IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

2018CV301128

GEORGIA INTERFAITH POWER & LIGHT, and PARTNERSHIP FOR SOUTHERN EQUITY, INC.,	*	Civil Action No. 2018CV301128
Petitioners,	*	
v.	*	
GEORGIA PUBLIC SERVICE COMMISSION,	*	
Respondent,	*	
and	*	
GEORGIA POWER COMPANY,	*	
Intervenor.	*	
GEORGIA WATCH,	*	
Petitioner,	*	Civil Action No. 2018CV302152
v.	*	
GEORGIA PUBLIC SERVICE COMMISSION,	*	
Respondent,	*	
and	*	
GEORGIA POWER COMPANY,	*	
Intervenor.	*	

FINAL ORDER

The above-captioned matters are before the Court following remand from the Georgia Court of Appeals. For the reasons that follow and for the reasons previously set forth in the Court's December 21, 2018 Final Order Granting Intervenor Georgia Power Company's ("Georgia Power") Motion to Dismiss (the "Prior Order"), the Court finds that it lacks jurisdiction over the Petitions for Judicial Review filed by Petitioners Georgia Interfaith Power and Light, Partnership for Southern Equity, and Georgia Watch (hereinafter collectively "Petitioners"). In further support thereof, the Court herein finds as follows:

PROCEDURAL BACKGROUND[1]

On January 11, 2018, the Georgia Public Service Commission (the "Commission") entered the Seventeenth Semi-Annual Vogtle Construction Monitoring Report for the Period January 1, 2017 through June 30, 2017 (the "17th VCM Order").

Thereafter, Petitioners filed their Petitions for Judicial Review in this Court (the "Petitions") pursuant to O.C.G.A. § 50-13-19 of Georgia's Administrative Procedure Act (the "APA"), seeking judicial review of the 17th VCM Order, which Petitioners described as a "Final Decision."

On April 27, 2018, Intervenor Georgia Power filed a Motion to Dismiss, asserting that the Petitions should be dismissed because the 17th VCM Order is not final and because Petitioners failed to allege or show the need for immediate review under the exception allowing for immediate review of non-final orders found in O.C.G.A. § 50-13-19(a).[2]

[1] A detailed factual history and procedural background of the above-referenced matters can be found in the Prior Order, which is incorporated herein by reference.

[2] The statutory exception states that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." O.C.G.A. § 50-13-19(a).

After the Motion to Dismiss was fully briefed and argued by the parties at a hearing in October 2018, the Court issued its Prior Order granting Georgia Power's Motion to Dismiss.

In the Prior Order, the Court found that the 17th VCM Order was not final, but was rather "one in a continuing series of Orders to be issued by the Commission under the Docket as the Commission conducts its ongoing review and monitoring of the construction of Units 3 and 4 at Plant Vogtle." The Court further found that the APA's narrow statutory exception – i.e. permitting immediate review of a non-final agency ruling if review of the final agency decision would not provide an adequate remedy – did "not apply to the present case."

Petitioners appealed the Prior Order to the Georgia Court of Appeals.

On October 29, 2019, the Georgia Court of Appeals issued an opinion affirming the Prior Order in part and remanding in part with direction to this Court. Specifically, the Court of Appeals determined that this Court "properly held that it lacked jurisdiction to review the order under that portion of OCGA § 50-13-19(a) providing for judicial review of a final decision." Georgia Interfaith Power and Light, Inc. v. Georgia Power Co., 352 Ga. App. 670, 674 (2019). However, with respect to the APA's statutory exception permitting immediate review of a non-final agency ruling in limited circumstances, the Court of Appeals remanded the case for further analysis and findings by this Court on the issue of whether this case is one in which the lack of adequate remedy exception applies and immediate review of the Commission's decision is appropriate. Id.

Following remand, this Court allowed the parties an opportunity to fully brief the issue of whether Petitioners met their burden to show that waiting to review the Commission's decision would not provide Petitioners with an adequate remedy and would result in irreparable harm. While the parties initially requested to be heard on this issue and the Court intended to schedule a hearing, the parties agreed to forego a hearing in light of the Judicial Emergency presently in place.

