IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIA INTERFAITH POWER & LIGHT, INC.,	)	
PARTNERSHIP FOR SOUTHERN EQUITY, INC.	)	
and	)	
GEORGIA WATCH,	)	
Petitioners,	)	Civil Action No. 2018CV301128
v.	)	
GEORGIA PUBLIC SERVICE COMMISSION	)	
Respondent,	)	
and	)	
GEORGIA POWER CO.	)	
Respondent-Intervenor.	)	

GEORGIA INTERFAITH POWER & LIGHT, ET AL.'S JOINT MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY OF THE GEORGIA PUBLIC SERVICE COMMISSION AND GEORGIA POWER CO. AND PRESENT EVIDENCE OF EX PARTE COMMUNCIATIONS, AND MEMORANDUM IN SUPPORT OF THIS JOINT MOTION

Petitioners Georgia Watch, Georgia Interfaith Power & Light ("GIPL"), and Partnership for Southern Equity ("PSE") hereby jointly submit this motion and memorandum in support seeking leave to conduct limited discovery of the of the Georgia Public Service Commission and Georgia Power Company and to present evidence of ex parte communications to the Court. The Georgia Public Service

Commission ("Commission"), the Respondent, engaged in improper ex parte communications, which are a form of procedural irregularity not shown in the existing record; as such, they can only be redressed by this Court as provided by the express language of the Georgia Administrative Procedure Act. *See* O.C.G.A. § 50-13-19(g) ("In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.").[1] *See also* Ga. Comp. R. & Regs. 515-2-1-.14 ("Proceedings before the Commission shall be open and transparent to all Parties and to the public."). For the reasons set forth herein, the Court should permit limited discovery of the ex parte communications and hold a hearing at which Petitioners may present evidence of same.[2]

I. INTRODUCTION

On December 21, 2017, the Georgia Public Service Commission ("Commission") made one of its most controversial and consequential decisions in decades when it voted to continue burdening Georgia ratepayers with the expense (and untold future financial risk) of the Plant Vogtle nuclear expansion project. To

[1] "The authorization to the superior court set forth in [§ 50-13-19(g)] to hear evidence relating to alleged irregularities in procedure before the agency that are not shown in the record is an exception to the principle that review by the superior court shall be confined to the record. . . ." *N. Fulton Cmty.. Hosp., Inc. v. State Health Planning & Dev. Agency*, 168 Ga. App. 801, 803 (1983) (citing *Ga. Real Estate Comm'n. v. Burnette*, 243 Ga. 516, 516 (1979) (quotations omitted)).

[2] Although this application is brought pursuant to the express provisions of section 50-13-19(g), before filing this motion counsel for the Petitioners conferred in good faith (via phone conference and exchange of emails) with counsel for the Respondents. *See* Uniform Superior Court Rule 6.4(B). Unfortunately, the parties were unable to arrive at a mutually-agreeable solution, thus necessitating this Motion.

the benefit of Southern Company's shareholders[3] and the detriment of the Georgia ratepayers it theoretically represents, the Commission saddled ratepayers with this burden despite more than five years of delay, a near doubling of the original project cost, and uncontroverted testimony that Georgia Power Company ("Georgia Power") stands to reap more than $5 billion in *additional* profit from the delays. The Commission's decision followed one or more behind-closed-door meetings and secret emails between individual Commissioners and Georgia Power employees and representatives. Those meetings violated both the letter and spirit of the Commission's own ex parte rule. The result was a final decision that rejected recommendations of the Commission's own staff and adopted terms largely favorable to Georgia Power.

The above is the sum and substance of Count III of Petitioners' respective petitions for review of the final decision. Petitioners allege that the Commission erred by refusing to observe its ex parte rule. The rule, which is procedural, takes effect once evidentiary hearings on a matter conclude. Thereafter, the Commissioners and their staff are forbidden to meet privately with any party. If any such meetings do occur, the Commission—or the party that engaged in ex parte communications—must give all other parties to the proceeding notice of the communications and an opportunity to respond. Adopted by the Commission in

[3] Southern Company is Georgia Power Company's parent company. The Plant Vogtle expansion project is, in part, being financed by Southern Company shareholders.

