UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW YORK SHIPPING ASSOCIATION, INC., on behalf of its members; METROPOLITAN MARINE MAINTENANCE CONTRACTORS' ASSOCIATION, INC. on behalf of its members; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf of its members and affiliated locals in the Port of New York and New Jersey; LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf of its members; and LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf of its members, Plaintiffs, -against- WATERFRONT COMMISSION OF NEW YORK HARBOR, Defendant.	**Case No. 2:13-CV-07115 - SDW-MCA**

MEMORANDUM OF LAW OF PLAINTIFFS
NEW YORK SHIPPING ASSOCIATION, INC. AND
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In 1953 Defendant Waterfront Commission of New York Harbor (Commission) was created by the States of New York and New Jersey, with the approval of the Congress of the United States, to eliminate corruption and other criminal activities prevalent at that time in the longshore industry. Sixty years later the Commission has taken upon itself to become involved in matters never envisioned at the time of its creation. The Commission has changed the long-established procedure for and is interfering with the hiring of workers desperately required by the employer-members of Plaintiffs New York Shipping Association, Inc. (NYSA) and Metropolitan Marine Maintenance Contractors' Association, Inc. (MMMCA). It has also announced its intention to become actively involved in collective-bargaining matters in contravention of both its governing statute and federal labor law. Plaintiffs NYSA and International Longshoremen's Association, AFL-CIO (ILA) seek a preliminary injunction directing the Commission to process requests for new employees in accordance with the procedure that had been in place for more than 40 years and to cease its interference with their collective bargaining agreements.

FACTS

Background

When the Waterfront Commission Compact (Compact), Pub. L. No. 83-252, ch. 407, 67 Stat. 541 (Aug. 12, 1953), was created, it granted the Commission *inter alia* authority to license workers, known as deep-sea longshoremen and deep-sea checkers and clerks, who load and unload cargo on and off vessels calling at the Port of New York and New Jersey (NY-NJ Port), and to maintain a list of those workers, known as the deep-sea longshoremen's register. At the same time, the Compact expressly prohibited the Commission from interfering with the rights of employers and their employees to engage in collective bargaining:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing.
>
> * * *
>
> This compact is not designed and shall not be construed to limit in any way any rights of longshoremen . . . or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise . . . .

See id., 67 Stat. at 557.

During the 1960's a technological advance known as containerization, which involved the use of large, reusable metal receptacles carrying upwards of 60,000 pounds of cargo that can be loaded on and off-loaded from ocean vessels unopened, eliminated the traditional piece-by-piece loading and unloading of ships. Containerization significantly reduced the number of longshoremen required to load and unload vessels, resulting in unprecedented job displacement. The collective-bargaining parties addressed that job displacement through the adoption of the

Guaranteed Annual Income (GAI) Program in the 1964 NYSA-ILA Collective Bargaining Agreement (NYSA-ILA CBA). Under the GAI Program, qualified longshoremen were guaranteed wages, whether or not they actually performed any work. *See* Certification of James R. Campbell, dated December 11, 2013 (Campbell Cert.), Exh. 3 at 4.

In 1966, the Legislatures of New York and New Jersey each adopted the closed-register statute, often referred to as section 5-p in response to the GAI Program. S*ee* N.J. STAT. ANN. § 32:23-114 (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920 (McKinney 2002). Section 5-p gave the Commission the power to open and close the longshoremen's register, thereby controlling the size of the workforce. The Commission closed the register that year, and except for three openings in the late 1960's, the register remained closed for more than 30 years.

In 1969, the state legislatures broadened the definition of longshoreman to include a new class of longshore workers, known as "A" registrants,[1] who do not load and unload ships but perform services ancillary to the loading and unloading operations. *See* N.J. STAT. ANN. § 32:23-85(6) (West 1990); N.Y. UNCONSOL. LAWS § 9905(6) (McKinney 2002). Most "A" registrants are employed by maintenance contractors that repair and maintain the containers, chassis, and cargo-handling equipment used in stevedoring operations. The Commission's authority with respect to "A" registrants is limited to licensing these workers and maintaining a separate list of these licensed "A" register longshoremen. From 1969 until 1982, the Commission did not apply section 5-p to "A" registrants, and in 1982, at the request of the Commission, the state legislatures amended section 5-p specifically to exclude them. *See* Campbell Cert., Exh. 1 at 10-12.

[1] The term "A" registrants is derived from the prefix "A" before the multi-digit number that appears on Waterfront Commission licenses issued to "A" registrants. *See Bozzi v. Waterfront Comm'm of N.Y. Harbor,* No. 90 Civ. 0926 (MGC), 1994 WL 606043, at *3 (S.D.N.Y. Nov. 3, 1994). The Waterfront Commission licenses assigned to deep-sea longshoremen and checkers/clerks do not contain any letter designation.

The longshore industry adapted to the "A" register legislation by creating separate workforces. NYSA's members employed the deep-sea longshoremen and checkers/clerks in accordance with the NYSA-ILA CBA, and MMMCA's members employed the "A" registrants in accordance with their collective bargaining agreement (MMMCA-ILA CBA) with Plaintiffs Local 1804-1, International Longshoremen's Association, AFL-CIO (ILA Local 1804-1) and Local 1814, International Longshoremen's Association, AFL-CIO (ILA Local 1814). *See* Affidavit of John Nardi sworn to December 6, 2013 (Nardi Aff.) at ¶¶ 3, 10, 11.

Over the years labor shortages in the deep-sea longshore workforce were addressed not by the Commission's opening of the deep-sea register but through resolutions adopted by the Commission to authorize the use of temporary workers and subsequent legislative enactments by the states to permit those workers to be permanently added to the register. *See, e.g.,* N.J. STAT. ANN. § 32:23-114(4)(c), (d,), (e), (f), (g) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(5) (c), (d,), (e), (f), (g) (McKinney 2002). By the 1990's this procedure had become outdated.

