

No. 09-1262

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

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**CENTER FOR A SUSTAINABLE COAST, et al.,**

**Petitioners,**

**v.**

**NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,**

**Respondents.**

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**On Petition for Review of an Order of the Nuclear Regulatory Commission**

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**INTERVENORS' REPLY  
TO PETITIONERS' RESPONSE TO MOTION TO DISMISS  
PETITION FOR REVIEW**

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**INTERVENORS' REPLY TO PETITIONERS' RESPONSE TO  
MOTION TO DISMISS PETITION FOR REVIEW**

Intervenors Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia (collectively, "SNC") adopt the reply of the Nuclear Regulatory Commission ("NRC" or "Commission"), and reply to the response filed by Petitioners Center for a Sustainable Coast, et al. ("CSC").

CSC first argues that ESP-004, for which it seeks judicial review, is separate from the first partial initial decision of the Atomic Safety and Licensing Board (the "Licensing Board") for which it sought Commission review. CSC contends that it did not seek Commission review of ESP-004 and thus the bar on simultaneous agency and judicial review does not apply to ESP-004. Second, CSC contends that Commission review of the first partial initial decision was a mandatory step that did not strip ESP-004 of its finality under Section 704 of the Administrative Procedures Act ("APA").

CSC's attempt to separate the first partial initial decision, for which it sought Commission review, from ESP-004 fails because the rulings for which CSC seeks judicial review were made in the first partial initial decision, not in ESP-004. Because NRC regulations did not render the first partial initial decision inoperable while pending for Commission review, CSC could have sought either Commission review or judicial review under APA section 704. Because CSC's request for

Commission review of that decision was pending when it filed its Petition for judicial Review with this Court, the rule against simultaneous agency and judicial review deprives this Court of jurisdiction.

**I. The Rulings for Which CSC Seeks Judicial Review Occurred in the First Partial Initial Decision, Not in ESP-004.**

This Court will review only portions of Commission orders that contain specific rulings that are properly before the Court. *See Massachusetts v. NRC*, 924 F.2d 311, *cert. denied*, 502 U.S. 899 (1991).<sup>1</sup> CSC seeks judicial review of whether the Licensing Board erred in its consideration of: (1) the cumulative impact on aquatic biota in the Savannah River of using water to cool Plant Vogtle Units 3 & 4 (and related evidentiary issues) [“cooling”]; and (2) the impacts of dredging the Savannah River [“dredging”]. *See* (CSC’s Stmt. of Issues to D.C. Cir., pp. 2-3, Nov. 25, 2009). CSC petitioned for judicial review of the first partial initial decision, which contains rulings on cooling and dredging, and ESP-004, which contains no rulings at all.

**A. CSC Challenges Rulings From the First Partial Initial Decision Proceeding, Not ESP-004.**

The procedural history demonstrates that the cooling and dredging issues were decided in the first partial initial decision, not in ESP-004:

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<sup>1</sup>*See Massachusetts*, 924 F.2d at 322 (stating that the Court would “review that portion of CLI-90-3 . . . [and] . . . rulings that relate to the final agency action presently before the court”).

- On October 12, 2006, the NRC issued a notice of hearing -- the ESP Hearing Notice -- in response to SNC's initial ESP application. *See Notice of Hearing and Opportunity to Petition for Leave to Intervene on An Early Site Permit for the Vogtle ESP Site*, 71 Fed. Reg. 60,195 (Oct. 12, 2006).
- On December 11, 2006, CSC intervened in the initial ESP proceeding.
- On November 16, 2007, the NRC issued a second notice of hearing -- the LWA Hearing Notice -- in response to SNC's supplemental application that sought the LWA. *See Supplementary Notice of Hearing and Opportunity To Petition for Leave To Intervene on an Early Site Permit for the Vogtle ESP Site*, 72 Fed. Reg. 64,686 (Nov. 16, 2007).
- CSC did not intervene in the LWA proceeding. *See S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, LBP-09-19, \_\_ NRC \_\_, slip op., (Aug. 17, 2009) (Second and Final Partial Initial Decision); n.3.
- The Licensing Board conducted (1) a contested proceeding for the initial ESP application in which CSC made arguments, and (2) an uncontested proceeding for all remaining issues, including the LWA, in which CSC did not appear.
- On June 22, 2007, the Licensing Board issued its first partial initial decision making findings relevant to the contested ESP hearing. *See S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, LBP-09-07, \_\_ NRC \_\_, slip op., (June 22, 2009) (First Partial Initial Decision).
- On July 15, 2007, CSC filed a petition for Commission review of the Licensing Board's first partial initial decision. (SNC Mot. Dism., Add. A.)
- On August 17, 2007, the Licensing Board issued its second and final partial initial decision, making additional findings relevant to the ESP and LWA. *See S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, LBP-09-19, \_\_ NRC \_\_, slip op., (Aug. 17, 2009) (Second and Final Partial Initial Decision).
- On August 26, 2009, the Commission issued ESP-004 (the ESP and the LWA) without making any additional findings or rulings. *See Southern Nuclear Operating Co., Early Site Permit No. ESP-004*, published at 74 Fed. Reg. 44,879 (August 31, 2009).

