21-337

IN THE
Supreme Court of the United States

George Berka,
Petitioner,
v.

Andrew M. Cuomo,
Respondent.

On a Petition for a Writ of Certiorari to
The Court of Appeals For The 2nd Circuit

PETITION FOR A WRIT OF CERTIORARI

Appearances:

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August 25th, 2021

QUESTION PRESENTED

Given our existing climate emergency, should the Indian Point Nuclear Power Plant be returned to service?

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1. #21-908, U.S. Court of Appeals for the 2nd Circuit, "Appeal", Filed: 04-21-2021, Disposed: 07-06-2021.
2. #20-cv-516, New York Northern District Court at Albany, "George Berka v. Governor Andrew M. Cuomo", Filed: 05-07-2020, Disposed: 03-26-2021.

INTRODUCTION

This case pertains to the premature shutdown of the Indian Point Nuclear Power Plant located in Buchanan, New York. Entergy, the plant's former owner, was in the process of seeking an additional 20-year license extension for the plant from the Nuclear Regulatory Commission, for its continued operation. Then-Governor Andrew Cuomo, however, forced Entergy to retire the plant early through obstructionist tactics, such as refusing to grant Entergy a permit to draw cooling water for the plant from the Hudson River. As a result, the plant's two operating reactors shut down in April of 2020, and in April of 2021, respectively.

The Petitioner had subsequently filed his complaint against Mr. Cuomo (#20-cv-516) in New York's Northern District Court at Albany on or about May 7th, 2020. In his complaint, the Petitioner had sought to have Indian Point returned to service. The grounds for the Petitioner's complaint were two-fold: environmental (climate change) and grid reliability concerns, which are further explained below. On March 26th, 2021, Chief Judge Glenn Suddaby dismissed the Petitioner's complaint on the grounds that the concerns in it were, essentially, "farfetched and unlikely." The Petitioner subsequently appealed the matter to the U.S. Court of Appeals for the 2nd Circuit on April 21st, 2021. The Court dismissed the matter as "moot" on June 2nd, 2021, since Indian Point's second reactor had already shut down by then, rendering the plant completely off-line. On June 15th, 2021, the Petitioner filed a Motion for Reconsideration with the Court, which was also denied on July 6th, 2021, bringing us to this Petition for Certiorari.

OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the 2nd Circuit (#21-908) and the New York Northern District Court at Albany (#20-cv-516) in this matter are listed in the Appendix. They are also available on line on the PACER web site.

JURISDICTION

The U.S. Court of Appeals for the 2nd Circuit had entered its final judgment on July 6th, 2021. Therefore, this Court's jurisdiction is hereby invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

It is now widely accepted that man-made climate change is real and that its destructive effects are beginning to accelerate with each passing year so much, that it constitutes a genuine emergency. It is also widely accepted that some of the most heavily-contributing human activities to climate change are electrical power generation, transportation, and heavy industry. In the arena of electrical power generation, nuclear power reactors are recognized as being *true carbon-free generators*, which makes them critically important in our efforts against climate change. Nuclear power reactors also posses the important attribute of being reliable as well as carbon-free, an attribute that is not shared by the renewable, wind and solar – powered generators. Therefore, it is of utmost importance that our existing nuclear power reactors be preserved, and kept in service for as long as possible.

But orchestrating the premature shutdown of the Indian Point Nuclear Power Plant, Mr. Andrew Cuomo had effectively taken a "giant step backwards" against climate

change, and placed us on exactly the trajectory that we cannot afford to be on. Indian Point had provided New York City and its surrounding communities with over 20% of their electricity, all of it carbon-free. This electricity has now been entirely replaced with carbon-emitting electricity from the Cricket Valley and Competitive Power Ventures natural gas-fired power plants. By replacing its nuclear power with gas, New York City has also sacrificed another important attribute in addition to carbon-free power: grid reliability.

