

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| Delaware Department of Natural Resources and Environmental Control, |) | |
| |) | |
| Petitioner, |) | |
| v. |) | No. 07-1007 |
| |) | |
| Federal Energy Regulatory Commission, |) | |
| |) | |
| Respondent. |) | |

**MOTION OF RESPONDENT FEDERAL ENERGY
REGULATORY COMMISSION TO DISMISS OR
ALTERNATIVELY TO HOLD IN ABEYANCE PETITION
FOR REVIEW AND TO SUSPEND THE REQUIREMENT TO
FILE THE CERTIFIED INDEX TO RECORD**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Circuit Rule 27, and this Court’s January 16, 2007 order directing the parties to file dispositive motions by March 2, 2007, Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) hereby moves to dismiss the instant petition for review, as the orders challenged in this petition, *Crown Landing LLC; Texas Eastern Transmission, LP*, 115 FERC ¶ 61,348 (2006) (“Certificate Order”), *reh’g denied*, 117 FERC ¶ 61,209 (2006) (“Rehearing Order”) (Attachments 1 and 2 to this Motion) were conditional, but not final orders. In the alternative, the Commission moves to hold the instant petition for review in abeyance pending the outcome of other proceedings and further Commission action.

The Commission further moves to suspend the requirement to file the certified index to record pending a ruling on this motion. In support of these requests, the Commission states:

BACKGROUND

On September 16, 2004, Crown Landing LLC (“Crown Landing”) filed an application under Natural Gas Act (“NGA”) Section 3, 15 U.S.C. § 717b, requesting authority to site, construct, and operate a liquefied natural gas (“LNG”) terminal in Logan Township, Gloucester County, New Jersey. In its Certificate Order, issued on June 20, 2006, the Commission conditionally approved the application. *See, e.g.*, Certificate Order at PP 36, 49, 66, 69, 89, 91; *see also* Rehearing Order at PP 2-4, 13, 15, 17, 21, 27, 29, 31, 32.

Among the conditions imposed by the Certificate Order is Ordering Paragraph G, which requires Crown Landing to comply with the environmental conditions contained in Appendix A to the Certificate Order. *See, e.g.*, Rehearing Order at PP 4, 13. For example, Environmental Conditions 19 through 22 require Crown Landing to provide the Commission with documentation of Crown Landing’s compliance with the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1456(c)(3)(A) and the Clean Air Act (“CAA”), 42 U.S.C. § 7506(c)(1), prior to construction of the proposed facilities. These and other environmental conditions must be fulfilled prior to the initiation of construction, which, in turn, can occur only upon written approval of the Commission’s Director of Office of

Energy Projects. *See* Rehearing Order at PP 4, 13. If and when those Commission approvals are granted at some future date, the parties will have additional opportunities to avail themselves of the rehearing process at the Commission. *See* Rehearing Order at P 32.

ARGUMENT

On January 12, 2006, Petitioner, the Delaware Department of Natural Resources and Environmental Control (“DNREC”) filed its Petition for Review of Commission’s Orders under the Federal Power Act (“FPA”) § 313(b), 16 U.S.C. § 825*l*, which provides that only parties aggrieved by FERC orders may obtain judicial review. FPA § 313(b); *New Mexico AG v. FERC*, 466 F.3d 120, 121-22 (D.C. Cir. 2006). To be aggrieved, a party must establish Article III constitutional standing by showing, among other things, that it has suffered an injury in fact – an invasion of a legally protected interest which is: (1) concrete and particularized; and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *California Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002); *Public Util. Dist. No. 1 of Snohomish Co. v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001).

DNREC cannot satisfy the requirements of constitutional standing here, because, as this Court has stated:

a party petitioning for review of an order that is “conditional, subject to a further compliance filing” can “show no injury-in-fact” – and hence cannot satisfy the requirements of constitutional standing –

because such an order is “without binding effect.” *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005); *see Transmission Agency of N. Cal. v. FERC*, 2006 U.S. App. LEXIS 6177, No. 05-1400, slip op. at 1-2 (D.C. Cir. Mar. 13, 2006); *California Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1125-26 (D.C. Cir. 2002). It is “not until . . . the Commission accept[s] the compliance filing, that [Petitioners can] demonstrate actual injury.” *DTE Energy*, 394 F.3d at 961.

New Mexico AG, 466 F.3d at 121-22.

Comparable circumstances pertain here. As the Commission explained in the Rehearing Order:

The approval we issued in the June 20 [Certificate] Order is expressly conditioned upon completion of Crown Landing’s remaining and unchallenged duties under these two applicable statutes [the CZMA and the CAA]. Our [Certificate Order] is an incipient authorization without current force and effect, since it does not yet allow Crown Landing to begin the activity it proposes. Crown Landing can do nothing to make the Commission’s conditional approval operative or effective until it fulfills the conditions the DNREC challenges.

Rehearing Order at P 21 (footnote omitted).

In fact, DNREC’s primary challenge to the Commission’s orders rests entirely on its admission that various state proceedings must first be resolved before Crown Landing can ever begin construction of its LNG project. DNREC claims that the Certificate Order violated the CZMA and the CAA since, it argues, both statutes require finalization of certain state action before the Commission can authorize facilities pursuant to NGA Section 3, and the relevant state actions have yet to be finalized. *See* Rehearing Order at PP 13-16; Petitioner’s February 15, 2007 Statement of Issues To Be Raised. Thus, even Petitioner agrees that the

orders on review are merely conditional.

Indeed, since DNREC has the power to grant or withhold the necessary state authorizations, DNREC itself “holds the keys” as to whether the Commission’s orders ever become effective and operable. The conditional approval of Crown Landing’s application remains subject to its filing, prior to construction, documentation of concurrence from DNREC that the project is consistent with applicable Delaware law, in conformance with CZMA. Certificate Order at PP 31, 60.¹ Similarly, Crown Landing must obtain state permits as required under the CAA, including the “DNREC final permits **prior to construction.**” Rehearing Order at P 34 (emphasis in original). Under these circumstances, the orders on review are not final and this Court should dismiss this petition for lack of jurisdiction.

Should this Court decline to dismiss this petition for review, in the alternative, it hold this petition for review in abeyance pending resolution of the various unresolved state and FERC proceedings. Holding the case in abeyance

¹ Certain relevant and currently applicable state laws and regulations may be subject to the United States Supreme Court’s disposition of the action pending before that Court in *New Jersey v. Delaware*, No. 134, Original, (U.S., redocketed, Nov. 28, 2005). New Jersey seeks review of Delaware’s assertion of authority under a 1905 Compact between the states over certain improvements appurtenant to the New Jersey shore of the Delaware River. On January 23, 2006, a Special Master was appointed in the proceeding.

under these circumstances would avoid a waste of judicial and party resources.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed. In the alternative, the petition for review should be held in abeyance. The Commission also requests that, in the interests of judicial economy and administrative efficiency, the date for filing the certified index to the record, currently due March 2, 2007, be suspended pending the Court's consideration of this motion.

Respectfully submitted,

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March 1, 2007

ATTACHMENT 1

ATTACHMENT 2

