ORAL ARGUMENT NOT YET SCHEDULED

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

No. 07-1007

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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REVISED FINAL BRIEF: SEPTEMBER 17, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

I. Parties and Amici:

The parties before this Court are identified in the brief of petitioner.

II. Rulings Under Review:

1. *Crown Landing LLC, et al.*, 115 FERC ¶ 61,348 (2006), JA 43; and

2. *Crown Landing LLC*, 117 FERC ¶ 61,209 (2006), JA 99.

III. Related Cases

This case has not previously been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

_____
Samuel Soopper
Attorney

September 17, 2008

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

COURT CASES:

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* Cases chiefly relied upon are marked with an asterisk.

COURT CASES: (cont'd) **PAGE**

COURT CASES: (cont'd) **PAGE**

ADMINISTRATIVE CASES:

STATUTES:

STATUTES: (cont'd) **PAGE**

GLOSSARY

Conditional Approval Order	*Crown Landing LLC, et al.*, 115 FERC ¶ 61,348 (2006), JA 43.
CZMA	Coastal Zone Management Act of 1972, 16 U.S.C. § 1451
Energy Policy Act	Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005)
LNG	Liquefied Natural Gas
NGA	Natural Gas Act
Rehearing Order	*Crown Landing LLC*, 117 FERC ¶ 61,209 (2006), JA 99.

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STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission (Commission or FERC) reasonably interpreted section 3 of the Natural Gas Act (NGA), 15 U.S.C. § 717b, to authorize conditional approval of an application for the siting, construction and operation of a liquefied natural gas (LNG) terminal, subject to the applicant's compliance with relevant provisions of the Coastal Zone Management Act and the Clean Air Act.

STATUTORY PROVISIONS

The pertinent statutes are contained in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Delaware Department of Natural Resources and Environmental Control (Delaware) seeks review of FERC orders conditionally approving an application to construct and operate an LNG terminal. *See Crown Landing LLC,* 115 FERC ¶ 61,348 (2006), JA 43 (Conditional Approval Order), *reh'g denied and clarified*, 117 FERC ¶ 61,209 (2006), JA 99 (Rehearing Order). Delaware argues that the Commission should have deferred issuing its decision because Delaware has denied authorization for the project under the Coastal Zone Management Act and has not yet acted under the Clean Air Act.

As discussed more fully in Part I of the Argument section of this brief, however, Delaware lacks standing to raise this argument. Because Delaware itself possesses the authority to grant or deny the relevant authorizations, and indeed has already acted to withhold one, Delaware cannot establish that it has suffered any cognizable injury by the Commission's conditional approval. Moreover, Delaware's arguments are not ripe for immediate review because, now that the Supreme Court has affirmed Delaware's right to veto the proposed LNG project as conditionally authorized by the Commission, the project cannot go forward unless reconfigured and until another filing is submitted for Commission approval.

STATEMENT OF THE FACTS

I. Statutory Background

A. Natural Gas Act Authorization Of LNG Imports And Terminals

Under section 3 of the NGA, 15 U.S.C. § 717b(a), "no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." The statute further provides that "[t]he Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest." *Id.* Moreover, the Commission "may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate . . . ." *Id.*

Section 3, section 311 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (Energy Policy Act), recently amended the NGA to specifically address the agency's consideration of LNG facilities. Thus, the Act amended NGA section 2 to define an "LNG terminal" (with certain exceptions not relevant here) as including:

> all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel.

15 U.S.C. § 717a(11).

The NGA, as amended by the Energy Policy Act, goes on to give the Commission "the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). In addition to providing certain mandatory procedures for such applications, not relevant here, the amended NGA states that the Commission "may approve an application" for an LNG terminal "in whole or part, with such modifications and upon such terms and conditions as the Commission find[s] necessary or appropriate." *Id.* § 717b(e)(3)(A). (The statute also places some restrictions on the Commission's conditioning authority, dealing with LNG service offerings and rates, *see id.* § 717b(e)(3)(B)(ii), which do not apply here.)

The Energy Policy Act further amended the NGA to endow the Commission with unique and detailed procedural authority to coordinate the processing and review of LNG applications. *See* 15 U.S.C. § 717n. To this end, the Act establishes the Commission as "the lead agency for the purposes of coordinating all applicable Federal authorizations . . . ," and requires "[e]ach Federal and State agency considering an aspect of an application" for LNG facility approval to "cooperate with the Commission and comply with the deadlines established by the Commission." *Id.* § 717n(b)(1)-(2). Pursuant to this procedural authority, for example, the Commission is authorized to set a schedule to ensure "expeditious completion" of all such proceedings." *Id. §* 717n(c). Additionally, the

Commission must "maintain a complete consolidated administrative record" for all decisions made in review of an LNG application, including those of a "State or administrative agency or officer acting under delegated Federal authority . . . ," with respect to "appeals or reviews under the Coastal Zone Management Act of 1972." *Id.* § 717n(d)(1).

B. The Relationship Of The NGA To The Coastal Zone Management Act And The Clean Air Act

The Energy Policy Act also amended section 3 of the NGA by specifically referencing, as relevant here, two other statutes in the context of the Commission's new authority with respect to LNG terminals:

> Except as specifically provided in this chapter, nothing in this chapter affects the rights of the States under –
>
> > (1) the Coastal Zone Management Act of 1972 [CZMA] (16 U.S.C. 1451 et seq.);
> >
> > (2) the Clean Air Act (42 U.S.C. 7401 et seq.)