Now, having considered the parties' supplemental briefings, the entire record in this matter, and applicable Georgia law, the Court makes the following findings and conclusions:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The APA allows for interlocutory judicial review of a non-final agency decision only "if review of the final agency decision would not provide an adequate remedy." O.C.G.A. § 50-13-19(a). This exception has been strictly construed and rarely applied. *See* Oxendine v. Government Transparency & Campaign Finance Commission, 341 Ga. App. 901, 903-04 (2017); *see also* Center for a Sustainable Coast v. Coastal Marshlands Protection Committee, 284 Ga. 736, 746 (2008) (holding that "[w]e have consistently construed the 'no[] . . . adequate remedy' language of OCGA § 50-13-19(a) as creating an extremely narrow exception to the final decision rule for superior court review of contested cases").

In *Oxendine*, the Court of Appeals rejected an argument that the APA's statutory exception applied to permit immediate judicial review of an agency's interlocutory order wherein the agency allegedly misapplied the law. Oxendine, 341 Ga. App. at 903. In finding that the exception did not apply, the Court of Appeals reiterated:

> The provision for immediate appeal under OCGA § 50-13-19 (a) is not applicable simply because an administrative ruling risks duplication of effort or expense. Such would render virtually every interlocutory administrative decision subject to immediate review. Instead there must be some suggestion that the administrative ruling, if incorrect, could not be remedied so as to cause irreparable harm.

Id. (citing Schlachter v. Georgia State Bd. of Examiners of Psychologists, 215 Ga. App. 171, 172 (1994)).

Here, in their original Petitions, Petitioners did not allege that this Court's jurisdiction arose under the APA's narrow statutory exception for review of non-final agency rulings nor did Petitioners raise irreparable harm as a basis for immediate review.

However, prior to the hearing on Georgia Power's Motion to Dismiss in October 2018, Petitioners sought leave to amend their Petitions to raise this exception as an alternative claim – i.e. "that review of the 'final' agency decision 'would not provide an adequate remedy.' O.C.G.A. § 50-13-19(a)."

Given that this Court has been directed by the Court of Appeals to consider whether this statutory exception applies to this case and the parties have now fully briefed the issue, the Court must and will consider whether waiting to review the Commission's decision "would not provide" Petitioners with "an adequate remedy" and would result in irreparable harm to Petitioners. O.C.G.A. § 50-13-19(a).

In support of Petitioners' allegations that review of the Commission's final decision would not provide an adequate remedy, Petitioners claim four procedural irregularities or injuries: (1) the Commission's failure to conduct an amended certification proceeding; (2) the Commission's improper determination of reasonableness; (3) partial decoupling; and (4) *ex parte* communications.

1. Amended Certification Proceeding

First, Petitioners argue that due to the magnitude of the cost and schedule revisions at issue in the 17th VCM, the Commission was required to conduct a proceeding to amend the certificate of public convenience and necessity approving the construction of Units 3 and 4, which was initially issued by the Commission in March 2009. Petitioners contend the Commission's failure to hold such an amended certification proceeding cannot be adequately remedied upon review of the Commission's final decision in the ongoing monitoring and review of Georgia Power's construction of Units 3 and 4 at Plant Vogtle – namely, Docket 29849 (the "Docket").

However, the Court finds that Petitioners have no legal right to demand such a procedure.

O.C.G.A. Section 46-3A-6 provides that "[u]pon application of a utility or upon its own motion, the commission may reexamine any certificate granted under this chapter . . . ." O.C.G.A. § 46-3A-6. This statute does not contemplate interested third parties, such as Petitioners, seeking an amendment to or reexamination of a certificate.[3]

Moreover, Petitioners will have the opportunity to raise this objection on judicial review of the final order of the Commission. If successful, and the matter is remanded to the Commission to consider a certificate amendment to provide the relief sought by Georgia Power in the 17th VCM, Petitioners would have the opportunity to oppose the amendment. If the certificate amendment is denied, then Petitioners will have obtained an adequate remedy because Georgia Power would not be able to recover from ratepayers the additional costs at issue in the 17th VCM Order.

