and more than 50 nuclear plants across the U.S. have been granted renewal licenses after demonstrating to the NRC that they are “managing the adverse effects of aging.”⁶ Eight more nuclear power plants are currently under review, including Indian Point.⁷ To allow the State, contrary to existing law, to upset settled investment expectations in this manner could have significant implications for future investment in New York.

ARGUMENT

I. NYDOS IS BARRED FROM UNILATERALLY BLOCKING THE CONTINUED OPERATION OF INDIAN POINT.

The plain language of the CMP expressly grandfathers from consistency review “those projects for which a final Environmental Impact Statement has been prepared prior to the effective date [of the CMP].”⁸ The CMP was established by the NYDOS, approved by the U.S. Secretary of Commerce, and became effective

⁵ See Nuclear Energy Institute, *Safety: The Nuclear Energy Industry's Highest Priority* (2015), <http://www.nei.org/Master-Document-Folder/Backgrounders/Fact-Sheets/Safety-The-Nuclear-Energy-Industry-s-Highest-Prior>; see also 42 U.S.C. § 2133; *Entergy Nuclear Vt. Yankee*, 733 F.3d at 409-10 (2d Cir. 2013) (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (“Radiological safety therefore represents an arena of field preemption that ‘Congress, acting within its proper authority, has determined must be regulated by its exclusive governance,’ thus precluding any regulation by the states.”)).

⁶ U.S. Nuclear Reg. Comm’n, *Backgrounder on Reactor License Renewal*, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-reactor-license-renewal.html> (last updated Apr. 29, 2016).

⁷ U.S. Nuclear Reg. Comm’n, *Status of License Renewal Applications and Industry Activities*, <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html#plant> (last updated Apr. 14, 2016).

⁸ CMP & Final EIS, Part II-9 at 1; 19 N.Y. Code, Rules & Regulations 600.3.

on September 30, 1982.⁹ This effective date is a full decade after Indian Point submitted its EIS for Unit 2, and seven years after it submitted its EIS for Unit 3. As a result, Indian Point is grandfathered from review by the NYDOS for consistency with its coastal management principles.¹⁰

Although the NYDOS denied Indian Point’s application for consistency certification based on alleged safety concerns,¹¹ the courts of New York have been clear that an agency must “comply with either a mandatory provision, or one that was ‘intended to be strictly enforced.’” *Blaize v. Klein*, 889 N.Y.S.2d 665, 668 (2d Dep’t 2009) (internal citation omitted). There is no clearer depiction of a “mandatory provision” that is “intended to be strictly enforced” than the provision at issue here: the CMP “*shall not apply* to action for which a final environmental impact statement has been prepared . . . prior to the effective date of this Part.”¹² This is not a case where the NYDOS is entitled to deference: where, as here, “the words [of the law] are clear and the question simply involves [their] proper application . . . there is little basis to rely on any special competence or expertise of the administrative agency.” *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 583 (N.Y. 2006); *see also Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588

⁹ Pet’rs’ Br. at 16-17.

¹⁰ CMP & Final EIS, Part II-9 at 1; 19 N.Y. Code, Rules & Regulations 600.3.

¹¹ CZMA Consistency Determination.

¹² 19 N.Y. Code, Rules & Regulations 600.3 (emphasis added).

(N.Y. 1982); and *Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep't of Health*, 5 N.Y.3d 499, 506 (N.Y. 2005) (“Although it is true that an agency’s interpretation of its own regulation generally is entitled to deference, courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language.”).

The NYDOS’s action here is especially egregious, because the agency cites “safety” as one of the key reasons for ignoring the clear mandate of the CMP. As Petitioner-Respondents have explained in detail, *see* Pet’rs’ Br. at 6 and 12, Congress has given the NRC *exclusive* jurisdiction to make safety determinations about new and existing nuclear power plants. Entergy argues that safety issues were fully addressed in the licensing of this plant, *see* Pet’rs’ Br. at 6, and is subject to comprehensive and stringent continuous regulation to “ensure[] that the [nuclear plant] maintains an acceptable level of safety.” *New Jersey Environmental Federation v. U.S. Nuclear Regulatory Commission*, 645 F.3d 220, 224 (3d Cir. 2011).

