

ORIGINAL

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(July 12, 2000)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 12, 2000

DOCKET NO. 99-16

CAROLINA MARINE HANDLING, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

**RULING ON MOTIONS TO STAY
AND LEAVE TO APPEAL**

The Ruling on Respondents' Motions to Dismiss, served May 2, 2000, denied respondents' motions to dismiss. The following pleadings have now been filed by respondents:

(1) A motion for stay of this proceeding by respondent South Carolina State Ports Authority ("SPA" or "SCSPA"), pursuant to Rules 12 and 104 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.12 and 502.104, and Fed. R. Civ. P. 62;

(2) A motion for leave to appeal the May 2, 2000 ruling by respondent Charleston Naval Complex Redevelopment Authority (“RDA”), including tendered appeal, and also a request for stay;

(3) A motion for reconsideration of the May 2, 2000 ruling by respondents Charleston International Projects, Inc. and Charleston International Ports, LLC (collectively “CIP”); and

(4) Notice of exceptions to portions of the May 2, 200 ruling and brief in support by respondent RDA.

Complainant Carolina Marine Handling, Inc. (“CMH”) has filed replies to Nos. (1), (2) and (3), above, and noted opposition to (4), above.

SPA has also filed a “reply” to the motion for leave to appeal in (2), above, in which it supports the motion of RDA. RDA also filed a statement concerning the motion for stay of SPA in (1), above, in which it supports SPA’s motion.

CIP seeks permission to file a reply to CMH’s reply in No. (3), above, and CMH opposes CIP’s request. CIP’s request will be granted.

The various motions and replies, except No. (3) above, will be addressed in this document. No. (3) will be the subject of a separate ruling.

(1) Motion for Stay by SPA

In addition to the present proceeding in which SPA has been named as a respondent in a complaint filed by a private party, SPA is also a respondent in Docket No. 99-21, *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*. Chief Judge Norman D. Kline, in his January 5, 2000 order of dismissal in Docket No. 99-21, believed that SPA, as an arm of South

Carolina, is immune from a complaint by a private party before the Commission under the doctrine of state sovereign immunity, and dismissed the complaint. 28 S.R.R. 1307. On March 23, 2000, the Commission served an Order Reversing the Administrative Law Judge's Order and Remanding for Further Proceedings the complaint that SCSPA refused to give berthing space at Charleston, SC, to a vessel which permits gambling activities on board when the vessel is in international waters. 28 S.R.R. 1385. The Commission ruled that the doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether federal or state, not executive branch, administrative agencies like the Commission, involving, as noted, a private complaint brought against a port authority arguably operating as an arm of South Carolina. On April 24, 2000, SPA filed a petition asking the United States Court of Appeals for the Fourth Circuit to review the Commission's March 23, 2000 order, and the Fourth Circuit assigned the petition Docket No. 00-148 1.

Judge Kline granted SPA's motion to stay Docket No. 99-2 1 on May 10, 2000 (hereafter "the Chief Judge's Order"), pending decision of the Fourth Circuit, finding that the harm to complainant resulting from any delay to be reparable, at least monetarily, assuming that complainant can ultimately prove its claim whereas the harm that SPA would suffer by having to defend against the complaint, if its Eleventh Amendment claim is ultimately upheld, would not be reparable.

SPA notes that in the present proceeding (Docket No. 99-16), SPA claimed its right to immunity, and that the May 2, 2000 ruling found that SPA did not have immunity based on the Commissions' order in Docket No. 99-21, and that the May 2 ruling also directed the respondents

to answer the complaint and to consult with complainant to propose a procedural schedule for the next phase of this proceeding.’

SPA states that it has filed its answer and propounded initial discovery requests, and that it did not seek Commission review because the Commission’s rules are clear: the May 2 ruling “may not be appealed,” citing 46 C.F.R. § 502.153 .²

SPA states that because the dispute between the Commission and SPA before the Fourth Circuit involves a fundamental disagreement over the constitutional limits on the federal government’s power to disregard a state’s sovereign immunity and raises a serious challenge to the Commission’s jurisdiction, SPA seeks a stay of Docket No. 99-16 until the Fourth Circuit clarifies the proper scope of the two governments’ powers.