15 U.S.C. § 717b(d).

Both the CZMA and the Clean Air Act require state approval for federal licenses and permits. Thus, the CZMA provides in pertinent part that "[n]o license or permit shall be granted by [a] Federal agency until the state or its designated agency has concurred with the applicant's certification" that the proposed activity "is consistent with the objectives of this chapter." 16 U.S.C. § 1456(c)(3)(A). *See, e.g., Mountain Rhythm Resources v. FERC*, 302 F.3d 958 (9th Cir. 2002)

(discussing relationship between FERC license approval and the CZMA). Similarly, section 176 of the Clean Air Act, 42 U.S.C. § 7506(c)(1), states that "[n]o department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title." *See* 42 U.S.C. § 7410(a)(1) (requiring each state to adopt an air quality plan).

II. The Proceeding Before The Commission

A. The Conditional Approval Order

On September 16, 2004, Crown Landing LLC (Crown Landing) filed with the Commission an application under NGA section 3 to site, construct and operate an LNG terminal in Logan Township, Gloucester County, New Jersey, which would be used to import, store and vaporize LNG from foreign sources. R 1 at 1-2, JA 119-120. Crown Landing proposed to locate its LNG terminal on the eastern shoreline of the Delaware River in New Jersey, across from Pennsylvania, but near the Delaware border. *Id.* at 6, JA 127. While the onshore portion of the terminal would be located in New Jersey, the associated facilities for the unloading of ships would extend into the New Castle County, Delaware, portion of the Delaware River.

On June 20, 2006, after an extensive administrative proceeding (including the preparation of an Environmental Impact Statement and review of numerous public comments), the Commission issued its Conditional Approval Order, which addressed a large number of issues concerning Crown Landing's application for an LNG terminal.[1] However, only two issues are raised on appeal.

First, the Commission determined that the Crown Landing project was "subject to a federal Coastal Zone Consistency Review," as it would "involve activities within the coastal zones of New Jersey, Delaware and Pennsylvania." Conditional Approval Order P 60, JA 64. Thus, the agency observed, Crown Landing would need "to demonstrate consistency with the applicable states' coastal zone management program[s] and obtain concurrence of consistency from these agencies prior to the FERC approving the start of any construction." *Id.*

In this regard, the Commission acknowledged that Delaware earlier had, on February 3, 2003, issued a determination that Crown Landing's proposed off-loading pier (a significant part of the project) is prohibited by that state's Coastal Zone Act. Conditional Approval Order P 61, JA 64-65. The Commission further noted that New Jersey maintained that it had review and permitting authority,

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[1] The Commission's order also issued a certificate under NGA section 7, 15 U.S.C. § 717f, to Texas Eastern Transmission, LP, for a proposed pipeline to transport the regasified LNG from Crown Landing's terminal. That portion of the Commission's order is uncontested.

exclusive of Delaware, with respect to the project. *Id.*

The Commission rejected, however, Delaware's contention that its CZMA determination prevented the immediate conditional approval of Crown Landing's application. Conditional Approval Order P 31, JA 64. The Commission emphasized that final approval of Crown Landing's project was "subject to its filing, prior to construction, documentation of concurrence from [Delaware] that the projects are consistent with applicable Delaware law, in conformance with [the] CZMA." *Id.* (footnote omitted). The Commission determined that this course of action was consistent with its past practice under NGA section 3, particularly in light of the Energy Policy Act amendments giving the agency "authority over the siting, construction, expansion or operation of an LNG terminal." *Id.* P 33, JA 55 (footnote omitted).

Accordingly, the Commission specifically included in the environmental conditions attached to the Conditional Approval Order that Crown Landing file with the FERC Secretary "documentation of concurrence" from the appropriate Delaware agency "that the projects are consistent with the Delaware Coastal Management Program . . . **prior to construction.**" Conditional Approval Order Appendix A, Condition 20 (emphasis in original), JA 80. The Commission likewise required Crown Landing to file New Jersey's concurrence of consistency with its coastal management plan prior to the construction of the terminal. *Id.*,

Condition 19, JA 80.

Second, the Commission discussed the air emissions that would result from the construction of the proposed LNG terminal. Because of such emissions, the Commission determined that Crown Landing would need to obtain a final Lowest Achievable Emission Rate certificate from the New Jersey Department of Environmental Protection. *See* Conditional Approval Order P 67, JA 66-67. Thus, the Commission included a specific environmental condition on this point in its order:

> **Prior to construction**, Crown Landing shall provide a full air quality analysis identifying all mitigation requirements required to demonstrate conformance with the applicable state implementation plan . . . .

Id., Appendix A, Condition 22 (emphasis in original), JA 80.

B. The Rehearing Order

Delaware filed a timely request for rehearing of the Commission's Conditional Approval Order, arguing, as relevant here, that the Commission's conditional approval of Crown Landing's application violated both the CZMA and the Clean Air Act. R 278, JA 190. Delaware also asked the Commission to clarify that Crown Landing was required to obtain an air quality permit from Delaware, as well as from New Jersey, prior to construction and operation of the LNG terminal. *Id*. at 13-14, JA 202-203.

