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 GRANTING
INTERVENOR GEORGIA POWER COMPANY'S MOTIONS TO DISMISS

The above-captioned matters are before the Court on Intervenor Georgia Power Company's ("Georgia Power") Motion to Dismiss the Petitions for Judicial Review Filed by Petitioners Georgia Interfaith Power and Light, Partnership for Southern Equity, and Georgia Watch (hereinafter collectively "Petitioners").[1] Georgia Power filed its Motion to Dismiss on April 27, 2018. The Motion to Dismiss came before the Court for a hearing on October 31, 2018. Counsel for all parties appeared and were allowed an opportunity for oral argument. Now, having considered Georgia Power's Motion to Dismiss, Petitioners' Responses in opposition thereto, the pleadings of record, the arguments presented, and applicable law, the Court herein finds as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Based upon the record in this case, the pertinent factual and procedural history of this litigation is as follows:

Plant Alvin W. Vogtle ("Plant Vogtle") is a nuclear-powered electric generating facility located near Waynesboro, Georgia. Plant Vogtle is partially owned by Georgia Power, with the remaining ownership interests held by Oglethorpe Power, the Municipal Electric Authority of Georgia, and Dalton Utilities (through the Board of Water, Light, and Sinking Fund Commissioners of the City of Dalton, Georgia). Respondent Georgia Public Service Commission (the "Commission") regulates only Georgia Power's minority share of Plant Vogtle.

On August 1, 2008, Georgia Power filed an Application with the Commission for the Certification of Units 3 and 4 at Plant Vogtle (the "Application"), seeking Commission approval of

[1] These cases were consolidated by consent of the parties, and the corresponding Consent Order was entered by the Honorable Alford J. Demspey, Jr. on April 10, 2018. The cases were reassigned to this Court on June 26, 2018.

the addition of these units at the Plant. As part of the Application, Georgia Power submitted detailed information regarding: (1) the two proposed nuclear generation units to meet Georgia Power's future capacity and energy needs; (2) an Integrated Resource Plan update; (3) an evaluation of coal resources; and (4) updated information regarding the economics of retiring coal fired resources.

Thereafter, the Commission's Public Interest Advocacy Staff ("PIA Staff"), Georgia Power, and several Intervenors pre-filed testimony with the Commission and participated in three (3) rounds of hearings on the Application. The parties then filed post-hearing briefs and recommendations on Georgia Power's Application.

In early March 2009, the PIA Staff and Georgia Power reached an agreement on nearly all of the material facts/issues related to the construction of Vogtle Units 3 and 4 as presented to the Commission during the Application hearings. In furtherance thereof, on March 4, 2009, the PIA Staff and Georgia Power entered into a Stipulation (the "Stipulation") resolving these contested issues.

On March 30, 2009, the Commission issued an Amended Certification Order ("Certification Order") pursuant to O.C.G.A. Section 46-3A-5, approving Georgia Power's Application, as modified by the Stipulation, and incorporating the Stipulation into the Certification Order and attaching it thereto.[2]

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[2] As set forth in O.C.G.A. Section 46-3A-5:

> (a) A utility seeking a certificate or an amendment to a certificate shall make an application to the commission which contains the information required by this chapter.
> (b) No sooner than 30 days after an application is made for a certificate or an amendment, the commission shall conduct a public hearing on the application. Within 300 days after filing of the first such application and within 180 days after filing of each application thereafter, the commission shall issue an order adopting a forecast of future Georgia retail electricity requirements of the utility and describing in what manner the prospective certificate relates to the integrated resource plan and either granting the requested certificate or denying

The Certification Order directs Georgia Power to file "semiannual monitoring reports with the Commission as provided by O.C.G.A. § 46-3A-7(b)" and to provide the Commission "monthly status reports on the construction work in progress."[3] To that end, the Certification Order/Stipulation provides:

> the requested certificate and authorizing a specific alternative means of supplying the requirements found by the commission to exist. Each certificate shall describe the capacity resource, its approximate construction or implementation schedule, and its approved cost. If the commission fails to so act within 300 days after the first such application has been made and within 180 days after each subsequent application has been made, the forecast application and certificate shall be deemed granted by operation of law.
> (c) Within 60 days after the filing of an integrated resource plan or an application has been made with the commission for a certificate or amendment, the commission shall establish a fee therefor and notify the applicant thereof. The fee amount so established shall be in an amount reasonably necessary to defray the expense of the commission in reviewing the plan or determining whether to grant the application, including but not limited to the expense of conducting any certification proceedings required for such application. The fee so established shall not be recoverable from ratepayers of the applicant if the application or certification is denied nor shall the fee for review of the plan or any subsequent amendment thereto be recoverable from ratepayers. Such fee must be remitted to the commission before the commission may take any further action upon the application. For purposes of any time periods established in subsection (b) of this Code section and subsection (c) of Code Section 46-3A-2, an application shall be deemed to have been filed only when the fee established therefor has been remitted to the commission. In the event a joint application is filed by more than one utility, a single such fee only shall be required. The funds assessed and collected pursuant to this subsection shall be deposited in the state's general fund.