SPA states that the primary consideration for determining whether a stay should be granted is the balancing of the parties’ interests, citing *Landis v. North American Co.*, 299 US. 248 (1936), and the Chief Judge’s Order of stay. SPA states that its constitutional immunity from private suit has two inextricable elements: first, the right to avoid the burdens of litigation in a federal forum and, second, the right to avoid the financial and federalist implications of a judgment, whether for a cease-and-desist order or reparations; that forcing SPA to proceed before the FMC in Docket No. 99-16 before the Fourth Circuit resolves the immunity issue will seriously implicate the first element by requiring SPA to endure the indignity of subjecting a state to the coercive process

¹On May 3 1, 2000, the requirement for submission of a draft procedural schedule was postponed until after disposition of all pending motions.

²In its statement supporting SPA, RDA notes that Rule 153 “goes on to state ‘except where the presiding officer should find it necessary to allow on appeal.’ In other words, appeal of the May 2 Ruling is permissive and requires leave of the Presiding Officer” (which RDA has sought in No. (2) above, as noted).

of judicial tribunals at the instance of private parties—a right the loss of which cannot be later redressed, citing *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139,146 (1993) (“*Puerto Rico Aqueduct*”).

SPA states that the Supreme Court recognized the importance of the first element in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), where it held that the policies underlying immunity favor resolving immunity disputes before discovery and support an immediate appeal of an order denying immunity, *id.* at 526-30, and that the Court acknowledged that immunity cannot be effective unless it provides a right to avoid suit altogether, rather than a mere defense to liability, *id.* at 526.

SPA states that neither the Fourth Circuit nor the Supreme Court has definitively ruled on the dispute between the FMC and SPA over the proper application of the Eleventh Amendment; that if the stay is not granted SPA risks the irreparable loss of its constitutional right not to be burdened with litigation from a private complainant without its consent and that the harm to SPA is legally irreparable; and that it is the harm SPA “would suffer by having to defend against the complaint, if its Eleventh Amendment claim is ultimately upheld, which harm, according to case law, would not be reparable,” citing Chief Judge’s Order at 16.

SPA states that, as a public body, the FMC has an affirmative duty to operate within the boundaries established by the U.S. Constitution; that it would be contrary to the public interest for the Commission to participate in an unconstitutional proceeding, and to have subjected a fellow public body to a proceeding for which there is no legal basis; that, by contrast, the loss, if any, to CMH for the delay associated with staying Docket No. 99-16 is delay in obtaining access to the Charleston Naval Complex, which is reparable since monetary damages can compensate for its loss if CMH can prove its case; and that, when balanced against the loss of an irreparable constitutional

right, CMH's delay in obtaining the access and reparations it seeks, even though they may be serious to CMH, are legally reparable and therefore of less legal importance. Respondents CIP support SPA's motion.

By separate motion, as noted, respondent RDA has filed an appeal to the FMC. RDA also seeks a stay of Docket No. 99-16, but pending grant of its appeal to the Commission. RDA urges that it would be inequitable for Docket No. 99-16 to be stayed as to SPA, but ordered to go forward as to RDA. RDA also states that the rationale for the Supreme Court's decision in *Puerto Rico Aqueduct*, 506 U.S. 144,145 (1993), also supports the grant of a stay pending not only SPA's appeal to the Fourth Circuit, but also pending RDA's appeal to the Commission.

CMH's Opposition

Complainant CMH urges that SPA's motion to stay Docket No, 99-16 should be denied; that SPA presented no argument warranting denial of CMH's opportunity to pursue its complaint in Docket No. 99-16 while awaiting the outcome of Docket No. 99-21, which CMH urges, provides no precedent for SPA's request.

CMH states that SPA has claimed that it is immune from private complaints at the Commission, which is the same claim that SPA asserted in Docket No. 99-21; that SPA incorrectly assumed that it could rely on the Chief Judge's rationale for granting the stay in Docket No. 99-21 to justify a stay in Docket No. 99-16; and that, in so doing, SPA ignored the fundamental differences between Docket No. 99-21 and Docket No. 99-16, mandating denial of SPA's request for stay in Docket No. 99-16.

CMH states that the critical difference is that a ruling by the Fourth Circuit as to Docket No. 99-21 that the Eleventh Amendment applies to private complaints before the Commission would not conclusively determine this proceeding (Docket No. 99-16) or avoid the need for litigation in this proceeding; and that SPA would suffer no irreparable injury by having to continue litigation in this proceeding while the immunity issue remained before the Fourth Circuit in another proceeding (Docket No. 99-21).