In 1999, the state legislatures amended section 5-p to permit controlled openings of the deep-sea register through the use of an employer-sponsorship procedure. Under this new procedure, the Commission determines the total number of new workers needed by the industry by job category and "bring[s] the number of eligible longshoremen into balance with the demand for longshoremen's services within the Port of New York district without reducing the number of eligible longshoremen below that necessary to meet the requirements of longshoremen in the Port of New York district." *See* N.J. STAT. ANN. § 32:23-114(2)(b) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(2)(b) (McKinney 2002). Included with that amendment was a provision requiring sponsoring employers to "certify that the selection of the persons so sponsored [by them] was made in a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the states of New York and New Jersey dealing

with equal employment opportunities." *See* N.J. STAT. ANN. § 32:23-114(1)(e) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(4) (McKinney 2002).[2]

Interference With The Hiring Of "A" Registrants

The Commission had always maintained the separate identities of the two workforces under the two collective bargaining agreements. All that changed in May of this year, when the Commission informed NYSA that it would now permit NYSA's members to hire "A" registrants. *See* Nardi Aff. at ¶ 14. In response, NYSA and the ILA informed the Commission that they had amended their collective bargaining agreement to adopt the exact same hiring procedure that MMMCA's members had been using for more than 40 years to hire their "A" registrants.[3] *See id*. at ¶ 14. Under that hiring procedure, which the Commission had never previously objected to, all candidates for "A" registrant positions are referred to the employers by the union. *See* Nardi Aff. at ¶ 14; Affidavit of John D. Atkins sworn to November 26, 2013 (Atkins Aff.) at ¶ 8; Affidavit of Anthony Ray sworn to December 4, 2013 (Ray Aff.) at ¶ 6.

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[2] In 2007, the Legislature of New Jersey, where more than 80% of the NY-NJ Port's cargo is stevedored and where more than 80% of the hours of deep-sea longshoremen are worked, approved an amendment to section 5-p that would repeal its closed-register provisions. *See* N.J. STAT. ANN. § 32:23-114 (West Supp. 2013). The amendment provides that it will become operative, when a similar amendment is passed by the New York Legislature. *See id*. Bills are currently before the New York Legislature to do just that. *See* S. 03984, Reg. Sess. (N.Y. Mar. 4, 2013); Assemb. 04636, Reg. Sess. (N.Y. Feb. 7, 2013).

[3] The two labor contracts, the NYSA-ILA CBA and the MMMCA-ILA CBA, both state,

> With respect to new employees, the Employer shall notify the Union of the number and classifications of employees required. It shall be the responsibility of the Union to furnish the necessary employees requested by the Employer. The Employer shall have the right to determine the competency and qualifications of the employees referred. In the event that the Union is unable to supply qualified employees within thirty (30) days, then the Employer may secure the employees from any available source . . . .

On August 26, 2013, the Commission sent NYSA an e-mail advising that it would be adopting an amendment to Section 4.4(d) of its Rules and Regulations (hereinafter "Rule 4.4(d)") that would apply to employers of "A" registrants a requirement that had previously applied only to employers of deep-sea longshoremen. *See* Nardi Aff. at ¶ 15. Although the amendment would alter the hiring procedure that MMMCA's members had used for decades, the Commission never advised MMMCA that it was considering the amendment. MMMCA only learned of it through NYSA.

The Commission's amendment incorporated into Rule 4.4(d) the same certification set forth in the 1999 amendment to section 5-p, which requires an employer to certify that the selection of new employees "was made in a fair and nondiscriminatory basis in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities." *See* Nardi Aff. at Exh. 3. NYSA and MMMCA objected to that amendment on the grounds that the certification requirement lacks statutory authority and would alter the longstanding collectively-bargained methodology for hiring and registering "A" registrants. *See* Nardi Aff. at ¶ 16. But the Commission adopted the amendment and is interpreting it in a way that prevents the employers from hiring new "A" registrants. *See* Nardi Aff. at ¶ 18.

The certification refers to the *selection* of new employees, which is precisely what the employers have been doing for 40 years: they select their new employees from the applicants referred by the union. About 90% of these "A" registrants are skilled mechanics. The employers are willing and able to certify that this selection is in accord with the precepts of the federal and state laws relating to employment discrimination. But the Commission won't accept their certifications because the Commission interprets the term "selection" to include recruitment and referral. Since the labor contracts assign those two processes to the union, the Commission will

not allow the employers to hire new "A" registrants. The Commission's prohibition is causing the employers to suffer irreparable harm, which will continue unless the Commission's unlawful conduct is restrained by this Court.

ARGUMENT

I.

STANDARD OF REVIEW

The United States Court of Appeals for the Third Circuit has identified four factors that must be satisfied for a court to issue a preliminary injunction:

> (1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.

Opticians Ass'n v. Indep. Opticians, 920 F.2d 187, 191-92 (3d Cir. 1990). This memorandum of law will demonstrate the presence of all four factors and the appropriateness of a preliminary injunction prohibiting the Commission from enforcing the amendment to Rule 4.4(d) until this Court has decided its legality.

II.

PLAINTIFFS WILL BE SUCCESSFUL ON THE MERITS

This memorandum will demonstrate that the amendment to Rule 4.4(d) imposing the section 5-p certification requirement to the hiring of "A" registrants is thrice flawed. First, it derives its authority from the certification amendment to section 5-p that is invalid under the Compact Clause of the Constitution because it does not have congressional consent. Second, even if the certification requirement of section 5-p had the approval of Congress, it still would not authorize the challenged amendment to Rule 4.4(d), because section 5-p by its own terms does not apply to "A" registrants. Finally, even if the certification provision of section 5-p

applied to "A" registrants, the Commission's interpretation of that provision to disallow any certification of any "A" registrant if the new employee has been referred by the union in accordance with the labor contracts is directly at odds with the holding of the Third Circuit Court of Appeals in *Waterfront Comm'n of N.Y. Harbor v. Sea Land Serv., Inc.*, 764 F.2d 961, 966-67 (3d Cir. 1985), that the Compact and section 5-p prohibit the Commission from interpreting the requirements of section 5-p in a manner that would modify, limit, or restrict collectively-bargained hiring rights.

