

S E R V E D

February 12, 2007

FEDERAL MARITIME COMMISSION

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WASHINGTON, D. C.

DOCKET NO. 02-08

ODYSSEA STEVEDORING OF PUERTO RICO, INC.

v.

PUERTO RICO PORTS AUTHORITY

DOCKET NO. 04-01

INTERNATIONAL SHIPPING AGENCY INC.

v.

PUERTO RICO PORTS AUTHORITY

DOCKET NO. 04-06

SAN ANTONIO MARITIME CORPORATION and ANTILLES CEMENT CORPORATION

v.

PUERTO RICO PORTS AUTHORITY

**MEMORANDUM AND ORDER RECONSIDERING DENIAL OF STAY,
DENYING PETITION TO STAY PROCEEDINGS PENDING APPEAL ON
RECONSIDERATION, AND GRANTING LEAVE TO APPEAL DENIAL OF STAY TO
THE COMMISSION**

On January 9, 2007, I denied a petition to stay proceedings pending appeal filed by Respondent Puerto Rico Ports Authority (PRPA) in these three cases. On January 23, 2007, PRPA filed a Motion for Reconsideration of Orders Denying Petition to Stay Proceedings Pending Appeal or in the Alternative Motion for Leave to Appeal Denial to the Commission. For the purpose of ruling on PRPA's motion for reconsideration only, I will consolidate the three proceedings and issue one order applicable to all three cases. 46 C.F.R. § 502.148.

BACKGROUND

Each of these three complaints alleges that PRPA violated the Shipping Act of 1984. 46 U.S.C. § 40101, *et seq.* The cases are at different stages of development and proceeding separately in the Office of Administrative Law Judges. PRPA raised sovereign immunity as a defense in each case.

In the case brought by Odyssea Stevedoring of Puerto Rico, Inc. (Docket No. 02-08), PRPA raised sovereign immunity in a motion for summary judgment. On September 15, 2004, the presiding administrative law judge issued an oral ruling denying PRPA's motion and denying its request for a stay pending appeal to the full Commission. The oral ruling was reduced to writing in a ruling issued November 9, 2004. On September 16, 2004, the Commission issued an order staying the case to permit the Commission to review whether PRPA is entitled to sovereign immunity.

In the case brought by International Shipping Agency Inc. (Docket No. 04-01), PRPA filed a motion to dismiss based in part on sovereign immunity. On September 17, 2004, the administrative law judge denied the motion. On September 21, 2004, the Commission issued an order staying the case to permit the Commission to review whether PRPA is entitled to sovereign immunity.

In the case brought by San Antonio Maritime Corp. and Antilles Cement Corp. (Docket No. 04-06), PRPA filed a motion to dismiss based in part on sovereign immunity. On September 27, 2004, without deciding the motion, the administrative law judge referred the issue of PRPA's sovereign immunity to the Commission.

PRPA had also moved in the Office of Administrative Law Judges to consolidate the three cases. The Chief Administrative Law Judge designated one judge to decide the motion, which was still pending when the Commission took jurisdiction of the sovereign immunity issue. The Commission did not consolidate the cases, but it did treat the cases "in a similar manner for the purpose of determining whether PRPA is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico." *Odyssea Stevedoring of Puerto Rico, Inc. v. PRPA*, Docket No. 02-08, *International Shipping Agency Inc. v. PRPA*, Docket No. 04-01; *San Antonio Maritime Corp. v. PRPA*, Docket No. 04-06, slip op. at 2 n.1 (Nov. 30, 2006) (FMC Order). The Commission received briefs from the parties, accepted into the record an amicus brief from the Commonwealth of Puerto Rico, and conducted oral argument.

On November 30, 2006, the Commission issued its Order. The Commission noted that "the Supreme Court had altered traditional notions of determining arm of the state status through its pronouncements that state dignity, rather than risk to the state treasury, is the preeminent purpose of state sovereign immunity." *Id.* at 12, citing *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). Subsequent to the Court's decision:

the Commission's test to determine whether an entity is an arm of the state includes a review of the structure of the entity and the risk to the state treasury. In reviewing the structure of the entity, three factors are considered: 1) the degree of control that the state exercises over the entity at issue; 2) whether the entity deals with local or statewide concerns; and 3) the manner in which applicable law treats the entity.

Id. at 12, citing *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 30 S.R.R. 358, 368-369 (2004) and *Carolina Marine Handling v. South Carolina State Ports Authority*, 30 S.R.R. 1017, 1029 (2006). Applying this test and examining Supreme Court, circuit court, and its own precedent, the Commission found “that PRPA is not an arm of the Commonwealth of Puerto Rico and is therefore not entitled to the protections of sovereign immunity; and [found] that PRPA is also not entitled to sovereign immunity as an agent of the Commonwealth of Puerto Rico.” *Id.* at 31. The Commission remanded the proceedings “to the Office of the Administrative Law Judge for further proceedings consistent with this Order.” *Id.* at 32.

On December 13, 2006, PRPA filed a petition with the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission’s November 30, 2006, Order. *Puerto Rico Ports Authority v. Federal Maritime Commission*, No. 06-1407 (Dec. 13, 2006) (petition for review filed). On December 14, 2006, PRPA filed with the Commission a single Petition to Stay Proceedings Pending Appeal with all three cases identified in the caption seeking stay in all three cases. As noted, the cases had not been consolidated. Therefore, I treated the motion as if it had been filed in each of the three cases. I issued separate and substantially identical orders in each case denying the petition.