On November 17, 2006, the Commission issued its Rehearing Order,

rejecting Delaware's contentions. The Commission concluded that, pursuant to the broad authority provided by NGA section 3, as amended by the Energy Policy Act, it had the authority to approve Crown Landing's LNG application conditionally, subject to its compliance with state CZMA and Clean Air Act requirements. Rehearing Order P 17, JA 104-105.

However, the Rehearing Order did clarify at Delaware's behest that "Crown Landing must obtain state permits under the [Clean Air Act]." Rehearing Order P 34, JA 112. As the Commission explained, Condition Nos. 21 and 22 of Appendix A to the Certificate Order meant that Crown Landing must obtain "all necessary New Jersey and Delaware permits" in conformity with the Clean Air Act "prior to construction." *Id.* P 35, JA 112.

C. The Supreme Court Decision

As the Commission observed, Conditional Approval Order PP 31 n.20, 61, JA 54, 64-65, during the pendency of the agency proceeding, New Jersey had brought an original action in the Supreme Court alleging that Delaware had no jurisdiction to reject the Crown Landing LNG project pursuant to state authority recognized by the CZMA. The basis of New Jersey's claim was that, according to the terms of an interstate compact, the portion of the project extending into the Delaware River was not subject to Delaware's control.

In *New Jersey v. Delaware*, 128 S.Ct. 1410 (2008), issued while the appeal

at bar was pending, the Supreme Court "confirm[ed] Delaware's authority to deny permission for the Crown Landing terminal," pursuant to its state permitting authority. 128 S.Ct. at 1427. In its Decree, the Court explained:

> In refusing to permit construction of the proposed Crown Landing LNG unloading terminal, Delaware acted within the scope of its governing authority to prohibit unreasonable uses of the river and soil within the twelve-mile circle [of its authority].

Id. at 1428.

SUMMARY OF ARGUMENT

1. The Court should dismiss Delaware's appeal for lack of jurisdiction. Delaware argues that the Commission cannot conditionally approve Crown Landing's LNG application because Delaware has rejected the project as inconsistent with the CZMA (a right of rejection upheld by the Supreme Court), and has not acted with respect to the Clean Air Act. However, the Commission's final approval of the LNG application is conditioned on any necessary approval by Delaware under those statutes. Thus, Delaware seeks to vindicate what is, at best, an abstract right.

Alternatively, Delaware's petition should be dismissed as unripe. Now that the Supreme Court has affirmed Delaware's right to veto the project as proposed, if Crown Landing intends to go ahead with the project, it will have to file a reconfigured proposal for Commission approval. Thus, it is far from certain whether this controversy will ever require judicial review.

2. The Commission reasonably construed NGA section 3, 15 U.S.C. § 717b, to authorize conditional approval of Crown Landing's LNG application, subject to any necessary state approvals under the CZMA and the Clean Air Act, including Delaware's.

In NGA section 3, particularly as amended in 2005, Congress entrusted the Commission with broad power to approve LNG applications "upon such terms and

conditions" the Commission finds "necessary and appropriate." While NGA section 3 provides that the Commission must appropriately recognize state authority under the CZMA and the Clean Air Act, this provision does not affect the agency's power to conditionally approve LNG applications, subject to later compliance with those statutes. The Commission's reasonable interpretation also furthers the expressed purpose of amended NGA section 3, which designates the Commission the lead agency on such applications, and was designed to streamline the application process.

Delaware cannot demonstrate that the Commission's interpretation of its NGA section 3 authority with respect to the CZMA and Clean Air Act is unreasonable. On the contrary, Delaware's argument that the Commission cannot act until it has received all necessary state authorizations for LNG applications is inconsistent with the structure of NGA section 3, and would undermine the Commission's broad and exclusive authority to review such applications in a timely manner. Nor does any judicial precedent restrict the Commission's authority in this regard.

ARGUMENT

I. THE COURT SHOULD DISMISS DELAWARE'S PETITION FOR REVIEW FOR LACK OF JURISDICTION.

A. Delaware Cannot Establish That The Commission's Conditional Orders Inflict An Actual Injury Upon It.

Typically, when the Commission issues an order approving a major infrastructure project within its jurisdiction, such as a hydroelectric project, natural gas pipeline or, as here, an LNG terminal, it does so subject to various conditions. Thus, the Commission explained, its approval of Crown Landing's LNG terminal is subject to the condition that other federal, state and local agencies, with approval authorities of their own, provide necessary authorizations; if not, the project cannot go forward. *See* Conditional Approval Order P 89, JA 72. The Commission takes this course of action – rather than simply awaiting the last of the necessary other authorizations – because it wants to make timely decisions that help inform project sponsors, supporters and opponents, as well as other licensing agencies. *See* Rehearing Order P 26, JA 108-109 (explaining "practical reason" underlying the agency's approach).

In the typical case, the Commission, in defending such a conditional order on appellate review, would likely not move to dismiss the petition simply on the ground that the order is conditional. To do so would, arguably, shield from appellate review major FERC project licensing, certification and authorization

orders.

This, however, is not the typical case. Here, Delaware, the petitioner itself, has the authority to reject Crown Landing's LNG project, delegated to it by the CZMA and the Clean Air Act. *See* Rehearing Order P 21, JA 106 (approval of Crown Landing's application is "expressly conditioned" on CZMA and Clean Air Act compliance). And indeed, not only has Delaware rejected the proposed project pursuant to the CZMA, but also its right to so reject it has been affirmed by the Supreme Court in *New Jersey v. Delaware*.