Accordingly, the failure of the Commission to hold such an amended certification proceeding cannot constitute irreparable harm to Petitioners, and the Court finds that Petitioners have failed to demonstrate that review from a final agency decision would not provide an adequate remedy to protect their legal interests in this regard.

2. Reasonableness

Second, Petitioners allege that the Commission made an improper "advance reasonableness determination" as to the increased cost estimate approved in the 17th VCM Order. Specifically, Petitioners allege that the Commission erred in finding that certain costs above the certified amount were reasonable, and Petitioners further allege that the Commission's premature determination of reasonableness has improperly shifted the burden of proof in a future prudency hearing to Petitioners.

[3] Furthermore, the Commission ruled in the 8th VCM that Rule 515-3-4-.08(b), which addresses the circumstances under which a utility should seek a certificate amendment, would be waived "for the duration of the VCM monitoring period." This ruling was not appealed.

The Commission is required to find any costs above the certified amount to be both reasonable and prudent prior to authorizing Georgia Power to recover such costs. O.C.G.A. § 46-3A-7(a). O.C.G.A. Section 46-3A-7 provides that upon completion of a project, a utility may recover approved construction costs in customer rates, but "costs in excess of 100 percent of those approved by the commission shall not be permitted unless shown by the utility to have been reasonable and prudent." O.C.G.A. § 46-3A-7(a).

This statute does not specify when reasonableness determinations may be made by the Commission. However, the record indicates that during the course of the ongoing Docket, the Commission has made reasonableness determinations at various times. Moreover, while the statute requires the Commission to determine that the costs are reasonable and prudent before any such costs may be included in customer rates, the record reflects that the Commission has not yet made any prudency determinations, and customer rates have not been increased as a result of the 17th VCM Order. *See* Id.

The burden to show that costs above the certified amount are reasonable and prudent lies with Georgia Power. *See* O.C.G.A. § 46-3A-7(a). Petitioners claim that immediate review is necessary based upon an apparent misunderstanding that as a result of the 17th VCM Order, the burden to demonstrate the imprudence of the costs has shifted to Petitioners. However, the Court finds that the 17th VCM Order does not shift the burden to Petitioners, and Georgia Power retains the burden to demonstrate that the costs above the certified amount are prudent.

As the Court of Appeals noted, the Commission reserved any decision on recovery of these costs until after a prudency review at the completion of the Project. Georgia Interfaith Power & Light, Inc., 352 Ga. App. at 673. Therefore, Georgia Power is not yet authorized to recover these additional costs. In the event that a final Commission order approves the costs as prudent and recoverable from ratepayers, then Petitioners could seek judicial review of that order and include

within their petition a challenge to the finding that the costs are reasonable. If such an appeal is successful, Georgia Power will not be authorized to recover the costs.

Consequently, the Court finds that Petitioners failed to demonstrate that they do not have an adequate remedy and face irreparable harm.

3. Partial Decoupling

Third, Petitioners allege that (1) in the 17th VCM Order, the Commission unlawfully decoupled Units 3 and 4; (2) this issue was not properly noticed; and (3) review of a final order after the Project is complete will not provide an adequate remedy because a portion of Unit 3 will have already been placed in base rates by that time. The Court disagrees.

The record reflects that in 2018, the Commission issued an order approving a stipulation which provided that Unit 3 costs will not be recoverable in base rates until Unit 4 is commercially operational. However, in the 17th VCM Order, the Commission ordered that a portion of Unit 3 costs could be placed into base rates once Unit 3 is commercially operational – i.e. prior to the completion of construction of both units.