In my consideration of the petition for stay, I used the following test:

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958). I placed on PRPA, the party seeking the

stay, the burden of demonstrating that a stay of the proceedings should be entered. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985).

I noted that PRPA's petition for a stay was based on the irreparable harm to its sovereign immunity it claims would result if these cases proceed while the District of Columbia Circuit reviews the Commission's decision. While I found that "PRPA sets forth a strong argument that its immunity from suit, if found to exist, could be irreparably harmed if this matter were to proceed," (See, e.g., *Odyssey Stevedoring of Puerto Rico, Inc. v. PRPA*, Docket No. 02-08, slip op. at 3 (Memorandum and Order Denying Petition to Stay Proceedings Pending Appeal) (citation omitted)), I held that "[i]rreparable harm by itself is insufficient to justify a stay." *Id.*

I found PRPA's argument with regard to the other factors to be far less compelling.

The Commission's Order, a final agency decision controlling on me, found that PRPA does not have sovereign immunity. In its petition for a stay, PRPA states "the Court of Appeals *may* reach a . . . determination" that the Commission's decision is wrong and that PRPA is entitled to sovereign immunity, but does not explain how or why the court should reach a different result. Therefore, it has not met its burden of demonstrating that it is likely to prevail on the merits of the appeal. Of course, if PRPA were not to prevail before the court, failure to impose a stay would not cause it any harm. PRPA does not address at all the third and fourth factors - possible harm to others, and the public interest - set forth in the *Wisconsin Gas/Virginia Petroleum Jobbers* test. See *General Carbon Co. v. Occupational Safety & Health Review Commission*, 854 F.2d 1329, 1330 (D.C. Cir. 1988) (motion for stay denied when moving party failed to address some of the criteria necessary to decision).

Accordingly, I find that PRPA has established that it may suffer irreparable harm if a stay is not granted pending review by the District of Columbia Circuit. It has not met its burden on the other factors set forth in the *Wisconsin Gas/Virginia Petroleum Jobbers* test, however. Therefore, it has not met its burden of demonstrating that a stay should be imposed pending the court's review of the Commission's decision of November 30, 2006.

Id. at 4 (footnote omitted).

PRPA'S MOTION FOR RECONSIDERATION

PRPA makes several arguments in its motion. First, it argues that I applied the wrong test in my consideration of the motion. While conceding that the Commission has applied the factors set forth in *Virginia Petroleum Jobbers* in other contexts, PRPA claims “they have *not* been applied in evaluating stays ordered in the Commission’s three recent cases concerning sovereign immunity.” (Motion for Reconsideration at 8 (emphasis in original).) Second, PRPA argues that even if the *Virginia Petroleum Jobbers* standard were the proper test, only the irreparable harm and public interest factors should be considered. Third, it argues that even if all four *Virginia Petroleum Jobber’s* factors are applied, it is entitled to a stay pending review of the Commission’s decision by the District of Columbia Circuit.

DISCUSSION

I. PRPA’S REQUEST.

PRPA’s petition in the District of Columbia Circuit seeks review of an Order of the Commission in which the Commission found “that PRPA is not an arm of the Commonwealth of Puerto Rico and is therefore not entitled to the protections of sovereign immunity; and [found] that PRPA is also not entitled to sovereign immunity as an agent of the Commonwealth of Puerto Rico.” FMC Order at 31. In the motion for reconsideration of my denial of a stay, PRPA states that when it filed its petition for stay, “[t]he Commission did not decide the issue, but on January 9, 2007, the newly-assigned presiding officer denied the motions.” (Motion for Reconsideration at 5). PRPA’s reason for including this comment is not clear, but the comment implies an argument that PRPA’s petition for stay of proceedings pending review should have been decided by the Commission, not the administrative law judge to whom the remanded cases are assigned “for further proceedings consistent with this Order.” FMC Order at 32.

PRPA did not ask the full Commission to stay its remand order pending the court's consideration of PRPA's petition for review. *Compare Western Overseas Trade and Dev. Corp. v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 1382 (May 11, 1994) (*Western Overseas Trade*) (petition for review of Commission order filed with the court of appeals; motion for stay of order filed with Commission). Instead, PRPA filed a petition asking that the remanded proceedings be stayed. Since at that point the cases had been remanded to the Office of Administrative Law Judges, PRPA's petition for stay of proceedings pending appeal was appropriately decided by the administrative law judge who has been directed by the Commission to conduct "further proceedings consistent with [its] Order." If PRPA wanted the Commission to stay its Order, it should have asked the Commission to do so.

II. JURISDICTION TO RECONSIDER A DECISION.

As PRPA states in its motion for reconsideration, "[a] presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision." *Carolina Marine Handling v. South Carolina State Ports Authority*, 28 S.R.R. 1603 (2000). *See also Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (citing 2 Davis, *Administrative Law Treatise* § 18.09 (1958) ("Every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.")). Commission Rule 261 applies to reconsideration "after issuance of a final decision or order by the commission," 46 C.F.R. § 502.261(a), and is not applicable to this situation. Therefore, I have discretion to reconsider the denial of the motion for stay pending review issued January 9, 2007. I will exercise that discretion.