Under section 19(b) of the NGA, 15 U.S.C. § 717r(b), only a party that is "aggrieved" by a Commission order may obtain judicial review. An "aggrieved" petitioner must also meet the constitutional standing requirements. *See, e.g.*, *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998) (construing analogous review provision of the Federal Power Act). These requirements are that: (1) a petitioner must have suffered an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) there must be a "causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to be merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations and quotation marks omitted); *see also, e.g., Alabama*

Municipal Distributors Group v. FERC, 312 F.3d 470, 471 (D.C. Cir. 2002).

Here, Delaware cannot demonstrate any injury concrete and definitive enough to give it standing to object to the Commission's orders. The Commission has approved an application subject to requisite state approval, including Delaware's, under the CZMA and the Clean Air Act. At this time, any construction on the Crown Landing LNG terminal cannot occur absent appropriate state approval. *See* Rehearing Order P 21, JA 106. Furthermore, Delaware has exercised its right under the CZMA to reject the proposed project, and its right to do so was affirmed by the Supreme Court.

In essence, therefore, Delaware seeks to vindicate a phantom right, namely its authority to reject an LNG application under the CZMA and the Clean Air Act, which the Commission has approved subject to that same authority, an authority which Delaware has already exercised. Thus, Delaware's claim violates the rule of standing that an "injury must be distinct and palpable and not merely hypothetical, abstract, or conjectural." *University Medical Center of Southern Nevada v. Shalala*, 173 F.3d 438, 441 (D.C. Cir. 1999) (citations omitted).

Delaware makes two arguments that it nonetheless has standing on appeal. First, Delaware contends the CZMA and the Clean Air Act confer standing in and of themselves, because "a concrete and particular injury for standing purposes can . . . consist of the violation of an individual right conferred on a person by statute."

Pet. Br. 15 (quoting *Zivotofsky v. Secretary of State*, 444 F.3d 614, 619 (D.C. Cir. 2006)). Under this type of statutory standing, Delaware believes, it "need not show any concrete harm other than the violation of a statutory right conferred on it." Pet. Br. 17 n.22. This is particularly true for a state petitioner, which is "entitled to special solicitude in [the Court's] standing analysis." *Id*. n. 21 (quoting *Massachusetts v. EPA*, 127 S.Ct. 1438, 1454-55 (2007) (internal quotation marks omitted)).

Delaware is incorrect that standing based on a right conferred by statute, even to a state, eliminates the need for a party to nonetheless demonstrate a concrete injury. In *Massachusetts v. EPA*, the Supreme Court found Massachusetts had standing pursuant to the Clean Air Act to challenge the Environmental Protection Agency's decision that it had no authority to regulate the emission of greenhouse gases that could contribute to global warming. 127 S.Ct. at 1446. While indicating that Massachusetts had standing because "Congress has . . . authorized this type of challenge to [Environmental Protection Agency] action" under the Clean Air Act, *id.* at 1453 (citing 42 U.S.C. § 7607(b)(1)), and emphasizing "that the party seeking review here is a sovereign State," rather than a private individual, *id.* at 1454, the Court nonetheless required a demonstration of actual harm. In fact, the Court devoted an entire section of its opinion to the specific, imminent injury alleged by Massachusetts, namely "[t]he harms

associated with climate change," which "are serious and well recognized." *Id.* at 1455.

Similarly, in *Zivotofsky*, the injury alleged was also actual and concrete: the State Department had refused to register the birth of a child in accordance with governing law. That case did not involve an agency making a decision contingent on review by other statutorily-entitled authorities, like the Commission did here.

Delaware certainly has the right to seek to enforce the CZMA if it is actually injured by the Commission's application of that statute. In this case, however, no such injury exists. The Commission's approval of Crown Landing's project as proposed is conditioned on Delaware's approval of the project under the CZMA. Because Delaware has rejected the project, the Commission's orders simply do not inflict the kind of concrete, imminent injury required for standing, notwithstanding Delaware's rights under the CZMA and its status as a sovereign State.

Second, Delaware asserts that it has standing because it was subjected to an invalid administrative process by the Commission. Pet. Br. 18-21. In this regard, Delaware relies on *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), where the court upheld the standing of Texas to challenge an administrative procedure established by the Secretary of the Interior to resolve a dispute over a Indian gaming project.

In that case, however, the court based the state's standing on "Texas challenging the Secretary's authority to undertake this process," and the fact that "judicial invalidation" of the procedure "would give Texas direct relief from being effectively forced to participate in the process." 497 F.3d at 497. Here, however, Delaware is not challenging the validity of the administrative process established by NGA section 15 for Commission review of LNG certificates, which specifically contemplates state participation. *See* 15 U.S.C. § 717n(b)(2) ("Each . . . State agency considering an application for Federal authorization shall cooperate with the Commission" and comply with its deadlines); § 717n(e) (establishing that the Commission may admit "any interested State [or] State commission" as a party to LNG certificate proceedings).

Indeed, as the agency record demonstrates, Delaware fully participated in the proceeding below without any suggestion that the procedure itself was invalid. Rather, it is the *outcome* of the Commission's proceeding – the agency's decision to conditionally approve the proposed project subject to Delaware's objection – that Delaware attacks.[2]

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[2] Delaware's additional allegation of injury, stemming from its being deprived of making its CZMA determination in a more propitious "political climate" at an earlier stage of the proceeding, Pet. Br. 20, is speculative in the extreme.