A. The Certification Provision In Section 5-p Is Invalid Because It Lacks Congressional Consent

1. The Law Of Compacts

The Compact Clause of the Constitution of the United States provides, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . . " U.S. CONST. art I, § 10, cl. 3. It is well established that the Waterfront Commission Compact is an interstate agreement that requires congressional consent. *See Waterfront Comm'n of N.Y. Harbor v. Constr. & Marine Equip. Co.*, 928 F. Supp. 1388, 1391 (D.N.J.), *aff'd without op.*, 103 F.3d 115 (3d Cir. 1996); *NYSA-ILA Vacation & Holiday Fund v. Waterfront Comm'n of N.Y. Harbor*, 732 F.2d 292, 296-98 (2d Cir. 1984), *cert. denied*, 469 U.S. 852 (1984). Congress has given its express consent to the Waterfront Commission Compact in a unique manner. It consented not only to the Compact as written but also to future enactments by both states that further the purposes of the Compact:

> Amendments and supplements to this compact *to implement the purposes thereof* may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other.

Pub. L. No. 83-252, art. XVI, § 1, 67 Stat. 541, 557 (1953) (emphasis added).

Congress did not give carte blanche consent in advance to all future amendments enacted by both the New York and New Jersey Legislatures but only to those amendments that further the original purposes of the Compact. *See Constr. & Marine Equip. Co.*, 928 F. Supp. at 1403. If a proposed amendment does not advance the Compact's original purposes, then it would require a new, additional congressional consent in order for the amendment to be valid under the Compact Clause. For example, in 1970, the Legislatures of New Jersey and New York attempted to adopt amendments to the Compact to grant the Commission authority to regulate activity at the region's airports, thereby greatly expanding the scope of the Commission's function into an area not contemplated by Congress in 1953. The states, therefore, could not rely upon the advance consent but had to obtain a new congressional consent to transform the Waterfront Commission Compact into the Waterfront and Airport Commission Compact. This consent was not granted, and these 1970 amendments to the Compact never went into effect. *See Critics Question Airlines' Figures on Cargo Thefts*, N.Y. Times, May 30, 1979.

2. Section 5-p As Originally Enacted Falls Within Congress's Advance Consent

The courts have applied these principles in establishing that section 5-p as originally enacted in 1966 fell within the advance consent of Congress. *See Constr. & Marine Equip. Co.*, 928 F. Supp. at 1402-03. Section 5-p as originally enacted in 1966 was consistent with the original purposes of the Compact. It authorized the Commission to control the size of the longshore workforce by closing the deep-sea register and reopening it from time to time to add additional workers as needed. In vesting the Commission with this power, the evils of racketeering, kickbacks, and other forms of corruption that are fostered by an oversupply of labor could be eliminated. Indeed, the standards set forth in article IX of the Compact, *see* Pub. L. 83-252, art. IX, 67 Stat. 541, 551 (1953), were incorporated in section 5-p, a factor that convinced the court in *Constr. & Marine Equip. Co.* to conclude that the original section 5-p was an

"'enactment in furtherance' of the compact or an 'amendment [or] supplement to the compact to implement the purposes thereof,'" thus falling within Congress's advance consent. *See* 928 F. Supp. at 1392.

3. The Certification Provision In The 1999 Amendment To Section 5-p Lacks Congressional Consent

Applying this same analysis to the certification provision added in the 1999 amendment of section 5-p leads to a different result. The genesis of the language of the certification provision is a resolution issued by the Commission on September 5, 1978, a few weeks after the Commission was sued by the National Organization for Women (NOW) for employment discrimination relating to the exercise of its section 5-p authority. *See NOW v. Waterfront Comm'n of N.Y. Harbor*, 460 F. Supp. 84 (S.D.N.Y. 1978). The resolution approved the temporary registration of 750 persons as longshoremen, "said persons to be selected and referred to the Commission . . . on a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities." *See* Campbell Cert., Exh. 2 at 37. Ostensibly, this language was a defense mechanism designed to improve the Commission's litigation posture in the *NOW* case. Indeed, the ink was hardly dry on the resolution, when it became an exhibit to an affidavit sworn to September 19, 1978, in opposition to NOW's motion for a preliminary injunction prohibiting the implementation of a section 5-p determination. Since the Commission prevailed in the *NOW* case, it became the Commission's practice to include this language in all future temporary registrations under section 5-p to immunize itself from employment-discrimination claims.

In 1999, when section 5-p was amended in its entirety to permit controlled openings by the Commission of the deep-sea register through the use of an employer-sponsorship program,

the language of the resolution found its way into the amendment. The amendment contained a provision requiring sponsoring employers to "certify that the selection of the persons so sponsored was made on a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the states of New York and New Jersey dealing with equal employment opportunities." *See* N.J. STAT. ANN. § 32:23-114(1)(e) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(4) (McKinney 2002).