CMH argues that the pending appeal before the Fourth Circuit as to Docket No. 99-21 would leave unresolved the fact driven issues in Docket No. 99-16 of whether SPA is entitled to the immunity it claims or whether SPA has waived such immunity even if it were to attach, neither of which issues was raised by the complainant to the presiding judge in Docket No. 99-21 in opposition to SPA's motion to dismiss.

CMH states that neither SPA's status as an arm of the state nor SPA's waiver of immunity were decided by the Commission in Docket No. 99-21, nor were these issues considered by the presiding judge in this proceeding (Docket No. 99-16), and that the Commission, in Docket No. 99-21, n. 7, "expressed no opinion regarding whether SCPA is in fact an arm of the State of South Carolina," even though the presiding judge relied, in part, on his acceptance of SPA as an arm of the state.

CMH states that the issues of SPA's status as an arm of the state and of SPA's waiver of immunity are fact-based issues that require a hearing; that these issues and others raised by CMH could be properly litigated now in Docket No. 99-16 without necessitating any stay in the proceeding; that to do otherwise would unduly prejudice CMH, since CMH would have to await the outcome of lengthy court appeals that inevitably could necessitate a return to litigation on the very

issues of SPA entitlement to or waiver of immunity, if the Commission were reversed. CMH urges that SPA, on the other hand, would not be prejudiced by litigating these issues sooner than later.

CMH urges that an additional and highly compelling reason to proceed now is the fact that SPA recently has filed with the Commission under section 6 of the 1984 Act its agreement with CIP covering the terminal facilities at the Charleston Naval Complex, subject of the instant proceeding; that the filing has been noticed in the *Federal Register* (65 FR 33 8 18) and in accordance with the *Federal Register* Notice, CMH has filed a protest with the Commission to the agreement; and that SPA has claimed no immunity from Commission authority in its commentary accompanying the filing.³

CMH also notes that SPA is not the only respondent in this proceeding (Docket No. 99-16), as it is in Docket No. 99-21; that respondent RDA in this proceeding is not a party to Docket No. 99-21; that, while RDA claims immunity under the Eleventh Amendment, there has not been a finding, so far as CMH is aware, in a judicial or quasi-judicial forum that RDA is an arm of the state of South Carolina; and that, thus, stay of this proceeding pending the appeal in Docket No. 99-21 would clearly be improper, since the parties and the issues are very different and the alleged harmful conduct would continue unabated.

CMH states that the issue as to whether SPA can successfully claim immunity (if the Eleventh Amendment applies to private Commission complaint cases) is fact driven, and is, in this case, the subject of serious dispute as to material facts; that although SPA claims, and the presiding

³In a companion ruling, also on reconsideration in this proceeding, it was noted that this agreement, which was filed under protest, was found exempt from filing since it is a marine terminal facilities agreement within the meaning of 46 C.F.R. 535.3 1 l(a).

judge in Docket No. 99-21 accepted uncritically, that SPA is an arm of the state, SPA's claim has not been tested against present facts under current judicial criteria.

CMH states that whether a "state" port is "in fact" an arm of the state "is a determination made on a case-by-case basis, citing *id.*, 28 S.R.R. 1389; that it has argued this factual issue in depth (supported by affidavits and exhibits) in reaction to the earlier motions to dismiss; that CMH's argument included a critical analysis of the 1995 and out-of-date rationale in the case on which SPA (and the presiding judge in Docket No. 99-21) relied to classify SPA as an arm of the state, citing *Ristow v. South Carolina State Ports Authority*, 58 F.3d 1051 (4th Cir. 1995); and that, since 1995, the facts concerning SPA have changed, as have the court-established criteria for determining an entity's status as an arm of the state.

CMH states that it therefore cannot be concluded on the basis of SPA's arguments on a motion to dismiss that SPA should be treated as an arm of the state, and that this issue must be resolved in this proceeding if the Fourth Circuit reverses the Commission in Docket No. 99-21.

CMH states that SPA has the burden of proof that it is an arm of the state; that CMH already has presented well-supported arguments putting this point into issue; that serious dispute has arisen; and that, so far, in this proceeding, there has been no opportunity to weigh the factual merits of this issue in order to determine whether SPA can avail itself of a Fourth Circuit decision reversing the Commission.