**B. CSC Argued the Cooling and Dredging Issues and the Licensing Board Ruled on these Issues in the First Partial Initial Decision.**

In the contested hearing leading to the first partial initial decision, CSC argued its cooling and dredging contentions. *See* (SNC Mot. Dism., 4-5.) The Licensing Board ruled on these contentions in the first partial initial decision. NRC's regulations state that this "initial decision constitutes the final action of the Commission on the contested matter. . . , unless . . . [a]ny party files a petition for Commission review . . . ." 10 C.F.R. § 2.1210(a) (2009). (Emphasis added.)

**C. CSC Filed for Commission Review of the Cooling and Dredging Rulings Contained in the First Partial Initial Decision.**

On July 15, 2007, CSC filed a petition for Commission review of the Licensing Board's first partial initial decision. *See* (SNC Mot. to Dism., Add. A, CSC Pet. for NRC Rev.). CSC argued the same cooling and dredging issues that it had argued to the Licensing Board. *See id.* at 7-14, 15-19. CSC's petition for Commission review of the Licensing Board's rulings on cooling and dredging was still pending when CSC filed its Petition for judicial Review of those same issues with this Court on October 23, 2009.

**D. CSC Was Not a Party to and Made No Arguments Regarding the Second Partial Initial Decision that Authorized the LWA.**

In its second and final partial initial decision, the Licensing Board made additional findings on all uncontested issues, including the findings necessary for

the issuance of the LWA. CSC was not a party, made no arguments, and received no rulings in this proceeding.

While CSC purports to rely somewhat on the LWA, *see* (CSC Opp. 17), it cannot do so for three reasons. First, because CSC was not a party to the second and uncontested proceeding that authorized the issuance of the LWA (and ruled on other uncontested issues), it lacks standing to challenge the LWA. *See* (Second and Final Partial Initial Decision) 3, n.3 (“[N]o intervention requests challenging the SNC LWA were filed.”); *Devia v. NRC*, Nos. No. 05-1419, et al., 2006 U.S. App. LEXIS 16112, \*2-\*3 (D.C. Cir. June 23, 2006) (unpublished) (“Because petitioner in No. 06-1037 was not a party to the relevant agency proceeding, he lacks standing to intervene in Nos. 05-1419 et al. *See* 28 U.S.C. § 2344; *Simmons v. ICC*, 230 U.S. App. D.C. 236, 716 F.2d 40, 41 (D.C. Cir. 1983).”). Second, because CSC submitted no contentions (*i.e.*, arguments) and received no rulings in the second and uncontested proceeding before the Licensing Board, it waived any arguments regarding the LWA before this Court. *See Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (holding “[petitioner] waived the argument by failing to raise it before the Commission”).

Third, as a practical matter, CSC’s issues of cooling and dredging are not impacted by the LWA. The LWA allows SNC to engage in the following preliminary construction activities: “installation of engineered backfill, retaining

walls, lean concrete backfill, mudmats, and a waterproof membrane as described in the applicant's site safety analysis report (SSAR)." *Early Site Permit and Limited Work Authorization (ESP-004)* 4 ¶ G. Withdrawals of water from the Savannah River to cool the new Vogtle nuclear reactors will not occur during the placement of retaining walls and backfill under the LWA, but only after the NRC issues a combined operating license, construction of the plant is completed, and the plant commences operation. No dredging of the Savannah River has occurred or will occur during the LWA activities, if ever. Moreover, even the preliminary construction activities authorized under the LWA are covered by a site redress plan in the event that the project is terminated. *See ESP-004* 2 ¶ J.

**E. CSC Made No Arguments and the Commission Made No Rulings in ESP-004 for this Court to Review.**

Once the Licensing Board issued its first partial initial decision and its second and final partial initial decision making all of the safety and environmental findings necessary for issuance of the ESP and LWA, the NRC's staff's issuance of the ESP and LWA was simply a required ministerial act. *See* 10 C.F.R. § 2.340(i) (2009) (stating the Commission . . . shall issue a limited work authorization . . . [and] an early site permit . . . within 10 days from the date of issuance of the initial decision . . .") (emphasis added). Moreover, because the first partial initial decision is a necessary prerequisite for the issuance of ESP-004,

CSC's petition for Commission review of the first partial initial decision constitutes a petition for Commission review of ESP-004 itself.<sup>2</sup>

**II. CSC's Election to Seek Commission Review of the First Partial Initial Decision Bars Simultaneous Judicial Review.**

**A. CSC Had the Option to Seek Commission or Judicial Review of the First Partial Initial Decision.**

CSC states that it was required to seek judicial review under 10 C.F.R.