From 2000 until 2007, there were nine controlled openings under the 1999 amendment to section 5-p that added approximately 2,000 longshoremen to the deep-sea register. For all these new employees the sponsoring employers provided the certifications required by the 1999 amendment. The Commission never raised an objection to any of these certifications, even though it was common knowledge at the time that the union locals in the Port referred all new registrants. As a result of these openings the demographics of the portwide deep-sea workforce today show that African-Americans comprise 25% of the workforce, Hispanics 13%, and women 11%.[4]

Until now there was no reason to challenge the validity of the certification amendment because it was not being used to obstruct the hiring of new employees but merely to shield the Commission from liability should it be brought in as a defendant in an employment-discrimination lawsuit. The Commission's new administration, however, has now perverted the purpose of the certification provision to allow it to refuse a request for new employees, if in its opinion the industry is violating federal or state employment-discrimination laws. Under these

[4] These statistics are in line with the 2010 United States Census Bureau statistics for the relevant labor market of the NY-NJ-PA Metropolitan Area, which indicate that African-Americans comprise 17.8% of the total population and Hispanics 22.9%. More than 77% of the deep-sea workforce reside in 17 counties in New Jersey, and there are three times as many longshore workers residing in Pennsylvania than in Manhattan.

circumstances, there is now a need to adjudge the validity of the certification provision under the Compact Clause.

The Commission has publicly stated that its mission is to use the certification provision to enhance diversity in the longshore workforce. If this is the purpose of the certification provision, then it is an invalid amendment to the Compact because it lacks congressional approval. Diversity was not one of the purposes of the original Compact. Indeed, since the employment laws mentioned in the certification did not exist in 1953, when the Compact came into existence, neither Congress nor the state Legislatures could have intended that increasing diversity in the workforce was a purpose of the Compact to be furthered by the Commission. Indeed, the legislative history reveals that the collective-bargaining safeguards in article XV of the Compact make clear that "[t]here is nothing in the statute which is designed or can reasonably be construed to interfere in any way with the right of the waterfront industry to select its own employees." *See* Summary of Waterfront Commission Act, N.Y. UNCONSOL. LAWS, vol. 65, at p. 484 (McKinney 2002).

The certification provision is tantamount to the earlier attempt by the New York and New Jersey Legislatures to extend the Commission's regulatory authority to airports in the bistate area. Both the certification legislation and the airport legislation expand the Commission's authority into areas not encompassed in the original purposes of the Compact. Both, therefore, fall outside the advance consent granted in 1953. Absent a new consent by Congress, both are invalid because they violate the Compact Clause.

4. Lack of Congressional Consent Cannot Be Cured By Section 5-p's Public-Interest Standard

It cannot be seriously argued that Congress gave its advance consent to the Commission's taking upon itself the power to enforce the employment-discrimination laws over which it has no

jurisdiction or expertise to impose without a due-process hearing a devastating remedy that those laws do not themselves impose, *viz.*, the deprivation of an employer's right to hire needed employees.[5]

The Supreme Court of the United States has already warned about the inappropriateness of an agency's becoming involved in the employment-discrimination realm without having statutory authority to do so. In *NAACP v. FPC*, 425 U.S. 662 (1976), the National Association for the Advancement of Colored People (NAACP) sought to have the Federal Power Commission (FPC) impose a rule "requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees." *See id*. at 664. The NAACP's proposed rule would have required the FPC's regulated companies to adopt affirmative-action programs to combat discrimination. *See id*. at 664.

The Court stated that the key issue was whether Congress had given the FPC the authority to combat discrimination. *See id.* at 665. The NAACP argued that the Power and Gas Acts charged the FPC with advancing the public interest and that ending discrimination is in the public interest. *See id.* at 666. The Court ruled that "the use of the words "public interest" in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *See id.* at 669.

The Court ruled that the use of the words "public interest" in the governing statute was not a directive to the FPC to seek to eradicate discrimination but instead was a charge to promote

[5] The Commission's lack of expertise is evident from the woeful lack of diversity among the Commission's own personnel. No minority has ever held the position of Commissioner, Executive Director, Director of Law, Licensing & EIC, and Chief of Police. The Commission has approximately 97 employees, *see* Waterfront Commission of New York Harbor Annual Report 2011-2012, at 8, of which only one is an African-American and only a handful are Hispanics, *see* Steve Strunsky, *Waterfront Commission Disputes Lawsuit by Union and Shippers Charging Hiring Interference*, The Journal of Commerce, Nov. 25, 2013. The Commission's record brings to mind the proverb, "Physician, heal thyself." *Luke* 4:23-24 (King James).

the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. *See id*. at 670. The concurring opinion admonished, "To suggest . . . that the FPC could deny a license on account of a regulatee's discriminatory employment practices . . . is to thrust the Commission into a complex, volatile area for which Congress has already assigned authority to the EEOC." *See id.* at 674.

Section 5-p contains a limited public-interest standard that reads, "To protect the public interest of the port of New York district." *See* N.J. STAT. ANN. § 32:23-114(2)(g) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(2)(g) (McKinney 2002). This standard was added as part of the 1999 amendment that also created the certification requirement for deep-sea longshore workers. The New York State Senate explained the public-interest standard by noting problems the industry was facing in obtaining skilled labor needed to operate highly technical and sophisticated container-handling and computer equipment and that this situation threatened the viability of the NY-NJ Port and its ability to attract new business. The memorandum submitted to the New York Legislature in support of the 1999 Amendment to section 5-p stated,

> While the "new" 5-p facilitates the obtaining of new business, it will continue to protect the job security of the existing work force of longshorepersons. Any "opening" of the register will be controlled, and will not only be in full accordance with the Commission's mandate to balance the number of longshorepersons with the demand for their services but will "protect the public interest of the port of New York district." By judicious exercise of these powers, the Commission can meet the labor needs of the industry, while insuring that GAI payments will continue to diminish and eventually disappear. The provisions of the amended statute that provide for employer sponsorship of new registrants not only guarantee that each employer will receive its fair share of needed labor but will allow that employer to train its personnel so that they become skilled in operating that employer's particular equipment and knowledgeable in all aspects of that employer's specific operation.

See N.Y. SPONS. MEMO., 1999 Ch. 431, at 4 (Westlaw 2013). Thus, the "public interest of the port of New York district" under section 5-p is the continued commercial competiveness of the

Port. It had nothing to do with a public interest in a diverse workplace and cannot at this time be reprogrammed for this purpose without informed Congressional review and consent.