III. LEGAL STANDARD GOVERNING MOTIONS TO STAY.

PRPA argues that I applied the incorrect legal standard when I considered its petition to stay pending appeal. (Motion for Reconsideration at 7). Accordingly, I will first examine Commission precedent regarding motions to stay to determine the correct standard.

A. Commission Precedent.

PRPA acknowledges that the Commission itself (as distinguished from a Commission administrative law judge) has used the *Virginia Petroleum Jobbers* test in situations not involving a claim of sovereign immunity. (See Motion for Reconsideration at 8 n.7.) In the first case cited, *Western Overseas Trade, supra*, the Commission had held that the Shipping Act precluded its consideration of allegations in a complaint. The parties disappointed with this holding filed a petition for review of the order in the District of Columbia Circuit, but unlike this case, filed a petition asking the Commission to stay its order pending review. *Western Overseas Trade*, 26 S.R.R. at 1382. The Commission disagreed with the moving parties' argument that it should look to the standards for petitions for reconsideration set forth in Rule 261(a).

Accordingly, it is necessary to look to case law for guidance. In [*Virginia Petroleum Jobbers*] the Court of Appeals for the District of Columbia Circuit set out four standards to be applied in determining whether a stay should be granted. The four standards are as follows: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? [*Virginia Petroleum Jobbers*, 259 F.2d at 925.]

Although *Virginia Petroleum Jobbers* involved a petition for judicial stay pending review on the merits, the "irreparable harm" and "public interest" factors can be considered to have application where an administrative agency is being petitioned to stay one of its own orders pending an appeal.

Id. at 1383-1384. The Commission found that the complainants had not met their burden of demonstrating irreparable injury or that a stay would be in the public interest and denied the motion for stay. *Id.* at 1384.

In the second case, *Waterman Steamship*, the Commission had adopted with modifications an Initial Decision of an administrative law judge ordering a respondent to pay reparations. The respondent filed a petition asking the Commission to stay of enforcement of its order pending review by the United States Court of Appeals for the Second Circuit. *Waterman Steamship Corp. v. General Foundries, Inc.*, FMC Docket No. 93-15, slip op. at 1-2 (Aug. 25, 1994) (*Waterman Steamship*) (Order Denying Petition for Stay). The Commission noted that in *Western Overseas, supra*, it had adopted the four-part test established by *Virginia Petroleum Jobbers* to be applied in considering a motion for stay. *Id.* at 3. The Commission first addressed the “likelihood of success” factor, noting that the respondent was not likely to succeed on the merits as it had not timely filed a petition for review. *Id.* at 3-4. It also found that the respondent had not met its burden of showing irreparable injury as it had only established the possibility of pecuniary loss, and not shown that enforcement of the order would be injurious to other persons or to the public interest. *Id.* at 4-5. Therefore, it denied the motion for stay. *Id.* at 5.

In the third case, *Green Master*, a party to the proceeding, asked the Commission to reconsider its decision imposing a civil penalty and to stay its Order while the Commission considered exceptions filed in another case. *Green Master Int’l Freight Services Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 1319, 1320 (2003) (*Green Master*). The Commission denied *Green Master*’s motion for reconsideration of the penalty, then addressed the request to stay its decision. It again cited to the four-factor test set forth in *Virginia Petroleum Jobbers* as the appropriate standard to apply, noting that it had applied that

standard in *Western Overseas Trade*, *supra*, and *Waterman Steamship*, *supra*. *Id.* at 1323 and n.7. The Commission found that Green Master had not established that it would suffer irreparable injury and denied the request for stay. *Id.* at 1324.

Therefore, the Commission has firm precedent adopting the *Virginia Petroleum Jobbers* factors to be used when considering a motion for stay. Nothing in any of its opinions suggests that its administrative law judges should use a different standard.

B. PRPA'S Argument Regarding Applicable Standard.

Despite this Commission precedent, PRPA claims that justice requires reconsideration of the denial of its petition for stay because “[c]omplainants misdirected the presiding officer with the improper legal standard for a stay pending appeal of an order denying sovereign immunity.” (Motion for Reconsideration at 7). PRPA presents two arguments that it claims support application of a test other than the four-part *Virginia Petroleum Jobbers* test when sovereign immunity is at issue. PRPA first argues that the “harm balancing” test is the proper test for considering a motion for a stay pending appeal of an order denying sovereign immunity. *Id.* at 7-8. Second, PRPA argues that even if *Virginia Petroleum Jobbers* is the correct test, only the irreparable harm and public interest factors apply. *Id.* at 8.

1. Different Test for Sovereign Immunity Cases.

PRPA asserts that:

the Commission’s own test for considering a motion for a stay pending appeal of an order denying *sovereign immunity* is the harm balancing test applied in *South Carolina Maritime Services v. South Carolina State Ports Auth.*, FMC Docket No. 99-21 (May 10, 2000) (not reported in S.R.R.) ([*South Carolina Maritime*]), and *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, FMC Docket No. 99-16, 28 S.R.R. 1595 (July 12, 2000) ([*Carolina Marine Handling*]). This was the authority cited by the Ports Authority.