B. In The Alternative, The Appeal Should Be Dismissed Because The Controversy Is Not Ripe For Judicial Review.

"Under the ripeness doctrine, an Article III court cannot entertain the claims of a litigant unless they are constitutionally and prudentially ripe." *State of Nevada v. Department of Energy*, 457 F.3d 78, 83-84 (D.C. Cir. 2006) (quoting *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1381 (D.C. Cir. 1996) (internal quotation marks omitted)). As this Court has explained, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *State of Nevada*, 457 F.3d at 85 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks and citation omitted)); *see also, e.g.*, *New York State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 (D.C. Cir. 1999) (FERC orders establishing presumption that will control future case not ripe for judicial review).

This is precisely the situation here. As a result of *New Jersey v. Delaware*, the Crown Landing project as currently proposed cannot go forward absent a reconfigured submission by Crown Landing. *See* Motion of Crown Landing (April 30, 2005) at 2 (arguing for dismissal of Delaware's petition and confirming that it now "cannot proceed with the construction of its proposed LNG facility without modifications to its project" that must be filed with and approved by the Commission). Any future filings by Crown Landing amending its proposal will, of course, entail further proceedings before the Commission and further Commission

orders. If and when such events do occur, and Delaware is aggrieved by any future final agency orders, Delaware will then have the opportunity to have this Court adjudicate its CZMA and Clean Air Act claims.

In circumstances very similar to those here, the First Circuit in *City of Fall River v. FERC*, 507 F.3d 1 (1st Cir. 2007), recently dismissed a challenge to the Commission's conditional approval of an LNG project for lack of ripeness. Applying "[a] pragmatic view of the facts," the court explained why the case was not ripe for immediate review:

> [The] proposed LNG project may well never go forward because FERC's approval of the project is expressly conditioned on approval by the [United States Coast Guard] and the [Department of Interior]. Neither agency has yet given its final recommendations, and each has expressed serious reservations about the project.
>
> * * *
>
> Because "[c]ourts have no business adjudicating the legality of non-events" . . . we decline to decide whether FERC's actions thus far were proper.

507 F.3d at 7 (quoting *Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 2529, 263 (2nd Cir. 1982)). *See Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603, 620-21 (D.C. Cir. 1978) (similarly dismissing appeal of Commission conditional NGA section 3 authorization on ripeness grounds); *see also Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007) (holding that petition for review of nuclear license application was unripe, as licensee could not construct or operate the facility

without approval by another federal agency, which had thus far been denied).

Delaware asserts that *City of Fall River* is distinguishable because, there, the petitioners challenged the merits of the Commission's decision, while Delaware contests FERC's "decision to issue an order at all, absent the state concurrences that the CZMA and [Clean Air Act] require." Pet. Br. 24 n.28. But Delaware suggests no reason why its contention concerning the Commission's authority cannot await a case in which the impact is immediate and non-contingent.

Nor can Delaware demonstrate any hardship that would require judicial review of the Commission's conditional orders at this time. As in *City of Fall River*, neither Delaware nor any other party "will experience the effects of FERC's decision unless and until the agencies authorize the project." 507 F.3d at 7 (citing *New Hanover Twp. v. United States Army Corps of Eng'rs*, 992 F.2d 470, 472 (3rd Cir. 1993)); *see also State of Nevada*, 457 F.3d at 86 (citing *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1313 (D.C. Cir. 2004)) (in evaluating ripeness, requiring a party to participate in further proceedings does not provide sufficient hardship to trigger review).

Delaware cites *Sabre, Inc. v. Department of Transportation*, 429 F.3d 113, 119-21 (D.C. Cir. 2005), Pet. Br. 24, in support of its ripeness argument, but that case is readily distinguishable. There, in finding a petitioner's claim for pre-enforcement review of an agency order ripe for review, the Court emphasized that

the agency's potential imposition of civil liability under the Federal Aviation Act was the type of legal adverse impact that "affects [petitioner's] primary conduct." 429 F.2d at 1120. Delaware's conduct, however, is not affected by postponing review here.

Furthermore, the *Sabre* Court recognized that, in view of the "clear and relatively imminent" impact of the contested rule on the petitioner, neither the parties nor the Court had a significant interest in delay. *Id.* at 1121. Here, on the contrary, the Court does have such an interest; in view of the extremely contingent and remote nature of any actual injury to Delaware, the Court would be ruling on an issue it may never have to address with respect to these parties.[3]

Finally, Delaware has suggested that "if there is any jurisdictional defect" in its petition for review, "it is mootness," requiring "the underlying orders to be vacated." Delaware Reply at 1-2. Whatever the basis may be for dismissal of Delaware's petition, this Court has recognized that in determining whether orders should be vacated, it is "[o]f prime consideration . . . 'whether the party seeking relief from the judgment below caused the mootness by voluntary action' . . . , in which event vacatur would usually not be ordered." *Northern California*

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[3] Delaware has also suggested that further administrative review by the Secretary of Commerce pursuant to the CZMA "remains a distinct possibility." Delaware's Reply On Its Cross-Motion To Dismiss And Vacate The Orders Under Review (May 27, 2008) (Delaware Reply) at 4. This possibility further diminishes the ripeness of the current appeal.