Indian Point actually offered *tangible, physical protection* to the people of New York City and the surrounding communities because it was able to store a prolonged fuel supply (of greater than one year) on site, and was therefore able to operate reliably during periods of extreme cold, such as the Polar Vortex. This was in contrast to the natural gas-fired electrical generators that replaced Indian Point, which rely on "just-in-time" delivery of their fuel, and must sometimes cut back their output during periods of extreme cold, either because the gas is prioritized for home heating, or because the gas is physically unable to move through the pipelines in sufficiently large quantities, due to its pressure drop at very low temperatures. Wind and solar sources also cannot be fully relied upon during cold spells, because these periods are often accompanied by calm, wind-less weather, as well as cloud cover, which blocks the sun. Similarly, coal piles may also freeze, potentially rendering coal-fired generators useless as well, and there are virtually no coal-fired generators left in the Northeast. This leaves only one type of generator, with over a year's worth of fuel deep in its core, under its reinforced concrete dome, exceptionally well-suited to deliver large amounts of continuous, reliable

power in these types of extreme weather events, when it is needed the most – the nuclear power plant.

There have been cases during past Polar Vortex events in the Northeast when oil-fired "peaker plants" had to be brought on line, due to the inability of the gas plants to continue producing sufficient power, for the reasons mentioned above. These oil-fired plants typically have their fuel oil delivered by barge, but frozen rivers hampered this method of delivery, leaving tanker trucks as the only viable option. In areas where roads were obscured by ice, snow, or accidents, some peaker plants actually came perilously close to running out of fuel, which would have resulted in power outages. Since virtually all residential boilers, be they natural gas or oil-fired, also need *electricity* to operate in addition to their fuel, power outages during such a period of extreme cold may well have been life-threatening. A Reuters article from October of 2014 entitled "U.S. Power Grid Survived Polar Vortex, But Only Just", shows just how close we came, and that it was only a matter of time before taking these sorts of gambles would "bite us." Well, unfortunately, our "luck ran out" this past February in Texas, when a "perfect storm" of prolonged, cold weather, combined with an over-reliance on unreliable wind, solar, and gas-fired electrical generators, caused over 100 people to freeze to death. The Plaintiff had attempted to call out exactly this type of dangerous situation in his Complaint 1:20-cv-00516 before the Northern District Court, where Judge Suddaby dismissed it as "essentially far-fetched and unlikely." It doesn't seem so "far-fetched" now, does it? This Court is therefore urged to take action where the last two courts did not. Otherwise, these unfortunate events may continue to repeat themselves. The solution for preventing these tragedies in the future is fairly

straightforward, and basically comes down to just the fuel type used for the electrical generators. Nuclear power reactors therefore deserve preferential treatment, specifically because of their fuel type, which gives them their inherent reliability, unmatched weather resiliency, and hence great value.

The Plaintiff Had Correctly Predicted the Deaths in Texas (10) Months Before they Actually Happened

The Plaintiff's "core argument" in Complaint # 1:20-cv-00516 was that he may freeze to death if a power outage occurs during an event of extreme cold, and that Indian Point helped to guard him from this. He made this argument on May 7th, 2020, a *full (10) months* before a similar event occurred in Texas this past February, causing over 100 people to suffer exactly this fate. This fact should be weighed heavily by this Court, since it clearly demonstrates the potential consequences of removing these reliable nuclear generators from service, and replacing them with *unreliable*, wind, solar, and natural-gas-fired electrical generation.

New York City's Electrical Grid May Now Lose Two Thirds of its Reliability without Indian Point

In his sister Complaint EL21-61-000, filed before the Federal Energy Regulatory Commission, the Plaintiff had also attempted to analyze the adverse effects that Indian Point's closure will have on the local electrical grid. With Indian Point on line, the grid was fairly "healthy", with a 1-day blackout expected to occur about once every 32 years. Now, with Indian Point gone, this value had decreased to 9.2 years, even below New

York State's minimum standard of one blackout every ten years. So the electrical grid is now only 29% as reliable as it was in 2020, when both units of Indian Point were on line. Would you be willing to purchase an automobile, for example, that was only 29% as reliable as a competitor's automobile? If not, then why would we want to tolerate such a low reliability standard for our electrical grid, one on which critical facilities, such as hospitals, depend?