CMH also states that a hearing is necessary on CMH's claim that SPA has waived immunity; that this point, also, has been put into issue by CMH at length; and that this fact-based issue has not been fully aired so as to permit a proper weighing of the merits in order to determine the availability of any immunity to SPA.

CMH states that balancing the interests requires denial of the stay; that the circumstances in this proceeding, on their own, necessitate denial of SPA's request for a stay, highlighted by the differences between this proceeding and Docket No. 99-2 1; that this proceeding is dependent on the resolution of fact-driven issues that bear directly on the-question as to whether SPA can take advantage of Eleventh Amendment immunity, if the Fourth Circuit reverses the Commission's decision in Docket No. 99-21; that these issues are in serious dispute in this case, as evinced by the exchange of briefs on the motions to dismiss; and that the balancing of interests performed by the presiding judge in Docket No. 99-21 produces the opposite result here in docket No. 99-16. CMH states that the parties in this proceeding (Docket No. 99- 16) have put into issue the necessary factual determination as to SPA's status as an arm of the state entitled to any immunity, but not so in Docket No. 99-21; that the parties in this proceeding (Docket No. 99-16) have put into issue the necessary factual determination as to SPA's waiver of any immunity, but not so in Docket No. 99-21; that this proceeding (Docket No. 99-1 6) involves RDA, a state-created entity claiming immunity, but which has not previously been found to be an arm of the state; and SPA, the only respondent to be a party also in Docket No. 99-2 1; and that CMH in this proceeding (Docket No. 99- 16) has, with supporting affidavits, vigorously disputed claims of SPA (and RDA) that they are entitled to Eleventh Amendment immunity, whereas the complainant in Docket No. 99-21 demonstrated a disinterest in obtaining urgent relief and submitted no affidavit.

CMH states that the continuing nature of the harm caused to CMH by respondents' conduct easily outweighs the burden on SPA to participate in litigating issues that do not depend on the outcome of the Fourth Circuit decision in another case.

CMH states that no reason has been provided to defer resolution of the issues that determine whether Eleventh Amendment immunity is available to SPA; that Chief Judge Kline in Docket No. 99-21 explained that there is no need to defer Commission ruling on issues involving the application of constitutional and legal standards to Shipping Act issues and jurisdiction.⁴ CMH states that, rather, the Commission should resolve such issues promptly, and the Commission would have done so in Docket No. 99-21 had it been necessary.⁵

CMH urges denial of SPA's motion for a stay of this proceeding, or, in the alternative, if it is found appropriate for SPA to avoid litigation pending the appeal in Docket No. 99-21, CMH urges that Docket No. 99-16 be permitted to continue as to the other parties; that each of the respondents has been charged, separately, with violations, and there is no valid reason that this proceeding cannot continue as to them; and that, otherwise, CMH would be seriously prejudiced and denied due process of a prompt hearing on its complaint.

Discussion and Conclusions
on SPA's Motion for Stay

In Landis v. North American Co., 299 U.S. 248 (1936), the test for evaluating a motion to stay was prescribed more than six decades by Justice Cardozo, who wrote 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

⁴Citing Chief Judge's Order, 28 S.R.R. 1312-1313.

⁵Citing 28 S.R.R. 1385, n. 7. (“Because it is not necessary to a resolution of the sovereign immunity question, we express no opinion regarding whether SCSPA is in fact an arm of the State of South Carolina.”)

this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. (Citations omitted.) True the suppliant 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 someone else.”

Since Chief Judge Kline’s May 10, 2000 order reviewed the cases applying the test for a stay and since it involves some of the same parties as here, it is especially relevant.

In *Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413 (Fed. Cir. 1997), the court held that the trial court had to identify a pressing need for the stay and then balance the interest favoring a stay against interests frustrated by the stay and not lose sight of the fact that it was the trial court’s paramount obligation to exercise its jurisdiction timely in cases properly before it. Recognizing that the FMC is an Article I administrative agency and not an Article III court, the same test for a stay is applicable here. In *U.S. v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980), it was found that if an appeal to a higher court were “frivolous” so that a stay would unduly disrupt the trial process, the stay should not be granted.