2007, the purpose of the ex parte rule is to restore and maintain the public's confidence that decisions made by the Commission on ratepayers' behalf are fair and based on what is said in an open and public hearing room and not messages exchanged secretly behind closed doors.[4]

Based on parties personally knowledgeable of the proceedings in and around the Commission's Seventeenth Vogtle Construction Monitoring proceeding ("VCM 17" or "17th VCM"), Petitioners have evidence supporting their prima facie contention that the rule was violated. *See, generally*, Affidavit of Jillian Kysor ("Kysor Aff.") ¶¶ 7-12 (attached as Exhibit A) (staff attorney became aware of probable ex parte communications and procedural irregularities during VCM 17 while representing GIPL and PSE); *see also, generally*, Affidavit of Elizabeth Coyle ("Coyle Aff.") ¶¶ 2-3 (attached as Exhibit B) (personal knowledge regarding same as she "personally participated in the [VCM 17] proceeding before the Commission" in her capacity as Executive Director of Georgia Watch). Because the unlawful communications occurred in secret after the evidentiary hearings concluded, proof

[4] When the Commission adopted the ex parte rule in 2007, former Commissioner Angela Speir, who introduced the rule, said "Prohibiting these 'off the record' conversations during the critical decision making phase of the process is of crucial importance to the integrity and fairness of the process. . . . I am optimistic that this rule will go a long way towards restoring the public's confidence that the Commission's decisions are fairly decided and are based on what was said in the open hearing room—not behind closed doors." Press Release, Georgia Public Service Commission, Commissioner Speir's Open Hearing Rule Adopted by Public Service Commission, (Aug. 21, 2007), *available at* http://www.psc.state.ga.us/pscinfo/bios/myviewson/speir/20070821-as.pdf. The only commissioner to vote against the rule was Stan Wise, who chaired the proceedings at issue here.

of this procedural irregularity is not shown in the agency record filed with this Court.

Petitioners therefore seek leave to investigate through reasonable discovery in order to have the opportunity to present further evidence supporting their claim, as expressly authorized by the Georgia Administrative Procedure Act. O.C.G.A. § 50-13-19(g). Discovery under section 50-13-19(g) is the only way Petitioners could possibly have a fair opportunity to carry their legal burden.

II. STATEMENT OF RELEVANT FACTS

A. FACTUAL BACKGROUND

In the late winter and early spring of 2017, Westinghouse, the primary contractor for Plant Vogtle Units 3 and 4 and V.C. Summer, a related nuclear project in South Carolina, was limping into bankruptcy court, dragged under by its gross mismanagement of these sister nuclear construction projects and their fixed-price contracts. Continuing the projects was not only financially devastating to Westinghouse, but also to its parent company Toshiba. By the summer of 2017, details of the problems plaguing the nuclear construction projects at Plant Vogtle and V.C. Summer could no longer be kept from public view.[5] Like Georgia Power did

[5] In bankruptcy proceedings filed by Westinghouse and its corporate parent, Toshiba, privies of the South Carolina utility companies accused Westinghouse and Toshiba of engaging in a deceptive "extend and pretend" scheme regarding the V.C. Summer Project, in which the contractors "abandoned the [V.C. Summer nuclear construction] Project long after they knew that they could never finish it on time or at the contract price, or anywhere close." *See* In re Westinghouse Electric Company LLC et al., Chapter 11 No. 17-10751(MEW) Doc. No. 2055 at 9 (B.R. S.D.N.Y. Jan. 2, 2018). "With no viable prospect for completing the Project—which they had blatantly mismanaged for years—[Westinghouse/Toshiba] demanded and received

for Plant Vogtle Units 3 and 4, the South Carolina utility companies contracted for the construction of two AP1000 nuclear power units for the V.C. Summer plant with Westinghouse/Toshiba. Unlike Georgia Power, however, the South Carolina utilities retained Bechtel Corp. to investigate and audit the repeated construction delays and cost overruns. In a report dated 2016 but not published until late summer of 2017, Bechtel grimly catalogued Westinghouse's bungling of the V.C. Summer nuclear construction project, foretelling the same problems that surfaced in the proceeding at issue in this case: the 17th VCM for Plant Vogtle Units 3 and 4.