NYISO's Risk Assessments Were Not Completed

Each year, the NYISO (New York Independent System Operator) prepares a "Reliability Needs Assessment" (RNA) which, among other things, assesses the reliability of the electrical grid. In the years 2014, 2015, and 2016, the RNA's raised significant "red flags" about grid reliability without Indian Point. For example, the 2014 RNA noted that, "Significant violations of transmission security and resource adequacy would occur in 2016 if the Indian Point Plant would retire as of that time." Without Indian Point, an alarmingly high LOLE ("Loss of Load Expectation" or a blackout) of 0.31 was calculated, indicating a blackout every 3.2 years. This is *three times higher* than the State's minimum, and *ten times higher* than when Indian Point was in service.

The predictions offered in the 2015 and 2016 RNAs were equally alarming. The summary in the 2015 RNA stated that "Substantial uncertainties exist in the next ten years that will impact system resources... Depending on the units affected, the NYISO may need to take swift action to maintain grid reliability." Similarly, the 2016 RNA declared that, "This scenario simulates the retirement of the Indian Point Energy

Center by removing about 2600 megawatts of capacity from Zone H and finds that *significant violations of resource adequacy criteria* would occur immediately in 2017." The Zonal Capacity Risk Assessments are also of particular significance, since the *location* of a generator relative to a given service area is important, in addition to its *capacity*. Indian Point is located close to the areas of peak electricity demand, while the three gas-fired plants slated to replace it are more scattered, with one located in Bayonne, New Jersey, another in Orange County, and the third in Dutchess County. Operational experience has shown that the existing zonal arrangement is acceptable, even during periods of peak demand, provided Indian Point is operational. What is not known, however, is whether the new, more dispersed plant locations, will be acceptable as well. This is why the "Zonal Capacity Risk Assessments" are conducted. The 2018 RNA made it clear that the Zonal Capacity Risk Assessment for Zone H *was not yet complete* and noted that, "the impacts of removing capacity on the reliability of the transmission system and on transfer capability is highly location dependent." For this reason, the Complainant asks that the *complete reliability analysis* for the closure of Indian Point, including any outstanding Zonal Capacity Risk Assessments, be finalized and evaluated prior to Indian Point's closure. If the reliability criteria cannot be met without Indian Point, then Indian Point should remain in service.

Other Important Takeaways from NYISO's Analyses

NYISO's analyses communicated to the government of the State of New York, in no uncertain terms, that their electrical grid will be *significantly less reliable* with Indian Point gone. They issued what amounted to several stark warnings. New York's

government, intentionally or not, failed to act on these warnings. So the Complainant is now asking this Court to please step in and do this for them, plain and simple. Some of the key questions now follow. The fact that they are written in question form is intentional. They are deliberately meant to be "thought provoking", to encourage this Court to "dig deeper", and to fully examine the issues at hand. NYISO's "Generator Deactivation Assessment" does require some research, "homework", and "reading between the lines" to better understand. At first glance, it may not appear very informative to a non-technical person, or a layman. Fortunately, when reading the assessment, the Complainant had "help", in the form of Mr. Specter's well written, "Reliability Analysis for Riverkeeper," which is available upon request. This report helps to bring many things in NYISO's Assessment to light, and only encourages one to seek additional information, leading to the following questions for NYISO. The Complainant asks this Court to consider these questions carefully, as the answers to them may expose unacceptable reductions in grid reliability without Indian Point on line, and may thus justify the need for Indian Point to remain in service.

New Grid Reliability Levels Relative to the 2019 Baseline

In Table 1 on Page 4 of NYISO's Assessment, the "LOLE" figure increases from 0.028 in 2019 to 0.108 in 2021, and finally to 0.168 in 2027. "0.108 / 0.028" yields 3.8, and "0.168 / 0.028" yields 6.0. Does this mean that in 2019, the electric grid was 3.8 times as reliable as it will be in 2021, after Indian Point is fully off line? Does it also mean that in 2019, the electric grid was fully (6) times as reliable as it will be in 2027? Stated another way, does this also mean that the grid will be 74% less reliable in 2021, and

84% less reliable in 2027, than it was in 2019? If so, then these are *significant* reductions in reliability, are they not?