Judge Kline has found that SPA’s appeal to the Fourth Circuit at this time is not frivolous. CMH does not urge to the contrary here. Thus, a similar finding is warranted here that SPA’s appeal to the Fourth Circuit is not frivolous.

SPA’s pressing need for a stay is that if a stay is not granted and if SPA is forced to participate in Docket No. 99- 16, its right to avoid the burdens of litigation in a federal forum because of its claim to state sovereign immunity will be seriously implicated. SPA risks the irreparable loss of its constitutional right not to be burdened with litigation from a private complainant without its consent. If SPA is finally held to be immune from this complaint, the harm to SPA is legally

irreparable. In *Coakley v. Welch*, 877 F.2d 304,305 (4th Cir. 1989), the court held that if a claim to Eleventh Amendment immunity is denied such interlocutory rulings “. . . are, as a general matter, immediately appealable under *Cohen [v. Beneficial Indus. Loan. Corp., 337 U.S. 541 (1949)]*.” See also *Puerto Rico Aqueduct*, 506 U.S. 139, 144 (1993), where the Supreme Court also held that a party claiming Eleventh Amendment immunity from private suits had a right of immediate appeal if the claims were denied.

The ultimate issue for court decision is whether the doctrine of state sovereign immunity is meant to cover executive branch, administrative agencies like this Commission or rather only proceedings before judicial tribunals, whether federal or state. The companion question is whether the Commission is correct that an enforcement of a possible Commission order for payment of money damages against a State entity in a federal district court does not implicate the judicial power of the United States within the meaning of the Eleventh Amendment.

Complainant urges that the harm to it by granting a stay and enduring a lengthy appellate court appeal process would be greater than the harm to SPA. But it is clear that the harm to CMH would be reparable if SPA's claim to immunity were rejected and CMH's claim were upheld because CMH seeks money damages which could make it whole, whereas the harm to SPA would be irreparable if its claim to immunity were accepted. CMH urges that there are very real differences between Docket Nos. 99-16 and 99-21, not only in the facts but because in Docket No. 99-21 no question was raised as to whether SPA is an arm-of-the-state and, in Docket No. 99-16, the issue is the subject of serious dispute as to material facts involving affidavits and exhibits which have not yet been evaluated. CMH argues that the same distinction between the two cases exists as to whether SPA has waived its claim of state sovereign immunity if it were to attach; that in Docket

No. 99-21, no issue was raised as to that question, whereas there is a live question in Docket No. 99-16 as to whether SPA has waived its immunity even if it were to attach; and that even if the Fourth Circuit reverses the Commission and finds that state sovereign immunity applies to a private complaint against a port, and remands Docket No. 99-21, there will still be a need to have a hearing of some type on the question of whether SPA is an arm of the state and whether it has waived its immunity.

However, the essential first question as to whether SPA is entitled to state sovereign immunity from the private complaint in the present administrative proceeding is the same as that before the Fourth Circuit in its Docket No. 00-1481, the appeal from FMC Docket No. 99-21. It must be remembered what the Commission stated in its March 23, 2000 order:

The doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or SCSPA to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Commission's jurisdiction over state ports, which jurisdiction has been in place for decades. The Shipping Act of 1984, and the Shipping Act, 1916 [footnote omitted] before it, illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities. . . .

. . . It is important to note that the complaint case, as a regulatory tool, is not fungible with the right to file suit against a party in court. See *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281 (D.C. Cir. 1995) (agency adjudications are not Article III court proceedings) *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409 (9th Cir. 1992) (same); *Ecee, Inc. v. Federal Energy Regulatory Comm'n*, 645 F.2d 339 (5th Cir. 1981) (same); see also *Tennessee Dep't of Human Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (Eleventh Amendment does not apply to administrative agencies). A private

complaint may not bring court action regarding alleged violations of the Shipping Act, as the FMC's jurisdiction over any such violations is exclusive. See *Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (no implied private cause of action in court under the Shipping Act, 19 16); see also *D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.), *cert. denied*, 348 U.S. 839 (1954). This further emphasizes the unitary nature of the regulatory scheme created by the Shipping Act, as all original determinations as to whether the Act has been violated, whether initiated by private complaint or by Commission investigation, are made by the Commission. [Footnote omitted.]