Id. at 7-8 (emphasis in original). PRPA also states that “[i]n *Ceres Terminals*, the FMC *sua sponte* held the proceeding in abeyance, without any required showing on the part of the Maryland Port Administration . . . , in light of the appeal to the Supreme Court in [*South Carolina Maritime*] previously stayed pursuant to the balancing test.” *Id.* at 8-9.

In *South Carolina Maritime*, the first case cited by PRPA in support of its argument that the harm balancing test is the “Commission’s own test” for stays when sovereign immunity is claimed, the administrative law judge had dismissed a complaint against the South Carolina State Ports Authority (SCSPA) on sovereign immunity grounds, finding that it is an arm of the State of South Carolina entitled to immunity from private suits under the Eleventh Amendment to the United States Constitution. The Commission reversed this determination and remanded the case to the Office of Administrative Law Judges for further proceedings. SCSPA filed a petition for review of the Commission’s order in the United States Court of Appeals for the Fourth Circuit, then asked the administrative law judge to stay the proceeding pending the Fourth Circuit’s review. SCSPA argued that it would suffer irreparable harm if forced to proceed in violation of its constitutional rights.

The presiding administrative law judge did not refer to the *Virginia Petroleum Jobbers* factors, the Commission’s adoption of that test in *Western Overseas Trade*, and its use in *Waterman Steamship*, or explain why the *Virginia Petroleum Jobbers* factors should not be applied when the moving party asserted sovereign immunity as the basis for the stay. The administrative law judge relied on the Supreme Court’s opinion in *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (*Landis*) for the proposition that:

the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.

South Carolina Maritime, FMC Docket No. 99-21, slip op. at 3 (May 10, 2000) (Respondent's Motion to Stay Proceeding Pending Judicial Review Granted).

In *Landis*, “[t]he controversy hinge[d] upon the power of a court to stay proceedings in one suit until the decision of another, and upon the propriety of using such a power in a given situation.” *Landis*, 299 U.S. at 249. The Securities and Exchange Commission and other government officials (the Government) commenced an action in the Southern District of New York against several holding companies (not including North American Company) to enforce the Public Utility Holding Company Act of 1935. North American Company and a number of other companies filed suits in several district courts seeking to enjoin enforcement of the Act. The Government sought to stay the North American Company case and the other district court cases while it pursued its test case in New York for resolution by the Supreme Court. In its motion to stay, the Government represented that:

the trial of a multitude of suits would have a tendency “to clog the courts, overtax the facilities of the Government, and make against that orderly and economical disposition of the controversy that is the Government’s aim.” Accordingly the court was asked to stay proceedings in the suits at bar “until the validity of said Act has been determined by the Supreme Court of the United States” in the [New York] case, “or until that case is otherwise terminated.”

Id. at 251.

The district judge in the North American Company case concluded that the Supreme Court’s decision in the New York cases would at least narrow the issues in that case if it did not dispose of all the questions involved, and stayed the case conditioned upon diligent and active prosecution of the New York case. The court of appeals reversed the stay and remanded for further proceedings. The Supreme Court granted certiorari. *Id.* at 250-254.

The Court held that a district court does have the power to stay one case pending the outcome of another.

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. True, the supplicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Id. at 254-255 (citations omitted). With regard to the merits of the stay, the Court found that “the limits of a fair discretion are exceeded,” *id.* at 256, and remanded the case to the district court “to determine the motion for a stay in accordance with the principles laid down in this opinion.” *Id.* at 259.

The administrative law judge in *South Carolina Maritime* also relied on two cases following *Landis* to establish the standards he applied when ruling on the motion for stay. In the first of those cases, several Indian tribes commenced an action in the Court of Federal Claims seeking damages from the United States for the alleged failure to manage tribal lands. The trial court granted the motion filed by the United States seeking to have the lawsuit indefinitely stayed until ownership of the lands was conclusively fixed in other proceedings. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1414 (Fed. Cir. 1997). On appeal of that stay order, the Court of Appeals for the Federal Circuit recognized that:

The power of a federal trial court to stay its proceedings, even for an indefinite period of time, is beyond question. This power springs from the inherent authority of every court to control the disposition of its cases. When and how to stay proceedings is within the sound discretion of the trial court.

Id. at 1416 (citations to *Landis* omitted). The court recognized, however, that the discretion is not without bounds. “In deciding to stay proceedings indefinitely, a trial court must first identify a pressing need for the stay. The court must then balance interests favoring a stay with interests

frustrated by the action. Overarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Id.* The court found that the trial court abused its discretion by indefinitely staying the proceedings, vacated the stay, and remanded the case. *Id.* at 1418.

In the second *Landis* case on which the administrative law judge relied, a federal prisoner brought a civil rights claim against several state defendants. When the prisoner was transferred to another state, the court ordered that the case be "administratively closed" pending the prisoner's release from prison and subject to his right to reopen the case at that time. *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 110 (4th Cir. 1988). In vacating this order, the court of appeals noted the admonition in *Landis* that a stay "may not be 'immoderate in extent' nor 'oppressive in its consequences' and that it is 'immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible to prevision and description.'" *Id.* at 113.