When Georgia Power filed its 17th VCM Report on August 31, 2017, it hoped to avoid the level of scrutiny that a formal certificate amendment would require.[6] *See* R. at B2 (169459) at 6 (Georgia Power's 17th VCM Report at 6, Docket No. 29849 (Aug. 31, 2017)). Georgia Power hoped to avoid that heightened scrutiny by shoehorning the cost and risk issues it could no longer hide into VCM 17 despite its concession "that the conditions under which the Project was first certified have changed." *Id*. at 8. Leaving nothing to the imagination, Georgia Power admitted further that, following Westinghouse's bankruptcy, "[t]he risks that [Westinghouse] bore *have been shifted to Georgians*." *Id*. (emphasis supplied). Recognizing "the realities that now exist after the Westinghouse . . . bankruptcy," (*id*.), Georgia Power nevertheless "recommend[ed] that the Project be continued" (*id*.), despite the

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billions of dollars from the Owners and left them with nothing to show for their investment but two unfinished nuclear power plants that would cost billions more to complete." *Id*.

[6] The process for securing regulatory approval to build new electricity generation units is known as "certification." A certificate amendment is an amended application for certification in the event of project changes.

adoption of a new schedule with an "associated cost to complete of $9.45 billion (as of July 1, 2017)." *Id.* at 7.

B. FACTS JUSTIFYING ADDITIONAL EVIDENCE

The VCM 17 proceeding was manipulated by the Commission to achieve a result that would benefit Georgia Power and result in a decision to approve continued construction of Plant Vogtle Units 3 and 4 despite the uncontrolled and ever-expanding risk and costs. From the outset of the VCM 17 proceeding, and even more apparent in hindsight, the scope of the proceeding was expanded improperly to include "approval" of the new risk, construction delays, and massive cost increases despite the fact that shoehorning such issues into a VCM violated Georgia law requiring re-certification.[7] *See* O.C.G.A. § 46-3A-5 (governing resource certifications and certificate amendments); O.C.G.A. § 46-3A-6 (granting the Commission authority to reexamine resource certifications and modify or revoke as needed); Ga. Comp. R & Regs. 515-3-4-.08(1)(a) & (b) (defining circumstances that require a utility to seek an amendment to a resource certification). Unlike prior proceedings to evaluate ongoing construction costs of Units 3 and 4, VCM 17 "expressly considered whether to continue the Vogtle expansion despite a near

[7] The Georgia Integrated Resource Planning statute outlines the process for a utility seeking an amendment to a certificate. *See* O.C.G.A. § 46-3A-5. The Commission's regulations define the trigger points for when a utility is required to submit an amended application for certification:

> (a) The construction schedule has significantly changed;
> (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).

doubling of the original project cost and more than five years of delay to the construction schedule." Coyle Aff. ¶ 3; *see also id.* at ¶ 6 (Chairman Stan Wise moved to amend the proceeding to include the issue of Vogtle's additional cost and scheduling issues, "effectively open[ing] the door to continue building the Units at double the original cost and over an additional five years [of delay]"). "The inclusion of this weighty question into an otherwise routine construction monitoring proceeding created an unlevel playing field resulting in a Commission Order that advantaged Georgia Power Company and its shareholders while shifting undue burden and financial risks onto Georgia consumers." Coyle Aff. ¶ 4.

Coupled with this procedural irregularity regarding VCM 17's scope were public statements by Commissioners flaunting favoritism of Georgia Power's positions in ways both suspicious and ostentatious. Before the hearings even began, Commission Chairman Wise and Vice Chairman Tim Echols made statements that "foreclosed all but one option: complet[ing] both reactors," as recommended by Georgia Power. Coyle Aff. ¶ 5. For example, even before the first witness was sworn, Chairman Wise declared himself "an unabashed supporter of nuclear power." Coyle Aff. ¶ 8. In a press release from his own office, Vice Chairman Echols promoted an editorial he authored for the Wall Street Journal wherein, despite the estimated price tag for the Vogtle Units almost doubling, "Commissioner Echols appeared to commit himself to vote for continued construction of the Vogtle Units months before the Administrative Session where the votes would actually be cast." Coyle Aff. ¶ 12. These statements suggested prejudgment and bent-of-mind in favor of Georgia

Power's position even before hearing the first word of testimony. Coyle Aff. ¶ 5 ("public statements made by at least two of the Commissioners before the hearings even started show that they had already made up their minds.").