The Commission has refused to permit the employers to hire new "A" registrants because it thinks the union's involvement in the referral of candidates violates employment-discrimination laws. If the Commission is truly concerned about a potential violation of those laws, it should refer those matters to the EEOC or the appropriate state civil-rights agency rather than impede the industry's hiring of needed workers.

B. The Commission's Amendment To Section 4.4(d) Of Its Rules And Regulations Requiring Employers Of "A" Registrants To Submit Section 5-p Certifications Lacks Statutory Authority

In the 44 years that "A" registrants have been added to the longshoremen's register, the Commission has never required employers to submit a section 5-p certification. That changed on September 9, 2013, when the Commission revised Section 4.4(d) of its Rules and Regulations to require it. The legal deficiency in the amendment to Rule 4.4(d) is that the statutory derivative for the amendment is section 5-p, and that section does not apply to "A" registrants.

The certification provision in section 5-p came into being in 1999, when at the Commission's urging the Legislatures of New York and New Jersey enacted a wholesale amendment of section 5-p. The legislatures in both states passed a new, amended and restated section 5-p that would apply only to the deep-sea longshoremen's register. *See* Campbell Cert., Exh. 3 at 3, 9-11, 21; Exh. 4 at 7, 9, 10. This was clear to Senator John J. Marchi, the sponsor of the legislation in the New York Senate, who in a letter to the New York Governor's Counsel stated that the legislation he introduced at the request of the Commission "amends § 5-p of chapter 882 of the Laws of 1953 to empower the waterfront commission to make determinations to accept applications for inclusion in the '*Deep-Sea' longshoremen's register* upon petitions of sponsoring employers." *See* Campbell Cert., Exh. 3 at 8 (emphasis added).

In its memorandum to the New York Legislature in support of the 1999 Amendment, the Commission left no doubt that the amended section 5-p would apply, as had its predecessor, only to deep-sea longshoremen, not "A" registrants:

> - As noted below, Section 5-p was enacted in 1966 to empower the Waterfront Commission to open and close the "deep-sea Register of longshorepersons." *See* Campbell Cert., Exh. 3 at 12.
>
> - Effective April 7, 1966, the States of New York and New Jersey enacted the Commission's version of a bill to empower the Commission to open and close the "deep-sea" Register. *See* Campbell Cert., Exh. 3 at 14.

Excluding "A" registrants from the reach of section 5-p is consistent with the longstanding interpretation of section 5-p that the Commission has adhered to, since "A" registrants were first covered by the Compact pursuant to the 1969 Amendment.

The Commission has trumpeted in federal court that "it has consistently interpreted [section 5-p] as applying only to the deep-sea longshoremen's register and not to the A Register." *See Bozzi v. Waterfront Comm'n of N.Y. Harbor*, No. 90 Civ. 0926, 1994 WL 606043, at *7 (S.D.N.Y. Nov. 3, 1994). Indeed, the Commission's memorandum of law in that action states, "Ever since the inception of the closed register statute in 1966, the Commission has interpreted that statute to apply and has applied the same to 'deep-sea' registrants only." *See* Campbell Cert., Exh. 5 at 9.

In 1982, the Commission obtained an amendment to section 5-p codifying this interpretation. The Commission's memorandum in support of that amendment states,

> Since 1969, the Commission has administratively excluded these persons from the "closed Register" statute since the reason for the enactment of that statute does not pertain to such registrants. In order to clarify the status of such registrants with respect to the existing law, the Commission is now proposing that an exception be made for them in the "closed Register" statute.

* * *

> The Commission also believes that those persons who have been and are being added to the Register pursuant to the 1969 amendments to the Act ["A" registrants] should be excluded from the closed Register provisions.

See Campbell Cert., Exh. 1 at 10-11. The 1982 amendment now appears in section 5-p. *See* N.J. STAT. ANN. § 32:23-114(4)(b) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(5)(b) (McKinney 2002).

The *Bozzi* court observed that "[t]he Commission contend[ed] that the [1982 Amendment] was merely a housekeeping measure which did not change the rights or status of the A Registrants . . . , but simply clarified that A Registrants were not subject to the closed register provisions in [Section 5-p]."[6] *See Bozzi,* 1994 WL 606043, at *5. It has been "the Commission's long-standing administrative practice of excluding ['A' registrants] from the operation of that statute." *See* Campbell Cert., Exh. 5 at 10.

To evaluate the legality of an agency's rule or regulation, a court must measure it against the statutory directive. In doing so, courts look primarily to the plain meaning of the statute, drawing its essence from the express language. *See Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 404 (1988); *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167, 170-71 (2001); *Prestol Espinal v. Attorney General of United States*, 653

[6] In *Bozzi*, the Commission requested that the court grant deference to its interpretation of section 5-p, since that interpretation had been adhered to for a long period of time. *See* Campbell Cert., Exh. 5 at 17-18. Since the Commission has abruptly changed that decades-long interpretation and has failed to announce an acceptable reason for doing so, its new interpretation is not entitled to deference. *Cf. Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-44 (1983) (an agency's change in interpretation is arbitrary and capricious when it fails to provide a reasoned explanation for that change); *CBS Corp. v. FCC*, 663 F.3d 122, 138, 145-57, 151-52 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012) (an administrative agency "cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure.")

F.3d 213, 217-218 (3d Cir. 2011); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 248-49 (3d Cir. 2005); *Finkelstein v. Sullivan*, 924 F.2d 483, 489-91 (3d Cir. 1991). An agency's "failure to respect the unambiguous textual limitations" of a statutory provision is "fatal" to its regulatory efforts. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007); *see also Vill. of Barrington. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (an agency may not "excee[d] the statute's clear boundaries").