§ 2.1212. (CSC Opp. 10.) 10 C.F.R. § 2.1212, however, provides:

Unless otherwise authorized by law [i.e., 5 U.S.C. § 704], a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(Emphasis added.) That "law" is APA section 704, which allows judicial review of an initial decision notwithstanding the pendency of an internal agency appeal if the initial decision is not inoperable pending the appeal. *See* 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 152 (1993). Because NRC's regulations made the initial decision "immediately effective," as opposed to inoperable, *see* 10 C.F.R. § 2.1210(d), section 704 allowed judicial review of that decision.

**B. CSC's Seeking of Commission Review Made the First Partial Initial Decision Non-Final.**

When faced with the opportunity to seek judicial review under 5 U.S.C. § 704 or Commission review under 10 C.F.R. §§ 2.341 and 2.1212, CSC chose

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<sup>2</sup> CSC did not make any argument to the Commission in an attempt to forestall the NRC staff's issuance of the ESP and LWA and did not seek a stay. *See* 10 C.F.R. § 1213 (2009).

Commission review by filing its petition for Commission review on July 15, 2009. *See* (SNC Mot. to Dismiss, Add. A). That choice has legal consequences. Under NRC regulations, CSC's seeking of Commission review rendered the first partial initial decision and ESP-004 non-final:

Th[e] initial decision constitutes the final action of the Commission on the contested matter forty (40) days after the date of issuance, unless: (1) Any party files a petition for Commission review in accordance with § 2.1212 . . . .

10 C.F.R. § 2.1210(a) (2009) (emphases added). *See Massachusetts*, 924 F.2d at 322 (looking to NRC regulations for characterization of order as final: "This order is not a 'final decision' by the Commission pursuant to 10 C.F.R. § 2.770").

"5 U.S.C. § 704 . . . has long been construed by this and other courts merely to relieve parties from the *requirement of* petitioning for rehearing before seeking judicial review . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284 (1987) (internal quotation marks and citations omitted). "It is well established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order; a petition for judicial review filed during the pendency of a request for agency reconsideration will be dismissed for lack of jurisdiction." *Wade v. F.C.C.*, 986 F.2d 1433 (D.C. Cir. 1993). Accordingly, "[a] party must choose between administrative relief and judicial relief." *City of New Orleans v. S.E.C.*,

137 F.3d 638, 639 (D.C. Cir. 1998). “Once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party. The alternative presents too great a risk of wasting judicial resources without creating any significant benefit.” *Bellsouth Corp. v. F.C.C.*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994).

CSC elected to file its petition for Commission review of the Licensing Board’s first partial initial decision, challenging the exact same rulings on cooling and dredging that CSC’s seeks to challenge in this Court. (CSC’s Stmt. of Issues to D.C. Cir., pp. 2-3, Nov. 25, 2009.) This made the rulings at issue non-final and deprived this Court of jurisdiction to review them. *See Bellsouth Corp.*, 17 F.3d at 1489-90.<sup>3</sup>

**C. CSC’s Petition for Judicial Review is Incurably Premature.**

CSC contends: “On January 7, 2010, the Commission rejected the administrative appeal of the Partial Decision, thereby removing any jurisdictional impediment to judicial review of ESP-004.” (CSC Opp. 2-3.) This Court has

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<sup>3</sup> CSC’s argues that *Massachusetts* allows review of the August 26, 2009 order issuing the ESP and LWA because such are was “immediately effective.” (CSC Opp. 15.) Unlike the old regulations at issue in *Massachusetts*, 924 F.2d at 322, that required the Commission to “weigh[] equitable considerations” in determining whether an order should become immediately effective, current NRC regulations provide that the initial decision is automatically immediately effective. *See* 10 C.F.R. § 2.340 (2009). There is no Commission ruling to review, and it is too late to challenge the regulation.

recently confirmed that jurisdiction for review is measured at the time the petition is filed with this Court: “Petitioner’s petition for review filed while a request for agency reconsideration was pending is incurably premature. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, is not to the contrary.” *BNSF Ry. Co. v. United States DOT*, No. 08-1263, 2008 U.S. App. LEXIS 26306, \*1 (D.C. Cir. Dec. 22, 2008) (unpublished) (internal citations omitted) (emphasis added). See *Clifton Power Corp. v. FERC*, 352 U.S. App. D.C. 310, 294 F.3d 108, 110 (D.C. Cir. 2002) (“[S]ubsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction”) (quoting *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989)). Because CSC filed its Petition for judicial Review while its petition for Commission review was still pending, the Petition for judicial Review is incurably premature.

### **CONCLUSION**

This Court should grant the NRC’s and Southern’s motions to dismiss this incurably premature Petition for judicial Review.

Respectfully Submitted,

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Dated: February 4, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 4, 2010, a copy of foregoing "INTERVENORS' REPLY TO PETITIONERS' RESPONSE TO MOTION TO DISMISS PETITION FOR REVIEW" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ M. Stanford Blanton  
Of Counsel