In a third case on which the administrative law judge relied, a criminal defendant who asserted a double jeopardy bar to prosecution noted an appeal from the district court's denial of the double jeopardy plea. The court proceeded with the trial and the defendant was found guilty. The court appeals noted that the Supreme Court had held that a denial of a double jeopardy motion is an appealable order, and that generally the filing of the notice of appeal divested the trial court of jurisdiction since the double jeopardy clause is a guarantee against being twice put to *trial* for the same offense. In this case, however, the court of appeals had found that the double jeopardy motion was both frivolous and dilatory. In this situation, the court of appeals held that appeal from the denial of a frivolous and dilatory claim of double jeopardy does not deprive the trial court of jurisdiction to conduct a criminal trial. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *cert. den.*,

447 U.S. 926 (1980). The administrative law judge relied on this case for the proposition that if the trial court finds an appeal to a higher court to be frivolous, it should not stay the proceeding. *South Carolina Maritime*, slip op. at 5.

The administrative law judge then weighed the relevant factors. First, he considered the harm that would be suffered by complainant South Carolina Maritime (the non-moving party) if the proceeding were stayed. He stated that he did not know:

that any alleged harm suffered or to be suffered by complainant would be irreparable if it ultimately prevails on its claim for money damages I therefore have no showing other than by argument of counsel that *complainant would suffer irreparable harm* if the proceeding is stayed pending decision of the Fourth Circuit balanced against the holdings of courts that a party claiming 11th Amendment immunity will suffer irreparable harm regardless of financial impact if it has to defend before a court rules upon its constitutional claim and the court ultimately upholds that claim.

Id., slip op. at 11 (emphasis added). Second, he considered South Carolina Maritime's argument that the Fourth Circuit would likely deny the petition for review and remand the case to the Commission. He noted the opinions holding that the Eleventh Amendment provided SCSPA immunity from suit in the federal courts, and that denial of sovereign immunity is an interlocutory order immediately appealable under the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). He determined that he could not "find that SCSPA's appeal to the court at this time is *frivolous* and that the Fourth Circuit 'will likely deny SCSPA's Motion. . . ." *South Carolina Maritime*, slip op. at 12 (emphasis added). He also found that SCSPA had shown it would be irreparably harmed assuming the Fourth Circuit held the sovereign immunity would protect a state or arm of the state in administrative proceedings. *Id.* at 11. Therefore, he stayed the proceedings pending the Fourth Circuit's decision. *Id.* at 16. On October 26, 2000, the Commission noted that the proceeding was before the Fourth Circuit and issued a notice suspending the procedural schedule.

This notice did not discuss standards that control entry of a stay. *South Carolina Maritime*, Docket No. 99-21 (Oct. 26, 2000) (Notice of Suspension of Procedural Schedule).

Carolina Marine Handling, the second case cited by PRPA in support of its argument that the harm balancing test is the “Commission’s own test” for stays when sovereign immunity is claimed, was assigned to another administrative law judge who decided the motion for stay shortly after the stay was entered in *South Carolina Maritime*. SCSPA was a respondent in that case also. Based on the Commission’s remand of *South Carolina Maritime* that was under review by the Fourth Circuit, the administrative law judge had earlier denied SCSPA’s motion to dismiss *Carolina Marine Handling* on sovereign immunity grounds. SCSPA sought the stay in *Carolina Marine Handling* based on its sovereign immunity argument and the pending status of its sovereign immunity claim in the Fourth Circuit in *South Carolina Maritime*.

The administrative law judge cited to the stay order already in effect in *South Carolina Maritime* and applied the *Landis* line of cases cited in that decision. He agreed that SCSPA’s appeal to the Fourth Circuit was not frivolous and that if SPSCA were to prevail on its claim, the loss of its right to be immune from litigation would be irreparable. In contrast, he found, the non-moving party could be made whole by money damages. Accordingly, he stayed *Carolina Marine Handling* pending the outcome of the review by the Fourth Circuit of the Commission’s decision in *South Carolina Maritime*. *Carolina Marine Handling*, 28 S.R.R. at 1598-1600. *See also, id.* at 1600 (motion to stay and to certify sovereign immunity question to Commission filed by respondent Charleston Naval Complex Redevelopment Authority warranted because claims of sovereign immunity are immediately appealable and harm to non-moving party can be remedied by award of damages). On November 27, 2000, the Commission took note of this decision when it issued an

Order holding SCSPA's appeal in *Carolina Marine Handling* in abeyance. This Order, however, does not discuss the standards to be used when considering a motion for stay.

Ceres Marine is the only Commission decision on which PRPA relies to support its claim that the harm balancing test is the Commission's own test when sovereign immunity is claimed. *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, FMC Docket No. 94-01 (Oct. 18, 2001) (*Ceres Marine*) (Order Holding Proceeding in Abeyance). By the time the Commission entered this order, the Fourth Circuit had issued its decision in the *South Carolina Maritime* holding that sovereign immunity protected by the Eleventh Amendment prevented the Commission from hearing a complaint brought against an arm of the state by a private individual. *South Carolina State Ports Auth. v. Federal Maritime Comm'n*, 243 F.3d 165 (4th Cir. 2001). Shortly after the Supreme Court granted the Commission's petition for certiorari to review the Fourth Circuit's judgment, the Commission *sua sponte* issued the order in *Ceres Marine* on which PRPA relies. Without discussion of the standards to be applied when considering a motion for stay, the Commission concluded that "it would be premature for the Commission to proceed with the [Maryland Port Administration's] sovereign immunity claims until completion of the Supreme Court review of this issue." *Ceres Marine, supra*, slip op. at 2.