O.C.G.A. § 46-3A-5.

[3] The pertinent section of O.C.G.A. Section 46-3A-7 provides:

> In addition to the review of the continuing need for an electric plant under construction prescribed in Code Section 46-3A-6, the commission, upon its own motion, may conduct or the utility may request that the commission conduct an ongoing review of such construction as it proceeds. Every one to three years, or at such lesser intervals upon the direction of the commission or request of the utility, the applicant shall file a progress report and any proposed revisions in the cost estimates, construction schedule, or project configuration. Within 180 days of such filing, the commission shall verify and approve or disapprove expenditures made pursuant to the certificate and shall approve, disapprove, or modify any proposed revisions. If the commission fails to so act within 180 days after such filing, the previous expenditures and any proposed revisions shall be deemed approved by operation of law.

O.C.G.A. § 46-3A-7(b).

> [Georgia Power's] first semiannual monitoring report shall be filed on August 31, 2009 and shall cover any proposed revisions in the cost estimates, construction schedule, or project configuration and actual costs incurred during the preceding January through June. The second shall be filed on February 28, 2010 and shall cover any proposed revisions in the cost estimates, construction schedule, or project configuration and actual costs incurred during the preceding July through December. Each following monitoring report shall be filed on those dates (August 31 and February 28) in the following years until both Units 3 and 4 have reached commercial operation and shall cover the corresponding periods.

In June 2009, the Commission initiated a separate docket from the Application proceeding for purposes of conducting its ongoing monitoring and review of Georgia Power's construction of Units 3 and 4 at Plant Vogtle – namely, Docket 29849 (the "Docket"). The Docket is a continuing proceeding through which the Commission monitors and reviews the construction of Units 3 and 4. All pleadings and any PIA Staff data requests are filed in the Docket, and all hearings are held within the Docket.

To that end, beginning on August 31, 2009 through the present, Georgia Power files monthly status reports and semi-annual Vogtle Construction Monitoring Reports ("VCM Report") under the Docket in compliance with the Commission's Certification Order. Each VCM Report is then scheduled for a public hearing, following which post-hearing briefs are submitted by the Company, the PIA Staff, and/or the Intervenors. The Commission then issues its Order on the VCM Report (the "VCM Order") within 180 days of filing.

The record reflects that to date, the Commission has scheduled and conducted seventeen (17) semi-annual construction monitoring hearings and issued corresponding VCM Orders, to include the Commission's 18th VCM Order, which was issued on August 24, 2018 during the pendency of this litigation.

The VCM Order giving rise to the present litigation is the 17th VCM Order, which was issued by the Commission on January 11, 2018.

On February 12, 2018 and March 8, 2018, respectively, Petitioners initiated this litigation by filing their Petitions for Judicial Review in this Court, seeking judicial review of the Commission's 17th VCM Order, which Petitioners describe as a "Final Decision" of the Commission, pursuant to O.C.G.A. Section 50-13-19.[4]

In April 2018, Georgia Power filed the Motion to Dismiss now before the Court, asserting that the Petitions for Judicial Review should be dismissed because the 17th VCM Order is not final in either form or substance, and as such, this Court does not have jurisdiction to review it. For the reasons set forth below, the Court agrees.

The record shows that the 17th VCM Order is one in a continuing series of Orders to be issued by the Commission under the Docket as the Commission conducts its ongoing review and

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[4] Pursuant to O.C.G.A. Section 50-13-19:

> (a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. 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.
> (b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner; or, if the petitioner is a corporation, the appeal may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state; and provided, further, that all proceedings for review with respect to orders, rules, regulations, or other decisions or directives of the Commissioner of Agriculture may also be brought in the Superior Court of Tift County or the Superior Court of Chatham County. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall be served upon the agency and all parties of record. The petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in subsection (h) of this Code section upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court.

O.C.G.A. § 50-13-19(a) and (b).

monitoring of the construction of Units 3 and 4 at Plant Vogtle. Based upon the record, construction of Units 3 and 4 is expected to continue through at least 2021.

Petitioners argue that the 17th VCM Order is unique because during the 17th VCM proceeding, the Commission did not limit its consideration strictly to the issue of whether to approve expenditures incurred by Georgia Power since the last semi-annual construction reporting/monitoring hearing, but the Commission also went on to decide whether to approve proposed revisions to the construction costs for Units 3 and 4, the corresponding construction schedule and configuration, and the reasonableness of the proposed costs.