Furthermore, NYDOS may not contravene express limitations on the authority specified by the State’s CMP to address “whatever societal evils it perceives” with the continued operation of Indian Point. *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). If the State wishes to eliminate grandfathering under the CMP, it must seek to amend the law prospectively. *Zajdowicz v. N.Y. State &*

Local Police & Fire Ret. Sys., 699 N.Y.S.2d 844, 865 (3d Dep’t 1999) (“It is well settled that retroactivity is not favored in regulatory changes and, absent language requiring such a result, regulations will not be given retroactive effect.”); *see also* 16 U.S.C. § 1455(e) (outlining the necessary steps a state must take to amend or modify its current CMP).

Therefore, the State may not block a license extension on grounds that are not only outside the scope of the CMP, but also are within the sole purview of the NRC.

II. THE PREMATURE CLOSURE OF INDIAN POINT WOULD IMPAIR THE REGIONAL AND NATIONAL ECONOMY, DETER FUTURE INVESTMENT, AND THREATEN ELECTRIC GRID RELIABILITY.

Indian Point is a baseload generation facility, operating 24-hours a day to provide 25% of the electricity used by businesses and individuals in New York City and Westchester County.¹³ It has been estimated that closing Indian Point could directly “increase the costs paid by retail electric customers throughout the state by over \$2 billion per year.”¹⁴ This would equate to an increase in customers’

¹³ Entergy, *Indian Point Energy Center*, http://www.energy-nuclear.com/plant_information/indian_point.aspx (last visited May 2, 2016) (“Indian Point Energy Center”).

¹⁴ JONATHAN A. LESSER, *THE ECONOMIC IMPACTS OF CLOSING AND REPLACING THE INDIAN POINT ENERGY CENTER* 16 (Manhattan Inst. , 2012), *available at* <https://www.manhattan-institute.org/html/economic-impacts-closing-and-replacing-indian-point-energy-center-5988.html> (“Lesser 2012”).

electric bills of roughly \$772–\$1,132 per year.¹⁵ The indirect costs of closing Indian Point could be felt locally and also nationally. Such costs could include migration of close to 5,000 people out of New York within 20 years; more than 16,000 lost jobs nationally, including more than 5,000 locally; and dramatic impacts to governments due to lost tax revenue.¹⁶

The loss of other services to the community could also be significant. Indian Point has spent millions of dollars on multiple initiatives to research, protect, and replenish aquatic life in the Hudson River.¹⁷ And Indian Point employees are active in community organizations throughout Westchester County. In total, Indian Point and its employees, through payroll deductions and charitable giving, contribute more than \$240 million to the community annually, including support of state and local science, technology, engineering and math education.¹⁸

Closing Indian Point also could have severe repercussions for the reliability of the electricity grid, potentially leading to brownouts and other service disruptions. Indeed, a study commissioned by the New York City Department of Environmental Protection (“NYC DEP”) “clearly demonstrated that shutting [Indian Point] without a replacement is not a realistic option” because “it would

¹⁵ *Id.* at 17.

¹⁶ NUCLEAR ENERGY INSTITUTE, ECONOMIC IMPACTS OF THE INDIAN POINT ENERGY CENTER, 12 (2015) (“Indian Point Economic Impacts”).

¹⁷ Indian Point Economic Impacts at 14-16.

¹⁸ Indian Point Energy Center.

lead to unacceptable reductions in system reliability by 2016.”¹⁹ Indian Point is located in Zone H of the electric grid, a zone historically constrained by insufficient transmission capacity that limits transfers of electricity into the zone. Because of the location of Indian Point, the New York Independent System Operator (“NYISO”) determined in its 2014 Reliability Needs Assessment, that “[s]ignificant violations of transmission security and resource adequacy criteria would occur in 2016 if the Indian Point Plant were to be retired as of that time.”²⁰ Moreover, as the NYISO found, transmission solutions put forth by existing transmission owners will not be sufficient to solve the reliability violations the State will incur.²¹

As the NYISO also found, the loss of Indian Point capacity will cause the Loss of Load Expectation in the region to increase exponentially²² due to the expected annual growth in the area, “increas[ing] [the] chances of blackouts, [and] causing the state’s system to violate its own standards for reliability.”²³ This is an

¹⁹ Lesser 2012 at 16.