It is readily apparent that *Ceres Marine* did not involve consideration of a motion for stay by a party asserting irreparable harm to its sovereign immunity if a proceeding were not stayed. The Fourth Circuit had just determined in *South Carolina Maritime* that the Commission does not have jurisdiction over private complaints against port authorities that are "arms of a state." The Commission had two options: dismiss *Ceres Marine* pursuant to the Fourth Circuit holding in *South Carolina Maritime* or stay *Ceres Marine* pending the Supreme Court's decision on review. It stayed

the case pending the Supreme Court decision. It did not enunciate any test it used in making this decision, but any test the Commission used would be inapposite to PRPA's motion to stay this case.

The other two opinions, *South Carolina Maritime* and *Carolina Marine Handling*, are not opinions of the Commission, but of Commission administrative law judges. As such, they are not binding precedent. See *Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish 'the law of the district.'") (citations omitted); *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ("[I]t is clear that there is no such thing as 'the law of the district.' Even where the facts of a prior district court case are, for all practical purposes, the same as those presented to a different district court in the same district, the prior 'resolution of those claims does not bar reconsideration by this Court of similar contentions. The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another.' Where a second judge believes that a different result may obtain, independent analysis is appropriate.") (citation and footnote omitted).

The factors considered by the administrative law judge in *South Carolina Maritime* are quite similar to the *Virginia Petroleum Jobbers* factors adopted by the Commission in *Western Overseas Trade*. The administrative law judge considered whether the moving party would suffer irreparable harm, the merits of the moving party's appeal, the harm suffered by the other party, and the public interest. He altered the burden on the moving party in two significant ways, however. First, whereas *Virginia Petroleum Jobbers* requires a judge to determine whether the petitioner has "made a strong showing that it is likely to prevail on the merits of its appeal," *Western Overseas Trade*, 26 S.R.R. at 1384, the administrative law judge in *South Carolina Maritime* found this factor favored staying the proceeding because the appeal was not "frivolous or trivial." *South Carolina Maritime*, slip op. at 7. Therefore, the administrative law judge imposed a lower burden on the moving party. Second,

whereas *Virginia Petroleum Jobbers* requires a judge to determine whether “the issuance of a stay [would] substantially harm other parties interested in the proceeding,” *Western Overseas Trade*, 26 S.R.R. at 1384, the administrative law judge found “no showing other than by argument of counsel that complainant would suffer *irreparable harm* if the proceeding is stayed pending decision of the Fourth Circuit.” *South Carolina Maritime*, slip op. at 11 (emphasis added). This again imposes a lower burden on the moving party. He entered a stay pending resolution of the case by the Fourth Circuit. The administrative law judge in *Carolina Marine Handlers* applied a similar test and made similar findings.¹

The test used by the administrative law judges in *South Carolina Maritime* and *Carolina Marine Handlers* imposed a lower burden on the moving party on two of the *Virginia Petroleum Jobbers* factors than Commission precedent requires. I am not convinced that the Commission’s acquiescence in these stays, see *Carolina Marine Handling*, Docket No. 99-16 (Nov. 27, 2000) (Order Holding Appeal in Abeyance); *South Carolina Maritime*, Docket No. 99-21 (Oct. 26, 2000) (Notice of Suspension of Procedural Schedule), can be construed as a decision by the Commission that its administrative law judges should use a test other than *Virginia Petroleum Jobbers* when a stay is sought by a party asserting sovereign immunity. Accordingly, I find that the Commission has not established a “harm balancing test” different from *Virginia Petroleum Jobbers* for consideration of motions to stay based on claims of sovereign immunity. Therefore, I properly used the *Virginia Petroleum Jobbers* test when I decided PRPA’s petition for stay and will use that test in my consideration of PRPA’s motion for reconsideration.

¹ I note that *Carolina Marine Handling* fits precisely within the *Landis* mold. As in *Landis*, the controversy “hinge[d] upon the power of a court to stay proceedings in one suit until the decision of another.” *Landis*, 299 U.S. at 249. The Fourth Circuit already had *South Carolina Maritime* under review.

2. Abbreviated *Virginia Petroleum Jobbers* Test When Sovereign Immunity is Claimed.

PRPA next argues that even if *Virginia Petroleum Jobbers* is the correct test, only the irreparable harm and public interest factors apply. *Id.* at 8. It bases this argument on the fact that in *Western Overseas Trade*, the Commission did not apply all four factors, but only “irreparable harm” and “public interest,” thus implying elimination of the other two factors from consideration. (Motion for Reconsideration at 12-14.)

In *Western Overseas Trade*, the Commission stated “[a]lthough *Virginia Petroleum Jobbers* involved a petition for judicial stay pending review on the merits, the ‘irreparable harm’ and ‘public interest’ factors can be considered to have application where an administrative agency is being petitioned to stay one of its own orders pending an appeal.” *Western Overseas Trade*, 26 S.R.R. at 1384. The Commission also inserted the following footnote:

Because the Commission has already ruled on the merits of Complainants’ arguments and is prepared to defend its analysis and conclusions before the Court of Appeals, the question whether Complainants have a strong chance of prevailing on the merits in the appellate litigation is essentially *res judicata* as far as the Commission is concerned, and would be better addressed to the Court of Appeals. Also, since this case was decided on a motion to dismiss prior to hearing, the record does not permit an informed conclusion as to whether a stay would substantially harm [complainants].