The Court finds that Petitioners have not shown that immediate review is necessary because Petitioners are not and may never be aggrieved by the partial decoupling that was ordered in the 17th VCM Order. The alleged harm from the partial decoupling would only occur if Unit 3 is included in base rates prior to Unit 4. As Unit 3 has not yet been included in base rates, Petitioners have not yet been aggrieved by this portion of the Commission's 17th VCM order.

Although Unit 3 is scheduled to come online prior to Unit 4, the schedules have been adjusted previously during construction, and future construction of the Units may not adhere to the current schedule. Assuming, however, that construction of Unit 3 is completed prior to Unit 4, the Commission still must determine that the unit is "commercially operational" prior to its inclusion in rates.

Under the Commission Order Approving a Stipulation, the term "commercially operational" means "fully dispatchable on demand at the stated Net Electrical Output of 1,102 MWe of the unit." If Unit 3 experiences problems which delay a finding that the unit is commercially operational, Unit 3 may not be included in base rates prior to Unit 4. The Commission may also need to resolve disputes between the parties over what is required by the "commercially operational" standard and whether Unit 3 has met that standard.

Additionally, no determination has yet been made as to when and by how much rates will increase as a result of the Commission's decision to decouple Units 3 and 4. The statute governing the procedure for utility rate changes provides that before charging customers increased rates, Georgia Power is required to file a modified rate schedule with the Commission disclosing the proposed changes in rates and the basis for those changes. At that time, the Commission and interested parties will have adequate remedies available to seek appropriate relief. *See* O.C.G.A. § 46-2-25.

Accordingly, the Court finds that Petitioners have failed to show irreparable harm from the decoupling decision or that future judicial review will not provide them an adequate remedy. At this point, judicial review would be premature and would unduly interfere with the ongoing administrative decision-making process.

4. *Ex Parte* Communications

Finally, Petitioners allege that *ex parte* communications occurred between Georgia Power representatives and Commission officials in the period leading up to the issuance of the 17th VCM Order in violation of Ga. Comp. R. & Regs. 515-2-1-.14. Petitioners contend that this purported procedural violation influenced the 17th VCM Order and, in particular, the decoupling decision, causing Petitioners harm.

As set forth above, Petitioners failed to show irreparable harm authorizing immediate judicial review of the decoupling decision. Moreover, Petitioners may raise this alleged procedural error upon judicial review from a final Commission decision. If a reviewing court were to find that the Commission failed to properly interpret and implement the *ex parte* rule, causing harm to Petitioners, the court could remand the matter to the Commission for further proceedings necessary to rectify that procedural error and to reconsider any Commission decisions influenced thereby as warranted under the circumstances. *See* Ga. Comp. R. & Regs. 515-2-1-.14(4), (8). Petitioners' argument that review at the conclusion of the Project will not permit them to influence the vote to continue the Project fails because Petitioners do not have a right to have the Project cancelled. *See* O.C.G.A. § 46-3A-6.

Thus, Petitioners have failed to show that the Commission's purportedly incorrect application of the *ex parte* rule in connection with the 17th VCM Order could not be remedied so as to cause them irreparable harm. *See* Schlachter, 215 Ga. App. at 172; Oxendine, 341 Ga. App. at 903. "The provision for immediate appeal under OCGA § 50-13-19(a) is not applicable simply because an administrative ruling risks duplication of effort or expense." Id.

For the foregoing reasons, the Court finds and concludes that Petitioners have not shown that future judicial review of a final Commission decision would not provide them an adequate remedy. Therefore, the Court finds and concludes that the APA's narrow statutory exception does not apply to this case, and the Court lacks jurisdiction under O.C.G.A. § 50-13-19 to review the 17th VCM Order.

Based upon the Court's findings of fact and conclusions of law set forth above, IT IS HEREBY ORDERED AND ADJUDGED that Intervenor Georgia Power Company's Motion to Dismiss is **GRANTED,** and Petitioners' Petitions for Judicial Review are hereby **DISMISSED**.

SO ORDERED this 21st day of April, 2020.

SHAWN ELLEN LaGRUA, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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