Power Agency v. NRC, 393 F.3d 233, 225 (D.C. Cir. 2004) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994)).

Here, Delaware itself has exercised its right under the CZMA to veto the Crown Landing project as proposed and the Supreme Court has sustained Delaware's legal authority to do so. Thus, vacatur of the contested orders would be inappropriate, because Delaware's voluntary action created the situation warranting dismissal.

II. THE COMMISSION'S ORDERS REPRESENT AN APPROPRIATE EXERCISE OF ITS STATUTORY AUTHORITY AND SHOULD BE SUSTAINED BY THE COURT.

A. Standard Of Review

Where a court is called upon to review an agency's construction of a statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.C. 837, 842-43 (1984) (footnote omitted). *See also, e.g., Whitman v. American Trucking Assn's*, 531 U.S. 457, 481 (2001). If the statute is silent or ambiguous as to the question at issue, then the Court "must defer to a 'reasonable interpretation made by the . . . agency.'" *Whitman*, 531 U.S. at 481 (quoting *Chevron*, 467 U.S. at 844). *See, e.g., Williams Gas Processing-Gulf Coast Co., L.P. v FERC*, 331 F.3d

1011, 1016 (D.C. Cir. 2003) (applying the *Chevron* deference test to the Commission's interpretation of the Natural Gas Act).

B. The Commission Reasonably Interpreted NGA Section 3 To Authorize Conditional Approval Of Crown Landing's LNG Application, Subject To Necessary State Approval.

At the heart of this case is the Commission's holding that section 3 of the NGA, 15 U.S.C. § 717b, as amended by the Energy Policy Act, authorizes it to approve Crown Landing's LNG application, subject to relevant conditions, rather than deferring action on its application pending necessary approvals by Delaware and other licensing agencies, or rejecting the application outright. *See* Conditional Approval Order P 33 & n.26, JA 55 (citing Energy Policy Act section 311); *see also* Rehearing Order PP 17, 21, JA 104-107.

In reaching its decision, the Commission reasonably concluded that its power to attach conditions to NGA section 3 approvals was, like its analogous power under NGA section 7 to approve pipeline certificates, 15 U.S.C. § 717f(e), "extremely broad." Rehearing Order P 17 & n.17, JA 105 (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979)). *See also FPC v. Transcontinental Gas Pipe Line Corp*., 365 U.S. 1, 7 (1961) (Commission is the guardian of the public interest and has a wide range of discretionary authority in determining whether certificates should be granted); *FPC v. Hunt*, 376 U.S. 515, 525-27 (1964) (same).

Just as NGA section 7 affords the Commission broad authority to issue certificates of public convenience and necessity with "reasonable terms and conditions," 15 U.S.C. §717f(e), so too NGA section 3, both in its pre- and post-Energy Policy Act form, affords the Commission broad authority to approve import and LNG applications with "such terms and conditions" the Commission finds "necessary or appropriate" under the circumstances, *id*. §§ 717b(a), 717b(e)(3)(A). *See Distrigas Corp. v. FPC*, 495 F.2d 1057, 1066 (D.C. Cir. 1974) (construing NGA section 3 and 7 requirements as equivalent).

Pursuant to such broad authority, the agency concluded, it could conditionally approve Crown Landing's application without violating the requirements of either the CZMA or the Clean Air Act because any further action taken by Crown Landing "is expressly conditioned upon completion of Crown Landing's remaining and unchallenged duties under these two applicable statutes." Rehearing Order P 21, JA 106.

The Commission went on to determine that exercising its conditioning authority in this manner was in keeping with the purpose of the NGA section 3. Thus, the agency observed, "[i]n recent years, [it] has chosen to exercise a less intrusive degree of regulation for new LNG import terminals" by, among other things, issuing its orders conditionally, once it has considered all relevant facts within its jurisdiction, rather than awaiting the necessary approval of other state

and federal authorities. Conditional Approval Order P 33, JA 55. As the agency further explained,

> [f]or the Commission to deny NGA section 3 authorization to Crown Landing because a state's certification or concurrence under the CZMA and [Clean Air Act] is pending at the state level or on appeal in a state or a federal court as [Delaware] would have us do would require Crown Landing to begin again the complex, time-consuming, and expensive application process when and if the CZMA and [Clean Air Act] issues are resolved.

Rehearing Order P 29, JA 110.

By conditionally approving an LNG application, the Commission therefore can "construe the statutory terms" of the NGA harmoniously with the CZMA and the Clean Air Act to accord "appropriate respect for the practical demands facing an administrative agency and the common sense necessary to accomplish disparate statutory goals, without doing violence to such terms." Rehearing Order P 21, JA 106. In support of its exercise of discretion, the Commission looked to this Court's decisions in *Public Utility Comm'n of California v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (allowing the Commission to approve an NGA section 7 certificate for construction and operation of a pipeline prior to making the necessary environmental determinations under the National Environmental Policy Act), and *City of Grapevine, Texas v. Department of Transportation*, 17 F.3d 1502 (D.C. Cir. 1994) (allowing agency approval of an airport runway conditioned on the review process required by the National Historic Preservation Act). *See*

Rehearing Order PP 18-19, JA 105-106.