Id. at n.3.

PRPA has not persuaded me that through this decision, the Commission intended to eliminate the “likelihood of success” and “substantial harm to other parties” factors from the *Virginia Petroleum Jobbers* test on any motion for stay, including one where sovereign immunity is an issue. There are four reasons that support this conclusion. First, in *Western Overseas Trade*, the Commission found that the moving party had not met its burden of showing that absent a stay, it would be irreparably harmed or that a stay would be in the public interest. The Commission based

the denial of the motion for stay on this failure. Since the Commission had no need to address the likelihood of success on the merits or harm to other parties to make this ruling, the comment in footnote three is *dictum* and does not lead to the conclusion that the Commission intended to eliminate likelihood of success and harm to other parties as factors to be considered when ruling on a motion for stay. Second, despite the comment in footnote three of *Western Overseas Trade*, the “likelihood of success” factor was the *first* factor the Commission addressed in *Waterman Steamship*, decided after *Western Overseas Trade*. The Commission also addressed “public interest” in that order. *Waterman Steamship*, slip op. at 3-4. This indicates that the Commission still considers them to be appropriate factors for consideration. Third, the Commission cited to the full *Virginia Petroleum Jobbers* test in its subsequent decision in *Green Master*. 29 S.R.R. at 1323 and n.7. Fourth, failure to consider likelihood of success on the merits would be inconsistent with circuit court precedent. The United States Court of Appeals has stated that:

The doctrine thus stated is congruent with Rules 8 and 18 of the Federal Rules of Appellate Procedure, which state that motions for stay “must ordinarily be made in the first instance” to the district court or agency which issued the challenged order. Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. *What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.*

Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 844-845 (D.C. Cir. 1977) (emphasis added).

It is abundantly clear, then, that the complainants did not misdirect the presiding officer with the improper legal standard for a stay pending appeal of an order denying sovereign immunity as PRPA asserts in its motion for reconsideration, (Motion for Reconsideration at 7), and that I based

my decision on PRPA's petition to stay proceedings on the proper standards. Therefore, I will consider all four *Virginia Petroleum Jobbers* factors in my reconsideration.

IV. APPLICATION OF THE VIRGINIA PETROLEUM JOBBERS FACTORS TO PRPA'S MOTION FOR STAY.

The consideration of the factors on a motion for stay is left to the sound discretion of the administrative law judge. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968); *Landis v. North American Co.*, 299 U.S. at 254; *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d at 844-845. PRPA, the party seeking the stay, has the burden of demonstrating that a stay of the proceedings should be entered. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985); *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

A. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

In its earlier petition for stay, PRPA's only argument on this factor was its assertion that "the Court of Appeals *may* reach a . . . determination" (Petition to Stay Proceedings Pending Appeal at 5 (emphasis added)) that the Commission's decision is wrong and that PRPA is entitled to sovereign immunity. PRPA did not explain how or why the court should reach a different result, however. Therefore, I determined that it had not met its burden of demonstrating that it is likely to prevail on the merits of the appeal.

In its motion for reconsideration, PRPA essentially restates the arguments it made to the Commission in its appeal of the administrative law judge's finding that PRPA is not entitled to sovereign immunity. The Commission considered the facts before it and applied the law as announced by the Supreme Court in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, *supra*, and affirmed the administrative law judge's decision. PRPA asserts that the Commission majority opinion is wrong and that the dissenting opinion is correct. (Motion for

Reconsideration at 23-27.) For the reasons stated by the Commission's decision in its majority opinion, I find that PRPA has not made a strong showing that it is likely to prevail on the merits of its appeal.

B. Has the petitioner shown that without such relief, it will be irreparably injured?

When I denied PRPA's motion, I found that "PRPA sets forth a strong argument that its immunity from suit, if found to exist, could be irreparably harmed if this matter were to proceed," (Memorandum and Order Denying Petition to Stay Proceedings Pending Appeal at 3 (citation omitted)).² On reconsideration, I do not alter my finding that PRPA has established that it may suffer irreparable harm if a stay is not granted pending review by the District of Columbia Circuit and the court reverses the Commission's decision.

C. Would the issuance of a stay substantially harm other parties interested in the proceedings?

In its motion for reconsideration, PRPA argues that any harm suffered by the three complainants would be economic in nature and the "[i]t is well-established that economic loss alone is not irreparable harm." (Motion for Reconsideration at 21, citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (called "*Washington Gas Co. v. FERC* by PRPA); *South Carolina Maritime*, *supra*, at 16; *Carolina Marine Handling*, 28 S.R.R. at 1599.) *Wisconsin Gas* stands for the proposition that economic harm to a party moving for a stay is normally not considered to be "irreparable" for purposes of a stay. *Wisconsin Gas Co. v. FERC*, 758 F.2d at 673. As discussed above, the proper consideration here is whether the complainants as the *non-moving* parties would be *substantially* harmed if the stay were issued. It is not necessary to find that they would be