For these reasons, we have chosen to reverse the ALJ's decision dismissing the present case, and hold that the doctrine of sovereign immunity does not bar complaints against state-run ports.⁷

⁷Because it is not necessary to a resolution of the sovereign immunity question, we express no opinion regarding whether SCSPA is in fact an arm of the State of South Carolina.

There is no need to pursue any further litigation here at this time on the question of whether SPA is an arm of the state or whether it has waived that immunity if it is entitled to it. Once the Fourth Circuit has disposed of SPA's petition for judicial review, the proper procedure to be followed can be determined. If the court rejects SPA's position and CMH is ultimately able to prove its claims and does so, it can be adequately compensated monetarily. Weighing the various factors, the balance clearly tips in favor of SPA since the harm to it if it loses is irreparable while the harm to CMH if it ultimately succeeds is reparable.

CMH urges that, in the alternative, that the proceeding should go forward against the other issues and other respondents. In the next section of this ruling, RDA's request for a stay and certification of an appeal will be granted, and the other respondents will be dismissed from the proceeding in a companion ruling. CMH's request for alternative relief is denied. Again, if it is

ultimately successful, its damages can be fully compensated. In addition, in order to conserve administrative and judicial resources, a stay is clearly warranted.

Order on SPA's Motion to Stay

IT IS ORDERED:

SPA's request for a stay is granted pending the outcome of its petition before the Fourth Circuit in No. 00-1481, namely, SPA's appeal from the FMC's March 23, 2000 order in FMC Docket No. 99-21. Thirty (30) days after a final decision is issued, the parties should confer and propose a joint draft procedural schedule for the next phase of this proceeding or other appropriate procedure.

(2) Motion for Appeal by RDA

RDA's Position

Respondent RDA filed a motion for leave to appeal to the Commission the ruling dated May 2, 2000, denying RDA's motion to dismiss and for a stay of this proceeding pending the appeal pursuant to Rule 153(d), 46 C.F.R. § 502.153(d). The grounds of RDA's motion are as follows:

1. RDA notes that the May 2, 2000 ruling (a) denied RDA's motion to dismiss; (b) rejected the contention of RDA that the 11th Amendment to the Constitution of the United States immunized RDA, as an agency of South Carolina, from suit brought by a private citizen in this forum ; and (c)

rejected RDA's claims that the FMC lacked both in personam and subject matter jurisdiction over RDA and its activities as they relate to the complaint in this proceeding.

2. RDA notes that the May 2, 2000 ruling concerning RDA's immunity from suit under the 11th Amendment was consistent with the Commission's March 23 ruling in Docket No. 99-2 1, which held that the 11th Amendment to the Constitution of the United States did not immunize the SPA, also an agency of South Carolina, from suit brought by a private citizen in this administrative forum, and remanded the proceeding to Chief Judge Norman D. Kline.

3. RDA notes that SPA filed with the Fourth Circuit a petition for review of the FMC's decision in Docket No. 99-2 1, seeking reversal of the FMC decision on the 11th Amendment issue in Docket No. 99-21, and that Chief Judge Kline, on May 10, 2000, stayed Docket No. 99-21 pending action by the Fourth Circuit on the SPA petition for review.

4. RDA states that the grant of its motion for leave to appeal is necessary to prevent substantial expense, detriment, and undue prejudice to RDA and is a type of collateral order suitable for appellate review.

5. RDA states that the Supreme Court, in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546-47 (1949), recognized that a non-final order may be subject to interlocutory review if it conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment, and also citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463,468 (1978).

6. RDA states that the Supreme Court has also held that denials of 11th Amendment immunity are susceptible of interlocutory appeal; that the Court stated that "a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental

constitutional protection, whose resolution generally will have no bearing on the merits of the underlying action. RDA contends that the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice,” citing *Puerto Rico Aqueduct*, 506 U.S. 144,145 (1993); and that in so holding the Supreme Court noted that the “very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” *Id.*

7. RDA explains that the crux of the Supreme Court’s holding in *Puerto Rico Aqueduct* is rooted in the fundamental premise behind the 11th Amendment grant of immunity which is to protect a state or state agency from the indignity of participating in litigation from the outset, and that to subject a state agency to an entire trial process, including discovery and a hearing, only to have the proceeding negated at the end of the process would undisputedly cause RDA the harm that the 11th Amendment was designed to prevent.