²⁰ New York Independent System Operator, *2014 Reliability Needs Assessment; Final Report* at 39 (Sept. 16, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Planning_Studies/Reliability_Planning_Studies/Reliability_Assessment_Documents/2014%20RNA_final_09162014.pdf (“NYISO Reliability Assessment”).

²¹ *Id.* at 40.

²² *Id.*

²³ The “Loss of Load Expectation” is a measurement of the expected frequency for an unplanned interruption in service or blackout. An expectation that there will be an unplanned interruption in one day of service every ten years (*i.e.*, 0.1 days per year) is deemed a

unacceptably high risk of electricity blackouts for New York City and the surrounding region.

But the costs of the unilateral closure of Indian Point by New York would be far broader. The manner in which a state uses, and is permitted by Courts to use, regulatory powers shapes its investment climate.²⁴ Regulatory uncertainty harms the investment climate, because investment outcomes then become entirely unpredictable. New York’s failure to abide by the plain terms of its own CMP would send a troubling message to all industry that there can be no reliance on the regulatory pronouncements of the State. The regulatory uncertainty created by allowing the NYDOS to unilaterally reject its own laws and regulations, to push a policy agenda contrary the clear language of the CMP, creates “a significant source of risk [that] can be especially burdensome for firms in capital-intensive and heavily regulated industries.”²⁵

In particular, protecting investment-backed expectations through grandfathering clauses is a well-established and sound practice that creates a stable

“substantial violation” of the Loss of Load Expectation. Closing Indian Point will almost immediately put the New York Control Area at 0.31 probability for interruption in electrical services. This figure increases exponentially through the NYISO’s study, soaring to 1.17 meaning there will likely be more than one day of unplanned interruption in electricity service per year by 2024. Lesser 2012 at 22.

²⁴ WORLD DEVELOPMENT REPORT, A BETTER INVESTMENT CLIMATE FOR EVERYONE 95, (The World Bank and Oxford University Press, 2005) *available at* <http://documents.worldbank.org/curated/en/2004/01/17409144/world-development-report-2005-better-investment-climate-everyone> (“World Development Report”).

²⁵ *Id.* at 102.

investment environment.²⁶ Grandfathering clauses “avoid[] forcing many parties to inefficiently alter the durable investments . . . made in compliance with [prior] law.”²⁷ They function “to limit the impact of a legal change and to achieve more complete prospectivity” of law.²⁸ And that is precisely why the NYDOS exempts from consistency review facilities like Indian Point “for which a substantial amount of time, money and effort have been expended.”²⁹

To retroactively eliminate the Indian Point grandfathering provision, effectively forcing the shutdown of Indian Point units, is the type of regulatory abuse that not only hurts the investment-backed expectations of the immediately-affected company, but also serves as a deterrent to future investments in the State. If the NYDOS acting alone is allowed to disrupt settled expectations by retroactively withdrawing the grandfathering protection outside of the legal procedure required to amend the CMP, it will “make[] it hard for firms to make long-term decisions about entering markets, choosing production technologies, or hiring and training workers” going forward.³⁰ Projects like Indian Point “are large,

²⁶ *Id.* (“When the regulatory change could have a big impact on major investments made on the basis of earlier regulations, it may also be appropriate to grandfather those investments . . .”).

²⁷ Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 77 (2008).

²⁸ Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV 1055 (1996-1997).

²⁹ CMP & Final EIS, Part II-9 at 1; 19 N.Y. Code, Rules & Regulations 600.3.

³⁰ World Development Report at 101-02.

capital-intensive projects, and investors will understandably require some measure of certainty to commit that capital.”³¹ If businesses cannot rely on clear grandfathering provisions of the type at issue here, it will discourage investment in New York to the detriment of its people.³²

CONCLUSION

The judgment of the Appellate Division should be affirmed.

Date: August 30, 2016

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³¹ Charles River Assocs., *Indian Point Energy Center Retirement Analysis* at 20 (Aug. 2, 2011), available at <http://www.crai.com/publication/indian-point-energy-center-retirement-analysis> (“CRA Retirement Analysis”).

³² *Cf.* World Development Report at 101-02 (“Evidence from firm-level surveys shows that improving the predictability of regulation can increase the probability of making a new investment by more than 30 percent.”).