² PRPA states the "[t]he presiding officer has already concluded that the Ports Authority *would* suffer irreparable harm if a stay were not granted." (Motion for Reconsideration at 15 (emphasis added).) This overstates my finding.

irreparably harmed by a stay to justify denying a motion for stay. Furthermore, it is PRPA's burden as the moving party "to show either that [complainants] will not suffer harm from a stay, or that any resulting harm will be minimal; [complainants] are not required to show 'substantial harm' in order to prevent a stay." *Lightfoot v. District of Columbia*, Civ. Action No. 01-1484, 2006 WL 175222, at *9 (D.D.C. Jan. 24, 2006), *stay granted on other grounds*, No. 05-7028, 2006 WL 573869 (D.C. Cir. Feb. 10, 2006) (motion for stay granted on the basis of the District of Columbia's likely success on the merits). In its motion, PRPA has improperly attempted to shift to complainants the burden of showing harm to other parties interested in the proceedings. (*See* Motion for Reconsideration at 21-23).

The record supports a finding that continued delay of these cases could substantially harm complainants. It has been several years since complainants commenced each of these proceedings. *Odyssea Stevedoring*, Docket No. 02-08 (June 3, 2002) (Notice of Filing of Complaint served); *International Shipping*, Docket No. 04-01 (Jan. 6, 2004) (Notice of Filing of Complaint served); *San Antonio Maritime*, Docket No. 04-06 (Apr. 26, 2004) (Notice of Filing of Complaint served). Each verified complaint alleges substantial harm and continuing violations of the Shipping Act, and seeks a cease and desist order to end those violations. *Odyssea Stevedoring*, Docket No. 02-08 (Complaint at 10); *International Shipping*, Docket No. 04-01 (Complaint at 17); *San Antonio Maritime*, Docket No. 04-06 (Complaint at 22). Staying these matters while the District of Columbia Circuit considers PRPA's petition for review could substantially increase this alleged harm.

D. Where lies the public interest?

PRPA asserts that "the public interest factor is normally satisfied as a matter of law by an appeal of an order denying immunity." (Motion for Reconsideration at 19 (citing *McSurley v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982))). The court of appeals in *McSurley* denied the

motion to stay in a case in which the moving party claimed immunity grounds. *Id.* at 318 and n.17 (“As this case demonstrates, a petitioner’s claims may qualify under the collateral order doctrine [for appeal] but not meet the standards for a stay.”). Therefore, the fact that a party moving for a stay asserts that it has sovereign immunity does not by itself indicate that a stay should be granted. Furthermore, in any case, there may be more than one “public interest” to consider. *See, e.g., Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d at 978 (“[t]he public interest may, of course, have many faces”); *McSurley v. McClellan*, 697 F.2d at 317 (“[t]he interests of the public and the McSurleys in avoiding further delay are substantial”). PRPA has not carried its burden of demonstrating that the public interest weighs in favor of staying these proceedings.

E. Conclusion.

Balancing the *Virginia Petroleum Jobbers* factors, I find that PRPA has not met its burden of demonstrating that these three proceedings should be stayed while the District of Columbia Circuit review the Commission’s November 30, 2006, Order finding that PRPA is not entitled to sovereign immunity. Therefore, I deny PRPA’s motion for stay.

V. MOTION FOR LEAVE TO APPEAL THIS ORDER TO THE COMMISSION.

PRPA included with its motion for reconsideration a motion for leave to appeal this order to the Commission pursuant to Rule 153. Rule 153 permits an interlocutory appeal “where the presiding officer . . . finds it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.” 46 C.F.R. § 502.153(a).

I am granting PRPA’s motion for leave to appeal this order to the Commission for two reasons. First, while I consider it unlikely, it is possible that by acquiescing in the stays granted in *South Carolina Maritime* and *Carolina Marine Handlers* using a different standard, the Commission

intended to establish a test other than *Virginia Petroleum Jobbers* for motions to stay based on sovereign immunity. Second, it is possible that balancing the *Virginia Petroleum Jobbers* factors, the Commission may determine that these proceedings should be stayed pending the District of Columbia Circuit's review of its Order.

Rule 153(b and c) provide that when a party seeks to appeal an interlocutory order, "[a]ny such motion shall contain not only the grounds for leave to appeal but the appeal itself." and that replies to the motion and appeal may be filed within 15 days. 46 C.F.R. § 502.153(b and c). No other pleading on this issue is permitted.

ORDER

Upon consideration of the Puerto Rico Ports Authority's Motion for Reconsideration of Orders Denying Petition to Stay Proceedings Pending Appeal or in the Alternative Motion for Leave to Appeal Denial to the Commission and complainants' oppositions thereto, for the reasons stated above, it is hereby

ORDERED that Puerto Rico Ports Authority's Motion for Reconsideration of Orders Denying Petition to Stay Proceedings Pending Appeal be **GRANTED**. It is

FURTHER ORDERED that upon reconsideration, Puerto Rico Ports Authority's Petition to Stay Proceedings Pending Appeal be **DENIED**. These proceedings will continue in due course. It is

FURTHER ORDERED that Puerto Rico Ports Authority's Motion for Leave to Appeal Denial to the Commission be **GRANTED**. This order is certified to the Commission for its immediate review. 46 C.F.R. § 502.153(c).



Clay G. Guthridge
Administrative Law Judge