8. RDA states that the FMC reviewed Docket *No. 99-21 sua sponte* and reached a decision on the 11th Amendment issue without the benefit of briefs from the parties; that RDA does not believe that the 11th Amendment issue was fully presented to the Commission and is guardedly hopeful that the Commission will reconsider and revise its views on this issue once it affords itself and interested parties the benefit of a complete argument on this important issue.

9. RDA states that regardless of whether the Commission revises its views on the applicability of the 11th Amendment to FMC proceedings brought by private complainants, grant of this motion is essential to facilitate RDA’s prompt access to having the matter heard by a Circuit Court of Appeals of appropriate venue.

10. RDA states that, in addition to seeking 11th Amendment immunity from suit by private complainants, RDA also sought dismissal based on assertions that the Commission lacks jurisdiction over its person and over the subject matter of its activities as the state agency charged with supervising transition of Navy property to the private sector; that these arguments in support of dismissal were not only rejected, but affirmative findings of both subject matter and in personam jurisdiction were entered by the ALJ in the May 2, 2000 ruling; that RDA will contend that it was procedural error for the ALJ to reach affirmative findings of jurisdiction even prior to the filing of an answer in the proceeding; that, nonetheless, by affirmatively deciding jurisdictional issues (as opposed to simply denying the motion to dismiss) these jurisdictional points are now ripe for review by the Commission and should be decided now, rather than at the end of a lengthy and costly litigation process; and that economy in the management of the resources of the Commission and the parties dictates that prompt review of the ALJ's findings of jurisdiction be permitted to occur now, along with review of RDA's assertions of 11th Amendment immunity.

11. RDA states that the instant motion for leave to appeal, if granted by the presiding officer, together with the submitted exceptions and brief in support of exceptions shall constitute "the appeal itself" as contemplated by Rule 153(b).

SPA supports RDA's motion for leave to appeal and also seeks a stay of this proceeding.

CMH's Reply

In reply, complainant CMH states that the reality is that a decision of the Fourth Circuit in Docket No. 99-21, or in Docket No. 99-16 as to whether a state agency can be immune from a

private administrative complaint, will not also decide the application of its ruling to the facts of this proceeding; that neither the presiding judge nor the Commission has ruled, nor will a court have before it for consideration, the question of RDA's entitlement to immunity; that this is a fact-based issue that will survive a court of appeals decision as to whether immunity, *per se*, in a federal administrative complaint proceeding, is available to an entity that can prove that it is an arm of the state, a *sine qua non* for the entity to successfully assert its immunity; that, thus, a hearing and Commission consideration of RDA's status as an arm of South Carolina must occur even if the court were to reverse the Commission; and that there are thus compelling reasons dictating that this proceeding should not be stayed or certified to the Commission.

CMH states that RDA's challenge to the presiding judge's ruling on Shipping Act jurisdiction is surprising; that RDA raised this issue in its motion to dismiss this proceeding and in its reply to CMH's reply, and the presiding judge was obliged to determine whether this proceeding should move forward or be dismissed as to RDA; and that the stay requested by RDA is unwarranted.

CMH states that denial of leave to appeal and of a stay will not prejudice RDA; that, rather, CMH would be prejudiced by denial of its right to have its allegations heard and considered through proceedings that would not be rendered unnecessary by any ruling of a court of appeals,

CMH states that RDA first contended that RDA is a state agency and must be protected from the "indignity" of litigation; that it appears that some "indignities" are worse than others, since RDA does not dispute the purported "indignity" of a Commission initiated investigation of RDA's activities, nor does RDA consider the indignities suffered by the shipping public as a consequence of RDA's unlawful actions.

CMH states that RDA also overlooked the need for a determination of its status as an arm of the state, an issue that is vigorously disputed in the briefs already filed; that this issue would survive a court decision reversing the Commission in Docket No. 99-21 or another such appeal as outlined above.

CMH states that RDA's access to the court of appeals will not be foreclosed by denial of leave to appeal; that RDA could seek participation in SPA's already-filed appeal as *amicus curiae*; and that RDA did not demonstrate that denial of its instant motion would cause substantial expense, detriment or undue prejudice as Rule 153 requires.