The 17th VCM "was a mere charade en route to a predetermined result." Coyle Aff. ¶ 13. Ultimately, "the Commissioners elected to ignore the recommendation of their own Advisory Staff, which was to approve continuation of the project only on terms that made economic sense for ratepayers." Coyle Aff. ¶ 14. Facing the dissent of the Commission's Public Interest Advocacy Staff, the Commissioners "cut[ ] short the proceeding to force a vote just days before Christmas and, apparently, engag[ed] in ex parte communications to fashion a final order acceptable to Georgia Power." Coyle Aff. ¶ 5.

Just days before the second round of testimony, where witnesses for the Commission Advocacy Staff and Intervenors would testify in opposition to the project, Chairman Wise led the Commission to suddenly shorten the proceeding, lopping more than forty days off the time period previously scheduled for deliberation. Coyle Aff. ¶ 13. Wise declared the hearings would conclude following testimony from Commission Advocacy Staff and Intervenors, and the Commission would issue a final decision a mere eight days later. Coyle Aff. ¶ 13. At the December 21, 2017 Special Administrative Session, the Commissioners would take their final vote.

At that December 21st Session, following final arguments by the parties, Vice Chairman Echols abruptly "unveiled a seven-page, 16-point motion that approved

continuing the project according to Georgia Power's revised cost estimate and schedule." Coyle Aff. ¶ 14. This motion included terms "benefitting Georgia Power that had not been litigated at any point during the [VCM 17] proceeding," (Coyle Aff. ¶ 14), including a move to place Unit 3 completely on the backs of ratepayers earlier than allowed under the original certification. *Id*. Not only were these new provisions never the subject of any testimony or exhibit put into evidence before the Commission in VCM 17, they covered a topic that the Commission itself—in its own Procedural and Scheduling Order—"had expressly stated would *not* be addressed" in VCM 17. Coyle Aff. ¶ 14 (emphasis supplied).[8] Notwithstanding these items had never been part of the 17th VCM, Georgia Power ratified these terms immediately, and without seeking any additional time for study, stated that these terms would be sufficient to allow the project to continue. Kysor Aff. ¶ 10; Coyle Aff. ¶ 17.[9]

In a press conference immediately following the final vote, Chairman Wise boasted that "I never had the intention of any other vote today." Coyle Aff. ¶ 18. Vice Chairman Echols all but confessed to having negotiated directly with Georgia

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[8] Decoupling Units 3 and 4 to place Unit 3 in the rate base prior to the completion of both Units was a concession that Georgia Power unsuccessfully sought from Commission Staff during settlement discussions while the hearings were ongoing. Coyle Aff. ¶ 15. Apparently, Georgia Power simply went directly to the Commissioners and, through ex parte communications, got what it wanted. *See* Coyle Aff. ¶ 15 (quoting Email from Georgia Power attorney Kevin Greene to Commission Staff, saying "Given our differing views of reasonableness, we believe that this question [regarding decoupling] should be decided by the Commissioners. . . . In the end, they are the only ones whose view of reasonableness really matters.").

[9] "[Georgia Power's attorney's] ready assent to Commissioner Echols' lengthy motion suggested that Georgia Power had prior knowledge of its terms." Kysor Aff. ¶ 10. This prior knowledge strongly suggested that ex parte communications had in fact occurred.

Power ex parte. Coyle Aff. ¶ 18 (asked at the press conference about discussions with Georgia Power, Echols responded "ultimately, they were read in and gave feedback"); Kysor Aff. ¶ 11. That same day an op-ed article—obviously planned and drafted beforehand—was posted online by the Atlanta Business Chronicle wherein Commissioner Echols and his colleague Commissioner Chuck Eaton defended their vote to continue Vogtle's expansion even at a near-doubled price tag. Coyle Aff. ¶ 19.