Zoning Capacity Assessments

Has a "Zoning Capacity Assessment" been performed for Zone "H", which includes Westchester County? In Figure 28 in NYISO's 2018 "Reliability Needs Analysis", Zone "H" has been identified as "EZR", which means that it "Exceeds Zonal Resources". These Zoning Capacity Assessments are performed because a generator's *location* relative to an area of high electrical demand (such as a major, metropolitan area) is also important, in addition to the generator's size, or generating capacity. This is because certain areas are more constrained than others in both electrical generating capacity and transmission capability, (i.e., having sufficient power lines to get the power from where it is produced to where it is needed). Westchester County, for example, is already fairly highly constrained, but the arrangement we have today works satisfactorily well, with no issues, because Indian Point is right in the center of it, and powerful, at over 2,000 megawatts. Hence, ample power is now available close to where it is needed, and does not have to travel far to get there. This may not be the case with Indian Point gone, however, because its replacement plants (Bayonne, CPV, and Cricket Valley), are much farther away from where the power is needed. So, should this "Zoning Capacity Assessment" be performed before Unit 3 of Indian Point shuts down, to make certain that no issues arise? If this Assessment cannot be performed before April 30, 2021, should Unit 3 be kept on line until it can be completed? If the results of this

Assessment determine that Indian Point is indeed required, should Indian Point be kept on line permanently? Logic would dictate that the answers here be "yes."

Aging Infrastructure

Next, is it wise to rely too heavily on New York City's aging natural gas plants and infrastructure? A considerable fraction (22%) of these plants is beyond the age of where 95% of similar technology plants have already been retired. Some have been given ratings of "imminent deactivation" by NYISO, which means that they can fail at any time. A failure of any one of these plants would only exacerbate the above situation, and decrease the grid reliability even further. Indian Point, though also close to 50 years old, is in a different situation, however. It is especially robust to begin with, has been well maintained, and was expected to be licensed by the N.R.C. for continued operation until at least the year 2035. With continued maintenance, it may be able to operate even longer.

The Role of the Bayonne Gas Plant

The Bayonne gas plant is already connected from Bayonne, New Jersey, to Brooklyn via a 6.5 mile under-sea cable. This would suggest that is it already being used to supply power to New York City. In fact, isn't the Bayonne plant already being used as a "peaker" plant? If it is, then has the plant been given "double credit", in that it will not be able to replace as much of Indian Point's lost power as was claimed? If so, will this cause the grid reliability to decrease even below the values mentioned in NYISO's 2017 Assessment?

Carbon-Free Sources Were Promised for Indian Point's Replacement, but Not Delivered

Lastly, the commitment that Governor Cuomo made to the people of New York on January 9th, 2017, the day that the closure of Indian Point was announced, should be noted. The Governor had pledged that, "Replacement Power Will Be in Place that *Adds No New Carbon* and Will Have Negligible Impact on Ratepayers." As we now know all too well, at least the first half of this pledge *had not been met*, as Indian Point is being replaced almost entirely with *fossil-fired power*. Given the dire state of the climate situation today, this single item should be considered a serious failure, perhaps serious enough to warrant *returning Indian Point to service* on this basis alone.

It is also interesting to note that NYISO's own "RNA" reliability analyses from the years 2014, 2015, and 2016 issued stern warnings about the grid reliability being, essentially "intolerably low" if Indian Point had closed at that time, before the replacement CPV and Cricket Valley plants were built. Then, lo and behold, Cricket Valley Energy Center came on line only ten days before Unit 2 of Indian Point was shut down, in April of last year. Could this have been a coincidence? The schedules for Cricket Valley's opening and Indian Point's shut-down seem to have coincided quite well. It typically takes years to plan, design, and build a large electrical generating facility, such as Cricket Valley. Could it be that the Governor *knew full well* that Indian Point would be replaced with gas when he made that pledge to the people of New York in January of 2017? Given our current, dire climate situation, this would only add insult to injury.