The plain language of the 1999 amendment to § 5-p is "clear and unambiguous" ─ it applies solely to the "Deep-Sea" longshoremen's register, which is separate and apart from the register for the "A" registrants. *See Woodall*, 43 F.3d at 248-49; *Prestol Espinal*, 653 F.3d at 221-23. If the Legislatures of New York and New Jersey intended to apply the 1999 amendment to the "A" registrants, it would have drafted it that way. Since both legislatures chose not to apply the 1999 amendment to the "A" registrants, the Commission's "failure to respect the unambiguous textual limitations" of that section is "fatal" to the validity of the amendment to Rule 4.4(d). *See Fin. Planning Ass'n*, 482 F.3d at 490.

The imposition of the certification at issue in this case required legislative authority. That authority was provided in the 1999 Amendment but only for the deep-sea register. The amendment to Rule 4.4(d) seeks to impose the certification requirement with respect to applications for inclusion in the "A" register for which there is no statutory authority. Indeed, the Commission itself has consistently followed an interpretation that section 5-p does not apply to "A" registrants. For it now to make a 180° turn and seek to apply the section 5-p certification provision to "A" registrants cannot be accomplished by a regulation that is contrary to the legislative restriction in the 1999 Amendment. What the Commission, as an agency in the Executive Branch that lacks legislative power, must do to achieve its new found objective is to do what it did in 1999 and obtain legislation from both the New York and New Jersey

Legislatures, granting it authority to extend the certification provision of section 5-p to the "A" registrants. It cannot by regulation obtain that which requires legislative authority.

C. The Commission's Interpretation Of The Certification Provision Of Amended Rule 4.4(d) Violates The Compact By Interfering With The NYSA-ILA CBA

For more than a decade the Commission had accepted certifications provided by NYSA's members under section 5-p with respect to deep-sea longshoremen. During this time certifications were provided for more than 2,000 longshoremen. None was challenged by the Commission, even though it was well aware that the local unions in the Port referred all of these workers. The Commission transplanted the identical certification language of section 5-p into the certification provision of Rule 4.4(d) to require the same employers to certify their selection of "A" registrants. But the Commission informed the employers that for that certification to be valid the employers must be involved not only in the selection of the persons to be hired but also in the recruitment and referral of the candidates for the position. The Compact does not give the Commission jurisdiction over the union. As a result, the Commission's interpretation is an attempt to pressure the members of NYSA so that they deny ILA Locals 1804-1 and 1814 their right under the labor contracts to refer individuals for employment.

By its terms the certification in amended Rule 4.4(d) applies to the *selection* of the "A" registrants. The Commission, however, is altering the plain meaning of "selection" to include not only the selection of the persons hired but also their recruitment and referral by other sources. The Commission made this switch only after it was informed that NYSA and the ILA had amended their collective bargaining agreement to adopt the same union-referral process for the hiring of "A" registrants that had been used without any objection by the Commission for more than 40 years. Under the Commission's new construct of the certification language, employers are unable to hire the new workers they desperately need, unless they bypass the

union-referral system set forth in their labor contracts and actively go out and recruit new employees on their own.

Section 5-p, from which the certification provision is derived, states that "[n]othing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article fifteen of this act." *See* N.J. STAT. ANN. § 32:23-114(3) (West Supp. 2013); N.Y. UNCONSOL. LAWS §9920(3) (McKinney 2002); *Waterfront Comm'n of N.Y. Harbor v. Sea Land Serv., Inc.*, 764 F.2d 961, 966 (3d Cir. 1985). Article XV of the Compact, which is entitled, "Collective Bargaining Safeguarded," contains two provisions that expressly prohibit the Commission's construction of the certification language because of its effect upon the plaintiffs' collective-bargaining rights.

The first provision provides,

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing.

N.J. STAT. ANN. § 32:23-68 (West 1990); N.Y. UNCONSOL. LAWS § 9868 (McKinney 2002). The second states,

> This compact is not designed and shall not be construed to limit in any way any rights of longshoremen . . . or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise . . . .

N.J. STAT. ANN. § 32:23-69 (West 1990); N.Y. UNCONSOL. LAWS § 9869 (McKinney 2002).

A summary prepared by all the government entities of New York and New Jersey involved in the drafting and passage of the Waterfront Commission Compact unequivocally

reveals that the collective-bargaining safeguards in article XV of the Compact granted the industry "freedom of choice in the selection of employees."

Collective Bargaining Safeguarded

> There is nothing in the statute which is designed or can reasonably be construed to interfere in any way with the right of the waterfront industry to select its own employees, or with the right of industry and labor to bargain collectively and agree on any method for the selection of longshoremen and port watchmen by way of seniority, experience, regular gangs or otherwise in conformity with the license, registration and employment information center provisions of the statute. Because of the apparent misunderstanding of this policy reflected at the public hearings, express declaration to this effect has been included as Article XV [§§ 9868, 9869] in the Compact.
>
> Similarly, to obviate any misunderstanding, Article XV [§§ 9868, 9869] includes an express statement that the statute is not designed and shall not be construed to limit labor's rights.

See Summary of Waterfront Commission Act, N.Y. UNCONSOL. LAWS, vol. 65, at p. 484 (McKinney 2002).

Article XV of the Compact preserves for both labor and management in the longshore industry in the NY-NJ Port the collective-bargaining rights that are prescribed in federal labor law. Collective bargaining under federal labor law is premised on the concept of government noninterference and neutrality. *See NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 288 (1972); *H.K. Porter v. NLRB*, 397 U.S. 99, 108 (1970); *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 489-90 (1960). The Supreme Court of the United States explicitly admonished, "Our labor policy is not presently erected on a foundation of government control of the results of negotiations." *See Ins. Agents*, 361 U.S. at 491 (citations omitted); *see also H.K. Porter Co.*, 397 U.S. at 108 (labor policy is "based [upon] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.").