In the weeks following the vote, and given the reasonable suspicions of ex parte dealing provoked by the conduct and statements of the Commissioners, public records were sought pursuant to the Georgia Open Records Act ("GORA"). Kysor Aff. ¶¶ 12, 13. Requests for visitor sign-in logs at the Commission revealed that Georgia Power's Vice President of Regulatory Affairs visited the Commission building for several hours the day after hearings in VCM 17 concluded. Kysor Aff. ¶ 13 (Kyle Leach "signed in at 8:00 a.m. and out at 11:30 a.m."). A few days later, the same V.P. of Regulatory Affairs, along with Georgia Power's attorney in VCM 17, signed in to the Commission at 1:20 p.m. and were not recorded signing out. Kysor Aff. ¶ 13. On December 21, 2017, records obtained under GORA showed Georgia Power's V.P. of Regulatory Affairs signing in to the Commission building at 7:17 that morning (Kysor Aff. ¶ 13), mere hours before Echols would unveil his motion disposing of and settling VCM 17 (Kysor Aff. ¶ 22).

What was omitted from the Commission's GORA response were various emails sent by Commissioners' personal email accounts, including substantive email communications sent to Commissioners Eaton's and McDonald's personal

email accounts. Kysor Aff. ¶ 18 (we received emails sent from Commissioner Echols to Commissioners Eaton's and Lauren "Bubba" McDonald's personal accounts, but received no production from either of the latter Commissioners' personal accounts). In addition, the Commission failed to produce "certain email exchanges between Commissioners and representatives of Georgia Power and/or Southern Company, as confirmed by subsequent press reports." Kysor Aff. ¶ 19.

Among the email correspondence withheld from Petitioners (but apparently obtained by other third parties under GORA) were email exchanges between Vice Chairman Echols and the Chief Executive Officer of Georgia Power, Paul Bowers, discussing the Commission's final decision in VCM 17 in which Commissioner Echols (from his personal email account), writes: "Paul, not to get ahead of ourselves, but when we cut the ribbon on Unit 3, I want to see the President of the United States holding the scissors, and you and me on each side of him. Deal?" Kysor Aff. ¶ 19. Georgia Power's CEO responded, "Deal!!" *Id.* Other responsive documents obtained by third parties—and withheld from Petitioners' GORA response—included emails between Vice Chairman Echols and Mr. Leach, Georgia Power's aforementioned V.P. of Regulatory Affairs, in which it appears the motion ostensibly presented by Commissioner Echols on December 21 was being circulated ex parte to Georgia Power's Leach as early as December 13, 2017, just a few hours after the evidentiary hearings in VCM 17 concluded. *See* Kysor Aff. ¶ 21.

Based upon these facts, a reasonable person would conclude "that the Commission was biased in favor of Georgia Power Company's preferred disposition

of VCM 17 even before VCM 17 formally began and notwithstanding opposition to [Georgia Power's] positions not only of the Public Interest Advocacy Staff, but of the Commission's own Advisory Staff." Coyle Aff. ¶ 21; *see also* Kysor Aff. ¶ 22 (describing emails between Vice Chairman Echols and other commissioners reporting "I had hoped to get [Georgia Power's return on equity] down to 8.0 [%] but couldn't work it out," suggesting Echols directly negotiated with Georgia Power ex parte). In service of this bias, the commissioners employed ex parte communications to accomplish their predetermined ends. Coyle Aff. ¶ 21. "By conferring ex parte, it appears the Commission and Georgia Power Company collaborated to, first, negotiate in secret and, second, coordinate their public relations efforts to defend their secret disposition of VCM 17 while maintaining the illusion that the Commission was working on behalf of ratepayers." *Id.*

III. ARGUMENT AND CITATION OF AUTHORITY

"[D]iscovery is warranted to uncover the full nature and extent of . . . apparently improper ex parte communications," which tainted VCM 17 and "produced such an unfavorable result for Georgia Power customers." Coyle Aff. ¶ 21. While the Georgia Administrative Procedure Act generally confines judicial review of an agency decision to the record made before the agency, an exception is made when a party alleges that irregularities were committed in the proceedings. O.C.G.A. § 50-13-19(g). In those cases, the Court may hear evidence of the irregularities and must remand to the agency if additional findings are required. *Id.*; *see also Ga. Pub. Serv. Comm'n v. S. Bell,* 254 Ga. 244, 246 (1985). "In deciding

whether or not procedural irregularities occurred, and, if so, whether they were prejudicial to any party's rights, the superior court renders judgment without a jury." *N. Fulton Cmty. Hosp., Inc. v. State Health Planning & Dev. Agency*, 168 Ga. App. 801, 805 (1983).