The Commission's interpretation of NGA section 3 authority to allow the conditional approval of Crown Landing's application under these circumstances should be sustained by the Court. In neither NGA section 3(a) nor amended 3(e) did Congress address the specific issue the Commission decided here, namely, whether the agency was authorized to conditionally approve an LNG terminal application under NGA section 3 subject to state action under the CZMA and the Clean Air Act. Rather, NGA section 3 entrusts the Commission with discretion to employ "such terms and conditions as the Commission" may find "necessary or appropriate." 15 U.S.C. §§ 717b(a), 717b(e)(3)(A). Thus, because "Congress has not spoken so precisely," the Court "will defer to any reasonable interpretation of the statute by the agency." *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1273 (D.C. Cir. 2004) (citing *Chevron U.S.A. Inc.*, 467 U.S. at 843).

Congress did provide in the Energy Policy Act that the states would continue to exercise their mandates under the CZMA and the Clean Air Act, but with the caveat "[e]xcept as specifically provided in this chapter." 15 U.S.C. § 717b(d). The NGA, as amended by the Energy Policy Act, "specifically provide[s]" that the Commission continues to enjoy broad conditioning authority in its review of LNG applications. Furthermore, while the Energy Policy Act amendment does specify certain limited restrictions to the Commission's NGA section 3 conditioning

authority, those restrictions refer to LNG service offerings and rates, rather than state authority under the CZMA or the Clean Air Act. *Id.* § 717b(e)(3)(B)(ii)(I)-(III). It was reasonable, therefore, for the Commission to read NGA section 3 to authorize it to conditionally approve an LNG application, subject to necessary state approval under those statutes.

Moreover, the Commission's decision to conditionally approve Crown Landing's application, subject to state concurrence under the CZMA and the Clean Air Act, is in keeping with its status as the statutory "lead agency," under amended NGA section 3, which must coordinate all LNG proceedings, and with which a "State agency," such as Delaware, must cooperate to "ensure expeditious completion of all such proceedings." 15 U.S.C. §§ 717n(b)(1); 717n(c)(1)(A).

The Commission's interpretation of the interaction of the NGA with the CZMA and the Clean Air Act is therefore consistent with the principle that where "the meaning of one statute is affected by other Acts," the agency should be guided by the fact that "Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000) (citations omitted).

The reasonableness of the Commission's interpretation of its authority to conditionally approve Crown Landing's LNG application under these circumstances is further bolstered by the fact that, prior to the 2005 Energy Policy

Act, the Commission had "routinely issue[d] orders conditioning authorization of projects on the applicant's obtaining a CZMA consistency determination." Conditional Approval Order P 31 & n.21, JA 54 (quoting *Sound Energy Solutions*, 108 FERC ¶ 61,155 P 8 n.9 (2004), and citing earlier FERC orders); *see also* Rehearing Order P 26, JA 108 (indicating that "for some time," the agency "has routinely issued certificates for natural gas pipeline projects subject to the federal permitting requirements of, among other statutes, the CZMA and [Clean Air Act] as necessary and appropriate") (footnote and citations omitted). In these circumstances, it is fair to say that Congress's subsequent amendment, reaffirming the Commission's historically broad conditioning authority, "effectively ratified" this established policy of the Commission. *Brown & Williamson*, 529 U.S. at 156.

C. Delaware's Arguments To The Contrary Are Without Merit.

Delaware argues that NGA section 3 cannot be read to allow the Commission conditionally to approve an LNG application subject to state approval pursuant to the CZMA and the Clean Air Act. To prevail, of course, Delaware must demonstrate that the Commission's statutory interpretation is unreasonable, not merely that there is a reasonable alternative approach. *See, e.g.*, *Allied Local and Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 71 (D.C. Cir. 2000). In Delaware's view, state authority pursuant to the CZMA and Clean Air Act overrides the "exclusive authority" with which Congress has endowed FERC under

NGA section 3, to issue LNG certificates subject to conditions. 15 U.S.C. § 717b(e)(1). But, as discussed above, *see supra* pp. 25-26, NGA section 3(a) always has given the Commission broad conditioning power in its review of LNG applications. Moreover, under the 2005 amendments, the rights of the states pursuant to the CZMA and the Clean Air Act in NGA section 3 proceedings are recognized "[e]xcept as specifically provided" by the NGA, 15 U.S.C. § 717b(d), which goes on to specifically provide the Commission with "exclusive authority to approve or deny" an LNG application upon necessary and appropriate terms and conditions. *Id.* §§ 717b(e)(1), (e)(3)(A).

As Delaware observes, the CZMA provides, in relevant respect, that "[n]o license or permit shall be granted by the Federal agency *until* the state or its designated agency has concurred with the applicant's certification." Pet. Br. 26 (quoting 16 U.S.C. § 1456(c)(3)(a)) (emphasis petitioner's). The relevant portion of the Clean Air Act reads similarly.

However, the Commission has acted to ensure that Delaware's rights under the CZMA and Clean Air Act are fully protected, as Crown Landing must comply with all environmental conditions, including those based on the two statutes on which Delaware relies. *See* Rehearing Order P 4, JA 100 ("Of relevance to [Delaware's] rehearing request, Environmental Conditions 19 through 22 require . . . Crown Landing's compliance with the language of the [CZMA] and the Clean

Air Act . . . prior to construction of the proposed facilities. These and other environmental conditions must be fulfilled prior to the initiation of construction, which can occur only upon written approval" of FERC staff); *id.* P 13, JA 103 (same). Consistent with the language of the CZMA and Clean Air Act, then, the Commission will not "grant" authorization to Crown Landing, actually allowing it to move forward to construction and operation of the LNG facilities it proposes, unless and until any state with licensing authority under the CZMA and the Clean Air Act "has concurred."