Indian Point and Mr. Biden's Bold Climate Agenda

Recently, President Biden had unveiled a bold, new climate plan that promises to yield numerous benefits, both economic and environmental. His plan calls for the expanded use of wind and solar power, as well as electric vehicles. Money for nuclear research and the development of the next generation of nuclear power reactors is included as well, and the prospect of the many high-quality jobs that these efforts will generate is also mentioned. These are all great things, to be sure. Unfortunately, the next generation of nuclear reactors will probably not arrive soon enough, and the proposed wind and solar sources are not sufficiently energy-dense to make any meaningful progress on the climate front, in the limited amount of time that we have. Only our *existing nuclear power reactors*, such as Indian Point, can do that. They are safe, mature, proven out, paid for, running reliably, clean, carbon-free, and have *many years of useful life* left in them.

Perhaps it would be worthwhile to consider modifying the proposed Climate Plan in this regard. The "energy portion" of the plan should instead consider having existing nuclear reactors as the *primary backbone* of our energy system, with the renewable sources being secondary. This would enable the bulk of our most reliable and carbon-free electrical generating capacity [nuclear] to be preserved, thereby maximizing the possible benefit for grid reliability and the climate. This may also be one of the most economically attractive options there is, as it might be possible to simply return many of the recently-shuttered nuclear plants to service with minimal rework. Billions of dollars have been promised for this new climate plan. Only a small fraction of this

amount would be required to put our existing assets to good use. What should be avoided at all costs is the current and widespread practice of replacing shuttered nuclear with gas.

Should Indian Point be Nationalized?

If an agreement for continued operation of the plant cannot be reached with the current owners, perhaps one option might be for the Federal Government to simply nationalize Indian Point. Though this approach might seem controversial at first glance, it may prove to be a viable option. Some immediate benefits would be the potential availability of federal funding for the plant, and the option to place it under federal jurisdiction. This move, if exercised, could potentially resolve many of the "pitfalls" that led to the closure of the plant in the first place. Once under Federal control, Indian Point's "chances of survival" could immediately improve, as new options for it could present themselves. For example, the plant could be operated by a government entity, such as the Department of Energy, via Argonne National Laboratory (Idaho Labs), or leased back to a qualified and interested nuclear operator. The two main benefits of this approach would be that, firstly, the plant would remain in service, and thus continue to provide its important environmental, grid reliability, and economic benefits. Secondly, under Federal jurisdiction, it would be insulated and protected from the hostile influences that sought to bring about its demise in the first place. It would be important make every reasonable effort to fairly compensate all existing owners for the plant, and eminent domain should be considered only as a last resort.

Should Other Shuttered Plants be Returned to Service as Well?

Along these same lines, it may also be worthwhile, for the Federal Government, to consider acquiring and returning to service some of the other reactors that have been shuttered in recent years, such as New Jersey's Oyster Creek, Massachusetts' Pilgrim, California's San Onofre, Wisconsin's Kewaunee, and Iowa's Duane Arnold. To do this economically, these reactors would have to be granted waivers on the post-Fukushima upgrades, and be "grandfathered-in", and permitted to resume operation largely "as they were". This approach could return a total of 4600 megawatts of clean, safe, affordable and reliable electricity to the grid.

The Parable of Dusco Popov and Pearl Harbor

If we had information that would have prevented the tragedy at Pearl Harbor, should we have acted on it? It turns out that we did, and the failure to do so is still seen as a far – reaching, and embarrassing failure of our intelligence community. Dusco Popov was a Yugoslavian national, who was recruited as a spy by the German military intelligence service in the early years of the Second World War. Having witnessed atrocities committed by the Nazis against his people, Popov developed a deep aversion toward Nazism, and decided to become a double agent for the British. Perhaps his best known contribution to the war effort was his convincing of the Germans that the D-Day landings would take place in Calais, France, instead of Normandy. This is credited with saving numerous allied lives, and perhaps helping to insure the success of the allied invasion itself, as it concentrated the bulk of the German defenses at Calais, and thus reduced them considerably in Normandy.