In *N. Fulton Cmty. Hosp., Inc. v. State Health Planning & Dev. Agency*, the Fulton County Superior Court allowed an appellant to conduct discovery and present evidence regarding ex parte communications between an assistant attorney general for the state and the chairman of the State Health Planning Review Board. *Id*. at 803. The Court considered deposition evidence, interrogatory documents, and documents produced in discovery requests, and conducted a day-long hearing that included testimony by the board chairman and the assistant attorney general.[10] *Id*.

In instances where the Court has disallowed additional evidence to prove a procedural irregularity, it did so because the appellant failed to raise the issue before the state agency as required under § 50-13-19(c). *E.g., Ga. Power Co. v. Ga. Pub. Serv. Comm'n*, 196 Ga. App. 572, 573 (1990) (affirming the lower court's decision not to consider allegations of improper ex parte communications because petitioner did not raise it in its motion for reconsideration or in the proceedings).

Here, Petitioners did properly raise the issue below before the Public Service Commission, preserving it for action by the Court. R. at V3 (170495) (Tr. at 1858-

[10] The Georgia Court of Appeals ultimately determined the ex parte contacts between the board chairman and the assistant attorney general did not violate the board's regulations and were not improper based on the nature of the assistant attorney general's dual representation of state interests and the administrative body. *Id*. at 807–810. Further, the Court found the contacts "did not undermine the fairness of the overall proceedings." *Id*. at 809.

59), W3 (170499), K4 at 1 (170855). GIPL and PSE filed a letter of objection on the issue with the Commission prior to the conclusion of the hearings, and Georgia Watch raised the issue in its motion for reconsideration. *Id.*

Petitioners allege a procedural irregularity in the Commission's interpretation and violation of Rule 515-2-1-.14(2), the Commission's own rule barring ex parte communications. The rule was intended to ensure that the Commission's decisions are based on information shared in open hearings and not behind-closed-doors discussions with only one party.

The Commission was bound by its regulation restricting ex parte contacts. Georgia law limits the extent to which a state agency, like the Commission, may waive its own regulations. O.C.G.A. § 50-13-9.1. Where those regulations bind the Commission itself, Georgia law forbids the Commission from granting variances or waivers in favor of itself. O.C.G.A. § 50-13-9.1(g) ("Nothing in this Code section shall authorize an agency to grant variances or waivers to any statutes or to the agency itself or any other agency."); *see also* O.C.G.A. § 50-13-9.1(i) (requiring any waivers that were granted "be reported to the General Assembly within the first ten days of the next session," something the Commission indisputably did not do).

Nor could the Commission deliberately evade its ex parte restriction by indirect procedural maneuvers. When pressed as to "whether the Commission's ex parte rule would take effect upon conclusion of the Staff/Intervenor hearings," Chairman Wise preliminarily signaled that was "probably correct." *See, e.g.*, Kysor Aff. ¶ 7. However, when pressed again on the issue the following day, Chairman

Wise took a different position, claiming that "because Georgia Power reserved the right to file rebuttal testimony in the event the Commission did not make a substantive decision on December 21st," ex parte communications would be permitted. *Id*. at ¶ 8. Georgia Power never did actually file additional testimony and, upon information and belief, this procedural ruse was merely a pretext to allow otherwise prohibited ex parte communications between the Commission and Georgia Power. In fact, the Commission's December 11th order modifying the schedule plainly stated that "the Commission *will* render a decision in this docket" on December 21, 2017. R. at S3 (170469) (emphasis added).