Delaware's contrary interpretation of the CZMA and the Clean Air Act would substantially undermine the specific and exclusive conditioning authority Congress entrusted to the Commission under section 3 of the NGA, both before and after the 2005 amendment. Delaware would thus have this Court ignore its duty to interpret a statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (citations and internal quotation marks omitted).

Delaware's enhancement of the scope of the CZMA and the Clean Air Act at the expense of NGA section 3 also violates the "common sense" guidance by which the Court should determine whether Congress was "likely to delegate" such a "policy decision" to an administrative agency. *Brown & Williamson*, 529 U.S. at 133 (citation omitted). Here, Congress gave the Commission exclusive authority

to review LNG applications, explicitly empowering it to approve such applications subject to conditions it deems appropriate. Moreover, Congress designated the Commission as the lead agency to coordinate the roles of the states and other federal agencies and, in so doing, determined that state authority under the CZMA and the Clean Air Act could only be exercised subordinately to the NGA. *See* 15 U.S.C. § 717n(b)(1) (as to NGA section 3 LNG application determinations, "[t]he Commission shall act as the lead agency for the purpose of coordinating all applicable Federal authorizations"); *id.* § 717n(b)(2) ("Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission.").

Delaware's attempt to make the statutes governing state authority preeminent over NGA section 3 also violates the specific policies embodied in the latter. As the Commission observed, under NGA section 3, "[i]f every aspect of a project were required to be finalized before any part of the project could move forward, it would be very difficult, if not impossible, to construct such projects." Rehearing Order P 28 & n.40, JA 109 (quoting *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 P 138 (2002)). Thus, the Commission's view is in keeping with Congress's expressed concern to streamline and avoid delay in the approval of LNG applications, *see* 15 U.S.C. §§ 717n(c)(1)(A), 717r(d)(2), while Delaware's interpretation would have the opposite effect.

Failing to formulate a convincing argument based on the actual language of the statutes, Delaware turns to case law. Delaware attacks the Commission's reliance on *City of Grapevine* and *Public Utility Comm'n of California*, *see supra* pp. 27-28, as inapposite, as they involved statutes other than the CZMA and Clean Air Act. *See* Pet. Br. 28-30. Instead, Delaware believes this case is governed by *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), in which this Court, according to Delaware, held that "FERC exceeded its authority in granting licenses without first complying with a statute [the Clean Water Act] that, like the CZMA and [Clean Air Act], requires an applicant to procure state certification before federal agencies issue licenses." Pet. Br. 13. *See also id.* 2, 16, 22, 31, 32, 35.

Delaware contends that the Commission "has failed to come to grips" with *City of Tacoma*, which it maintains is the "most analogous authority" to the situation here. Pet. Br. 35. However, the Commission explained that *City of Tacoma* considered the issue of what exactly constitutes a state certification under the Clean Water Act, and only "references in passing to the Commission's granting a license or permit within the meaning of the statute." Rehearing Order P 27 & n.38, JA 109. Thus, the agency concluded, *City of Tacoma*, like the other cases relied on by Delaware in the administrative proceeding, does not "involve[] the direct construction" of the relevant "statutory terms with respect to procedural fact patterns similar to those presented here," but "merely cite[s] or broadly

describe[s]" the CZMA or the Clean Water Act. *Id.* P 16 & n.16, JA 104 (citing cases).

In sum, there is no direct judicial precedent on the issue of the Commission's authority to conditionally approve LNG applications in relation to state authority under the CZMA and the Clean Air Act. Thus, the Commission reasonably relied on the Court's deference to agency conditioning authority under NGA section 7 in *Public Utility Comm'n of California*, as well as the Court's affirming analogous conditional federal approval in *City of Grapevine*, to support its statutory interpretation. *See* Rehearing Order PP 18-19, JA 105-106.

Finally, Delaware maintains that the Commission "erred in relying" on the regulations of the two federal agencies (the Environmental Protection Agency and the National Oceanic and Atmospheric Administration) implementing their respective statutes (the Clean Air Act and the CZMA, respectively). *See* Pet. Br. 36-37. While the Commission found that these regulations "reasonably construed" supported the Commission's "procedural approach," Rehearing Order PP 22-25, JA 107-108, Delaware is correct that the regulations cannot determine the reasonable construction of the relevant statutes here. Rather, the Commission's interpretation of NGA section 3 should be sustained on the structure and policy of the Act, and its relationship with the two other relevant statutes, as discussed above.

In sum, Delaware cannot demonstrate that the Commission has unreasonably construed its NGA section 3 authority to allow approval of an LNG application conditioned upon the applicant's full compliance with applicable state authority under other federal statutes.

CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of jurisdiction, alternatively, the petition should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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Revised Final Brief: September 17, 2008

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D.C. Cir. No. 07-1007

Docket No. CP04-411

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 25(d)(1), I hereby certify that this brief contains 6,607 words, not including the tables of contents and authorities, the certificates of counsel, this certificate and the addendum.

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September 17, 2008