Not as well known is the information that Popov had supplied to then – F.B.I. director J. Edgar Hoover, warning him that an attack by the Japanese on Pearl Harbor was imminent. This is strongly corroborated by a telegram that Popov had in his possession when he arrived in New York, in August of 1941. Hidden on the face of the telegram was a microdot message to Popov, asking for defense information about U.S. and Canadian air forces, as well as a series of questions the Japanese had asked their German allies to answer. One third of these questions pertained to the defense installations around Pearl Harbor. The Germans had requested "sketches showing the exact locations of the Hickam, Wheeler, and Kaneohe airfields, as well as installations at Pearl Harbor, and detailed information about dredging, depth of water, torpedo nets, anchorages, and the like." This led Popov to conclude that an attack by the Japanese on Pearl Harbor was likely, and he informed Hoover that it would probably take place "before the end of that year."

It is not fully known if Hoover had chosen to not pass this information onto his superiors, or if his superiors had been informed, but had simply not acted on it. It is suspected that Hoover may have elected to not pass along Popov's message at all, because he distrusted Popov, owing to the fact that Popov was a double agent, and was therefore, "doubly untrustworthy." Regardless of what may have transpired there in the months leading up to the attack on Pearl Harbor, one thing remains virtually certain. Relaying this information to the White House and the Naval Command could have had a profound effect on how the events of the Second World War had unfolded. At the very least, given adequate warning, the U.S. Pacific Fleet could have sailed out to sea, where it would have been in a more advantageous position to face the incoming

Japanese fleet. The tight confines of the harbor and the clustering of the ships so close together made the attack all that much more devastating. Perhaps the lives of over 2,400 sailors could have been spared if only Popov's message had been passed along to the proper channels.

"How can this story possibly be relevant to the matter at hand," one might ask?

"Actually, quite a bit," it turns out. The old sayings of, "An ounce of prevention is worth a pound of cure," and "Hindsight is 20-20," come to mind here.

We have a historic opportunity here, much like J. Edgar Hoover had in August of 1941, to "make the right call." The consequences of the decision to keep Indian Point on line or not could prove to be equally profound. Although the prospect of world domination by hostile powers is not at stake here, perhaps something equally significant is – the future habitability of our planet. Deciding to keep Indian Point in operation could set a positive precedent – the precedent of doing whatever is necessary to keep existing nuclear power reactors in operation, as the backbone of our national, carbon-free energy system. Thus, it could place us on a path towards reduced carbon emissions, and a correct response to this climate crisis, starting today.

Likewise, choosing to shutter Indian Point, and replacing it with natural gas-fired generation could set an equally far – reaching, though *negative* precedent. It could "pave the way" for additional nuclear reactors to be retired in the near future, and replaced with additional gas-fired generation. This would place us on exactly the "wrong path" of increased carbon emissions, which would only exacerbate the climate crisis, and make future efforts to address it all that much more difficult.

We are at an important juncture here today. The choice is ours.

STATUTORY PROVISIONS INVOLVED

Since the U.S. Court of Appeals for the 2nd Circuit had entered its final judgment on July 6th, 2021, this Court's jurisdiction is hereby invoked under 28 U.S.C. § 1254 (1).

REASON FOR GRANTING THE PETITION

The Petitioner believes that this Court should grant this petition for the following reason: This matter is of a significant public importance because it gives this Court the opportunity to take action and to set an example on perhaps one of the most pressing issues of our time – climate change. By returning Indian Point to service, this Court can help to reverse this disturbing and harmful trend of nuclear power plant closures, which have recently only exacerbated this climate emergency.

CONCLUSION

In light of the above, the Petitioner hereby requests this Court to grant his Petition for a Writ of Certiorari. This Court has one final opportunity to reverse this deeply flawed decision, and to return Indian Point to service. It is not too late, as heavy demolition on the plant has not yet begun, and the plant may still be saved.

Respectfully submitted,

George Berka George Berka

George Berka,
Petitioner

August 25th, 2021