When tested against this standard, it is clear that the Commission's conduct is an impermissible intrusion upon collective bargaining. There can be no more direct influence upon the collective-bargaining process than the Commission's rejecting the terms of the parties' collective bargaining agreement over mandatory subjects of bargaining[7] and seeking to supplant those terms with its own judgment as to the best way to recruit and refer new employees.

The Third Circuit Court of Appeals has previously defined the limits imposed by article XV of the Compact on the Commission's section 5-p authority. *See Waterfront Comm'n of N.Y. Harbor v. Sea Land Serv., Inc.*, 764 F.2d 961 (3d Cir. 1985). In *Sea Land* the Commission addressed an apparent conflict between the collective-bargaining rights protected by article XV and the Commission's powers under section 5-p. A collective bargaining agreement required the employer to obtain labor from a union hiring hall. The Commission determined that these employees had to be registered, which could not be done because the Commission had closed the section 5-p register. The employer, therefore, was placed in the conundrum of having to hire registered workers who were members of another union, which would undermine the hiring-hall provisions in its collective bargaining agreement.

The Third Circuit determined that there were two interpretive guides in the Compact that governed the resolution of this conflict. The first was the collective-bargaining safeguards of article XV, and the second was section 5-p itself. *See id.* at 965-66. The latter declares that "nothing in [section 5-p] shall be construed to modify, limit or restrict in any way any of the

[7] Mandatory subjects of bargaining are those that "vitally affect" employees, such as those related to wages, hours, and other terms and conditions of employment. *See generally NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 348-349 (1958); *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 176-177 (1971). Hiring, referrals, and recruitment of new employees are mandatory subjects of bargaining. *See Sw. Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986) (hiring exclusively by union referral); *S. Cal. Gas Co.,* 346 N.L.R.B. 449, 453 (2006) (selection of a source from which to hire employees).

rights protected" by the former.[8] The court of appeals remarked, "This express reference to article XV dictates that the closed-register provision must be interpreted so as not to modify, limit or restrict collectively bargained hiring rights." *See id*. at 966. The court of appeals, therefore, concluded that article XV trumped section 5-p and required that section 5-p "be construed as not precluding registration of otherwise eligible [union] members" both those currently working for the employer and those currently on the hiring-hall list. *See id.* at 966. The Third Circuit summed up its holding as follows:

> Although this modification may appear at first glance to go beyond the literal language of the statute, in fact it ensures that the district court's order is faithful to the requirement that no restriction be placed on current collectively-bargained hiring rights.
>
> * * *
>
> This result would appear to be not only consistent with but actually required by the statutory language respecting collective bargaining agreements.

See id. at 966-67 (footnote omitted).

The *Sea Land* case is dispositive of the validity of the Commission's interpretation of the section 5-p certification it embodied in amended Rule 4.4(d). The Commission's interpretation limits and restricts a collectively-bargained union-referral process that had been until now accepted without challenge by the Commission for 40 years. As in *Sea Land,* this action by the Commission violates article XV of the Compact and the section 5-p provision that states, "Nothing in this section shall be construed to modify, limit or restrict in any way any of the rights protected by article fifteen of this act." N.J. STAT. ANN. § 32:23-114(3) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(3) (McKinney 2002).

[8] This exact provision remains in the current version of section 5-p. *See* N.J. STAT. ANN. § 32:23-114(3) (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9920(3) (McKinney 2002).

III.

PLAINTIFFS' MEMBERS WILL BE IRREPARABLY HARMED IF AN INJUNCTION IS DENIED

The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that it will experience harm that cannot adequately be compensated after the fact by monetary damages. *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000). "Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill." *Guardian Life Ins. Co. v. Estate of Cerniglia*, 446 Fed. Appx. 453, 456 (3d Cir. 2011) (*citing Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 726 (3d Cir. 2004)); *see also Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998). The affidavits submitted on this motion demonstrate that NYSA's members have not been able to operate their facilities as they require because the Commission has established unnecessary roadblocks to the hiring of new mechanics.

NYSA's members have invested hundreds of millions of dollars on infrastructure improvements and new equipment. Container-handling equipment sits idle because there are not enough mechanics to maintain and repair the machines. Because of the shortage of mechanics, those in the workforce are being burnt out from the excessive hours on the job. The pending exodus of retirees in April 2014 under the enhanced window pension program in the recently negotiated NYSA-ILA CBA will exacerbate these shortages. Their replacements need to be hired now to enable them to undergo necessary on-the-job training. The shortage of mechanics causes an underutilization of cargo-handling equipment which reduces productivity and increases costs. *See* Atkins Aff. at ¶¶ 18, 20, 21; Ray Aff. at ¶ 12; Pelliccio Aff. at ¶ 7.

Ocean carriers will not tolerate inefficient cargo operations caused by labor shortages that increase their costs when calling [at] the NY-NJ Port. *See* Nardi Aff. at ¶ 8. The NY-NJ Port

operates in a competitive business environment vis-à-vis other ports. Carriers are acutely aware of inefficiencies or productivity reductions and will take their cargo elsewhere to avoid the increased costs. *See* Atkins Aff. at ¶ 23. "Ocean carriers and beneficial cargo owners are certainly in a position to divert their cargoes from the NY-NJ Port. They have done so as recently as this past summer . . . ." *See* Nardi Aff. at ¶ 7.

Once the cargo is diverted, Plaintiffs' members will have no recourse against the Waterfront Commission for monetary damages for lost revenues, lost wages, and lost union dues. First, the damages will likely be incalculable. Second, any claim in federal court for money damages against the Waterfront Commission may be barred by the Eleventh Amendment to the United States Constitution. *See NOW v. Waterfront Comm'n of New York Harbor,* 460 F. Supp. 84, 87, fn. 9 (S.D.N.Y. 1978) ("We are now inclined to believe, without finally deciding, that the Eleventh Amendment would preclude any damage award to plaintiffs.") (*citing Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977) (In interpreting compact between New York and New Jersey, the court held "Consequently we do not construe the sue-and-be-sued clause . . . to be a waiver of the states' Eleventh Amendment immunity in the federal courts simply because Congress has approved the compact.")).