CMH states that RDA misread the presiding judge's May 2, 2000 ruling denying respondents' motions to dismiss; that RDA argued that leave to appeal is necessary on the Commission's personal and subject matter jurisdiction over RDA under the Shipping Act because the presiding judge affirmatively found against RDA on these issues; that in an attachment to its motion for leave to appeal, RDA listed citations to the May 2, 2000 ruling where, RDA argued, the presiding judge committed procedural error in making such findings, citing Notice of Exceptions to Rulings of Administrative Law Judge, May 17, 2000; that, however, RDA omitted to cite the presiding judge's stated qualification that his rulings were "[o]n the basis of the material furnished in the present proceeding at this juncture, before any evidence is submitted and before discovery";⁶ that it is inevitable, in any event, for a presiding judge to arrive at some preliminary conclusions in order to decide whether or not to dismiss; that, otherwise, motions to dismiss would never be decided; that the essence of motions to dismiss is that the moving party should not prevail on

⁶Citing Ruling on Respondents' Motions to Dismiss, issued May 2, 2000, at 62.

jurisdictional issues unless jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law, citing *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765,768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); that, in this proceeding (Docket No. 99-16), there can be no doubt that the factual dispute on the jurisdictional issue is substantial; that RDA clearly is unhappy with the outcome on its motion to dismiss; and that, however, dissatisfaction with the ruling of a presiding judge provides no basis for applying the exception to the rule barring appeals of interlocutory rulings.⁷

CMH urges denial of RDA's motion for leave to appeal and for a stay, and states that RDA's motion was accompanied by its appeal, as required by Commission rule; that CMH has not attached its reply to RDA's appeal, but CMH reserves the right to file its reply if leave to appeal is granted to RDA; and that CMH requests the presiding judge to permit CMH to do so, in that event.

CMH states that because of the substantial difference between the shipping and constitutional issues raised by RDA, if the presiding judge decides that leave to appeal is appropriate on the immunity issue, that the presiding judge grant leave only as to that issue and not in any event on the Shipping Act issues.

Discussion and Conclusions
as to RDA's Request For a Stay

RDA's request for a stay and to certify its appeal of the May 2, 2000 ruling will be granted.

While RDA's claim to state sovereign immunity is not supported at this time by any decision of any

⁷CMH cites *Compania Trasatlantica Espanola, S.A., et al. v. Virginia International Terminals, Inc.*, 26 S.R.R. 532 (ALJ 1992), where the respondent was denied leave to appeal the presiding judge's denial of its motion to dismiss that challenged Commission jurisdiction.

court nor has the issue as to whether it is an arm of South Carolina been decided, the sole basis for denying RDA's motion to dismiss CMH's complaint was the March 23, 2000 order of the Commission in Docket No. 99-21, which order is on appeal to the Fourth Circuit. Chief Judge Norman D. Kline has stayed further proceedings on remand in Docket No. 99-21. RDA's appeal in the instant proceeding will be certified to the Commission so that these important questions can be the subject of a final decision, preparatory to court review, if the parties so desire. CMH's alternative request for permission to reply to RDA's appeal will be granted.

This conclusion is warranted because of the wealth of court opinion holding that claims to state sovereign immunity are immediately appealable from interlocutory rulings, See, e.g., *Puerto Rico Aqueduct*.

CMH contends that the question of RDA's entitlement to immunity is a fact-based issue as to whether RDA can prove that it is an arm of South Carolina and that this should be decided earlier rather than later. However, if the Fourth Circuit reverses the Commission and finds that SPA's claim of state sovereign immunity bars the private complaint in an administrative proceeding, CMH's complaint against RDA may be limited to the arm of the state question. Since any harm to CMH can be remedied by an award of damages, if it proves its claim on the merits, the damage to CMH is reparable. If we now go forward to determine whether RDA is an arm of South Carolina and the Fourth Circuit finds that state sovereign immunity bars the complaint in Docket No. 99-21, RDA's damages for being forced to litigate the arm of the state issue now would be irreparable. Clearly the balance tips in favor of RDA.

In the circumstances, RDA's request for a stay and motion for leave to appeal the May 2, 2000 ruling to the Commission will be granted.

IT IS ORDERED:

That respondent RDA's motion for leave to appeal the May 2, 2000 ruling to the Commission and request for stay are granted. RDA's submitted exceptions and brief in support of exceptions constituting the appeal is certified to the Commission. As requested, complainant may file a reply to RDA's appeal on July 28, 2000.


Frederick M. Dolan, Jr.
Administrative Law Judge