Petitioners further assert that due to the nature of Georgia Power's proposed revisions to the construction costs and construction schedule, which amount to billions of dollars in cost increases and a delay of several years until the construction is completed, Georgia Power was required to seek an amendment to its certificate under O.C.G.A. Section 46-3A-5, as opposed to mere approval from the Commission under O.C.G.A Section 46-3A-7(b).

In justification for filing their Petitions for Judicial Review at this stage of the proceedings, Petitioners claim that because the VCM process was abused by Georgia Power and the Commission in an effort to avoid the broader recertification review process and because the implications of the 17th VCM Order are so grave for Georgia Power's customers, Petitioners are compelled to seek judicial review now.

The Court finds that under O.C.G.A. Section 46-3A-7 and the Certification Order, the Commission is authorized to approve, disapprove, or modify any proposed revisions in the cost estimates, construction schedule, or project configuration presented by Georgia Power during the semi-annual review process. *See* O.C.G.A. § 46-3A-7(b). Thus, the mere fact that the Commission considered Georgia Power's proposed revisions during the 17th VCM proceedings does not violate Georgia law.

However, the Court's analysis does not end there. Petitioners also allege that the revisions at issue were of such a magnitude that Georgia Power should have submitted an amended application for certification instead of submitting these requests in the 17th VCM proceeding.

The governing rule, Commission Rule 515-3-4-.08, provides in pertinent part:

> The Utility shall submit an amended application for certification (as the certificate is described under Rule 515-3-4-.07) in the event that: (a) The construction schedule has significantly changed; [and] (b) The total cost estimate has been revised such that the costs are over the estimates in the approved certificate by more than five percent or some other variation tolerance as specified by the Commission in the approved certificate.

Ga Comp. R. & Regs 515-3-4-.08(1)(a)-(b).

Whether Georgia Power's proposed revisions presented in the 17th VCM Report are significant enough to warrant an amended application for certification under Commission Rule 515-3-4-.08 is not an issue properly before this Court. *See* Id.

Even if it were appropriate to consider this issue at this stage of the proceedings, the record reflects that during the 8th VCM proceedings, PIA Staff and Georgia Power entered into a Stipulation waiving the application of Commission Rule 515-3-4-.08 "**for the duration of the VCM monitoring period**." (Emphasis added). This Stipulation was subsequently adopted by the Commission in an Order Adopting Stipulation issued on October 8, 2013, and no appeal was taken from that decision.

Accordingly, the Court finds that Georgia Power was not required to file a request to amend the certificate with the Commission during the remainder of the VCM monitoring period, which is unquestionably ongoing.

Finally, the Court finds that by its very language, the 17th VCM Order is not final. *See* O.C.G.A. § 50-13-19(a).

As explicitly set forth in the 17th VCM Order,

> **[T]the Commission will continue to conduct semi-annual VCM reviews** and, as appropriate, verify and approve all expenditures on a semi-annual basis regardless of whether the expenditures exceed the original certified amount. During these VCM reviews, the Commission will not determine prudence, nor will it assure cost recovery to [Georgia Power]. **All Commission decisions regarding cost recovery will be made after a prudence review at the end of construction of Units 3 and 4.... [J]urisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.**

(Emphasis added).

Based upon the above, the Court finds that the 17th VCM Order is not a "final decision;" Petitioners have not yet "exhausted all administrative remedies" below; and this Court does not have jurisdiction to consider the Petitions for Judicial Review at this time. O.C.G.A. § 50-13-19(a).

Georgia law is clear that a party aggrieved by an administrative agency's decision must raise all issues before that agency and exhaust all available administrative remedies before seeking a judicial review of that agency's decision. Id.; Dept. of Community Health v. Georgia Society of Ambulatory Surgery Centers, 290 Ga. 628, 629-30 (2012) (holding that a party must exhaust its administrative remedies before seeking judicial review and the determination for whether a party has done so must be assessed at the time a lawsuit is filed).

The record reflects that when Petitioners initiated this litigation in February and March 2018, the Docket and corresponding VCM proceedings were pending before the Commission and remain pending to date, and thus, Petitioners have not exhausted their administrative remedies and their Petitions should be dismissed. O.C.G.A. § 50-13-19(a). The Court finds that none of the exceptions to O.C.G.A. Section 50-13-19 otherwise apply.[5]

[5] Under this statute,"[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). However, the Court finds that this exception does not apply to the present case.

Therefore, based upon the Court's findings 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**.

Based upon this ruling and because the Court lacks jurisdiction herein, the Court finds that all other pending Motions or issues in this case should be and are likewise dismissed.

SO ORDERED this 21st day of December, 2018.

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

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