"What the executive branch cannot do directly, it cannot do indirectly." *Perdue v. Baker*, 277 Ga. 1, 14 (2003). The Commission may claim that, by leaving the status of the hearings in limbo as to whether it would or would not hear evidence, it avoided the ex parte restriction from being triggered. This argument goes too far. If the Commission, by duplicitous gamesmanship, could so easily evade its own rule against ex parte communications, the effect on public confidence in the integrity of the Commission's decisions would be corrosive. "Thus, even though the [Commission] generally has the power and authority to control [its hearings], it cannot exercise this power in order to prevent the execution of a law." *See id*.

Although it is clear that ex parte communications did occur, important details regarding those communications are not apparent. This is not surprising considering that the communications occurred in private. Limited discovery is needed to supply those details, and in particular, to show why the communications

were sufficiently egregious to warrant the relief Petitioners ultimately seek on Count III of their petitions: reversal of the Commission's final decision because it was made upon unlawful procedure; is arbitrary and capricious; an abuse of discretion; and was affected by other errors of law. *See* O.C.G.A. § 50-13-19(h)(3), (4) & (6).

Georgia law has not spoken clearly to this issue, however it is expected that the Commission and Georgia Power may argue the law should not presume automatically that ex parte contacts "prejudiced" the proceedings below. *See, e.g., Hammack v. Pub. Util. Comm'n of Texas*, 131 S.E.3d 713, 732 (Tex. App. 2004) ("absent a showing that the communications fell within the prohibition against introducing off-record facts and absent a showing the Commission's minds were 'irrevocably closed' against them, appellants have not shown a denial of due process"); *see also Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982) ("a court must consider whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect").

In making a determination of whether the ex parte communications "tainted" the public interest the Commission was charged with protecting, this Court may weigh a number of considerations, such as (1) "the gravity of the ex parte communications"; (2) "whether the contacts may have influenced the agency's

ultimate decision"; (3) "whether the party making the improper contacts benefitted from the agency's ultimate decision"; (4) "whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond"; and (5) "whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose." *Prof'l Air Traffic Controllers Org.* 685 F.2d at 565.

Only this Court can ensure sufficient evidence is brought to light before it decides on whether ex parte communications tainted the proceedings below. This Court essentially is confronted with two choices: (1) ensure Petitioners a fair opportunity to adduce evidence through discovery so that the ex parte contacts may be investigated before deciding whether they rise to the level of requiring reversal; or (2) deny or restrict discovery, thereby all but ensuring the public never uncovers the extent to which these improper ex parte contacts influenced a grave decision that will impact Georgia ratepayers for decades. Because of the furtive conduct of the Commission and Georgia Power, Petitioners were prevented from developing such evidence in the proceedings below. Further, and given the circumstances, it would be naïve and unreasonable to expect the Commission and Georgia Power could be trusted to develop such evidence against themselves in the absence of orders from this Court compelling it.

The obvious reason the Administrative Procedure Act guarantees discovery in the event of "procedural irregularities" is to empower this Court to safeguard the integrity of the Commission's proceedings. There could scarcely be a more

compelling argument for the exercise of this Court's authority under subsections (g) and (h) of section 50-13-19 than the devious way VCM 17 was apparently engineered by the Commission, facilitated by ex parte communications, to produce the outcome desired by Georgia Power.

IV. CONCLUSION

For the reasons foregoing, Petitioners ask that the Court entertain a scheduling conference for purposes of hearing argument on this motion and, thereby, enter a reasonable scheduling order facilitating:

(1) reasonable discovery pursuant to the procedures of the Civil Practice Act fit for complex litigation;

(2) for a period of approximately four (4) months; and

(3) with a preliminary briefing schedule to follow thereafter to entertain relief on the Petitions for Judicial Review.

Respectfully submitted this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed **GEORGIA INTERFAITH POWER & LIGHT, ET AL.'S JOINT MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY OF THE GEORGIA PUBLIC SERVICE COMMISSION AND GEORGIA POWER CO. AND PRESENT EVIDENCE OF EX PARTE COMMUNCIATIONS, AND MEMORANDUM IN SUPPORT OF THIS JOINT MOTION** via Odyssey eFileGa, through the means of which electronic service will be properly made to all counsel of record.

Respectfully submitted this 11th day of May, 2018.

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