When a plaintiff faces significant economic harm but cannot sue a governmental agency for money damages, harm is irreparable as a matter of law. *See, e.g., Temple Univ. v. White,* 941 F.2d 201, 215 (3d Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992) (Eleventh Amendment bar to an award of retroactive damages against the commonwealth clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature.); *NCAA v. Christie,* 926 F. Supp. 2d 551, 578 (D.N.J. 2013), *aff'd,* 730 F.3d 208 (3d Cir. 2013) ("Plaintiffs demonstrate an inadequacy of a remedy at law because New Jersey, by operation of the Eleventh

Amendment, cannot be forced to pay retroactive money damages."). Accordingly, without the requested injunction, Plaintiffs' members will suffer harm that is irreparable.

IV.

DEFENDANT WILL NOT SUFFER ANY HARM IF AN INJUNCTION IS GRANTED

The Commission would not be harmed, if an injunction is granted. An injunction would merely require the Commission to apply the same policies and procedures that it has applied for more than four decades. In other words, all Plaintiffs ask is to maintain the *status quo* pending litigation. "One of the goals of the preliminary injunction analysis is to maintain that *status quo*, defined as the last, peaceable, noncontested status of the parties." *Conestoga Wood Specialties Corp. v. Sec'y of HHS*, 724 F.3d 377, 417 (3d Cir. 2013) (*citing Kos Pharms., Inc. v. Andrx Corp.,* 369 F.3d 700, 708 (3d Cir. 2004)). The Commission would still determine whether the individuals who are hired meet the statutory requirements for being added to the longshoremen's register,[9] and it would still be able to revoke the registrations of individuals who no longer meet those requirements.

The Commission cannot claim that temporarily enjoining the certification amendment to Rule 4.4(d) would somehow undermine its authority because the Commission itself has already granted exceptions to the certification requirement. It has given a dispensation from the certification to any applications that were pending prior to the effective date of the amendment. Just recently it announced that it would magnanimously allow the industry to hire 10 mechanics

[9] Under the original Compact, an applicant shall be added to the register unless the applicant has been convicted of certain crimes, advocates terrorist or treasonous activity, or is a danger to the public peace or safety. *See* Pub. L. 83-252, art. VIII, § 3, 67 Stat. 541, 545-46, 550 (1953). Later amendments added additional criminal convictions, misrepresentation or refusal to disclose information on an application, and association with a member or associate of an organized crime or terrorist group as disqualifying conditions. *See* N.J. STAT. ANN. § 32:23-92 (West Supp. 2013); N.Y. UNCONSOL. LAWS § 9912 (McKinney Supp. 2013).

to be allocated among the various terminals without having to provide the certification required by the amendment. *See* Campbell Cert., Exh. 6.

If Plaintiffs succeed on the merits, as this brief demonstrates that they should, it will be because the Commission is acting in contravention of the law. If Plaintiffs do not succeed, the Commission's new policies and procedures will merely have a delayed start.

V.

THE ISSUANCE OF AN INJUNCTION IS IN THE PUBLIC INTEREST

Not only is the Commission's conduct irreparably harming the Plaintiffs' members, it is hamstringing the Port of NY-NJ, interrupting the free flow of commerce and eventually harming the local economy. The free flow of commerce is in the public interest. *See, e.g., Kobell v. Suburban Lines*, 731 F.2d 1076, 1096 (3d Cir. 1984) (*Aldisert, J., concurring*) (*quoting Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 141 (3d Cir. 1975) regarding "the public interest in the free flow of commerce."). Likewise, the health of the local economy is a proper consideration in the public-interest analysis. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011).

In this case, the 25 million inhabitants of the Greater New York Metropolitan Area depend upon the NY-NJ Port for the products they consume, process, and sell. The NY-NJ Port is the source of over 170,770 direct jobs in the region and supports 279,200 total jobs in the 26-county metropolitan area. In 2010, the NY-NJ Port generated nearly $11.6 billion in personal income and $37.1 billion in business income. *See* Campbell Cert., Exh. 7 at 3. In 2012, NYSA's carrier members transported nearly 3.3 million containers to the NY-NJ Port, making it the third largest port in the United States. The NY-NJ Port handles approximately 33 percent of the cargo transported to the East Coast of the United States, benefiting 80 – 90 million consumers within

24 hours of the port and having access to nearly all the consumers in the United States via railroad. *See* Nardi Aff. at ¶ 4. The NY-NJ Port is an invaluable resource that is the lifeblood of the economies of New York and New Jersey.

Any long-term slowdown in the Port's efficient operation could result in a loss of cargo to other ports, which will in turn cause lost income to NYSA's members and lost jobs to the ILA's members and to employees in the region as a whole. Thus, absent an injunction, the Commission's conduct will undoubtedly have a detrimental effect on the economy of the NY-NJ-PA Metropolitan Area. The Commission should not be permitted to straddle the port like the Colossus of Rhodes standing in judgment of an entire industry that affects tens of millions of people and tens of billions of dollars in commerce. The businesses of NYSA's members, the jobs of ILA's members, and the economy of the region should not be held hostage to the whim of two self-professed masterminds who seek to control and manipulate matters over which they have no authority.

CONCLUSION

Because all the standards for a preliminary injunction exist: Plaintiffs have a probability of success on the merits, they will be irreparably harmed if an injunction is not issued, while the Commission will suffer no harm from the issuance of an injunction, and an injunction is in the public interest, this Court should issue a preliminary injunction, prohibiting the Commission from implementing its amendment to Section 4.4(d) of its Rules and Regulations pending this Court's final disposition of this case.

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