

S E R V E D
January 9, 2007
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

DOCKET NO. 04-01

INTERNATIONAL SHIPPING AGENCY INC.

v.

PUERTO RICO PORTS AUTHORITY

MEMORANDUM AND ORDER DENYING
PETITION TO STAY PROCEEDINGS PENDING APPEAL

This case is one of three separate cases pending against the Puerto Rico Ports Authority (PRPA). The other two cases are *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, and *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority*, Docket No. 04-06. Each case alleges that PRPA violated the Shipping Act. The three 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 this case brought by International Shipping Agency Inc., 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 *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 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 *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority*, 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.

Motions to consolidate the three cases were pending before an administrative law judge at the time the proceedings were stayed, but there had not yet been a ruling on the motions. 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).

On November 30, 2006, 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. It 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 this Office a single Petition to Stay Proceedings Pending Appeal seeking stays of all three cases. As noted, the cases have not been consolidated. Therefore, the motion has been treated by the Commission as having been filed in each of the three cases. A separate order is being issued for each case.

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. F.E.R.C., 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). The applicant for a stay has the burden of demonstrating that a stay should be imposed. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985).

PRPA’s petition for a stay is based on the irreparable harm to its sovereign immunity it claims would result if this case proceeds while the District of Columbia Circuit reviews the Commission’s decision. 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 Petition to Stay Proceedings Pending Appeal at 2-4). Irreparable harm by itself is insufficient to justify a stay, however. See *Demjanjuk v. Meese*, 784 F.2d 1114, 1118 (D.C. Cir. 1986) (stay denied where imminent extradition may qualify as a threat of irreparable harm, but petitioner failed to demonstrate a likelihood of success on the merits).

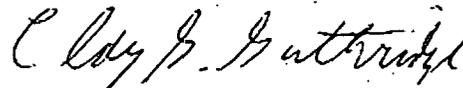
PRPA's argument with regard to the other factors is far less compelling. The Commission's Order, a final agency decision controlling on me, found that PRPA does not have sovereign immunity. In its petition for a stay, PRPA states "the Court of Appeals *may* reach a . . . determination"¹ that the Commission's 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.

¹ Petition to Stay Proceedings Pending Appeal at 5 (emphasis added).

ORDER

Upon consideration of the Puerto Rico Ports Authority's Petition to Stay Proceedings Pending Appeal and complainant's opposition thereto, for the reasons stated above, it is hereby **ORDERED** that Puerto Rico Ports Authority's Petition to Stay Proceedings Pending Appeal be **DENIED**.



Clay G. Guthridge
Administrative Law Judge