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## Administrative Law - Pending Petition for Agency Reconsideration Bars Appellate Court Jurisdiction

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1989]

ADMINISTRATIVE LAW—PENDING PETITION FOR AGENCY  
RECONSIDERATION BARS APPELLATE COURT JURISDICTION

*West Penn Power Co. v. EPA* (1988)

I. INTRODUCTION

In *West Penn Power Co. v. EPA*,<sup>1</sup> West Penn Power Company petitioned the United States Court of Appeals for the Third Circuit to review the Environmental Protection Agency's (EPA) denial of the Commonwealth of Pennsylvania's request to redesignate a Western Pennsylvania county to "attainment" status under the Clean Air Act.<sup>2</sup> West Penn had previously filed a petition for reconsideration of the agency action.<sup>3</sup> That petition was still pending before EPA when West Penn sought judicial review of EPA's denial.<sup>4</sup> Though both West Penn and EPA claimed that the outstanding petition for agency reconsideration did not affect appellate jurisdiction, the Third Circuit held that the pending request for agency reconsideration rendered the original agency order "non-final," and thus precluded jurisdiction.<sup>5</sup> Prompted by a recent Supreme Court decision, *ICC v. Brotherhood of Locomotive Engineers*,<sup>6</sup> and by concerns for judicial efficiency,<sup>7</sup> the Third Circuit adopted a definition of "finality" with regard to agency actions which runs counter to the plain language of the applicable section of the Administrative Procedure Act (APA).<sup>8</sup> This holding has added to the current

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1. 860 F.2d 581 (3d Cir. 1988).

2. 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986). A particular air quality region reaches "attainment" status when the region complies with national ambient air quality standards (NAAQS), which are promulgated by EPA pursuant to 42 U.S.C. § 7409. See *West Penn*, 860 F.2d at 583.

3. *West Penn*, 860 F.2d at 582.

4. *Id.*

5. *Id.* at 583.

6. 482 U.S. 270 (1987).

7. *West Penn*, 860 F.2d at 586-87.

8. 5 U.S.C. §§ 701-706 (1982 & Supp. IV 1986). Section 704 is entitled "Actions reviewable" and provides in full:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

*Id.* § 704.

split among the circuits on this issue.<sup>9</sup>

## II. DISCUSSION

West Penn is an electric utility that operates a coal-fired generating station in Armstrong County, Pennsylvania.<sup>10</sup> West Penn built an extraordinarily tall smokestack to disperse pollutants and to improve local air quality.<sup>11</sup> The stack conformed to, and was built in reliance on, proposed EPA regulations.<sup>12</sup> EPA, however, eventually promulgated final regulations that were significantly more stringent than those proposed at the time West Penn constructed its smokestack.<sup>13</sup> Under the final regulations the stack height exceeded "good engineering practice."<sup>14</sup> Therefore, the dispersive effect of the height of the stack did not provide

9. See, e.g., *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371 (7th Cir. 1986) (allowed simultaneous agency and court jurisdiction); *American Trucking Ass'ns v. ICC*, 697 F.2d 1146 (D.C. Cir. 1983) (same); cf. *Tenneco Oil v. Department of Energy*, 475 F. Supp. 299, 315-16 (D. Del. 1979) (allowed simultaneous agency and court jurisdiction, but dismissed claim not raised in optional agency reconsideration mechanism).

10. *West Penn*, 860 F.2d at 583.

11. *Id.* The 307-meter smokestack, built to replace two 70-meter stacks, reduced pollution in the local area because its extraordinary height ensures that high wind currents catch the smoke generated and send pollutants elsewhere. *Id.* This type of dispersion technique "is generally regarded as the cause of 'acid rain.'" *Id.* In 1977, Congress expressed its preference for pollution reduction over pollution dispersion by adding § 123 to the Clean Air Act. *Id.* Section 123 provides in part:

The degree of emission limitation required for control of any air pollutant under an applicable implementation plan under this subchapter shall not be affected in any manner by—(1) so much of the stack height of any source as exceeds good engineering practice (as determined under regulations promulgated by the Administrator), or (2) any other dispersion technique.

42 U.S.C. § 7423(a) (1982).

12. *West Penn*, 860 F.2d at 583. The stack conformed to proposed regulations promulgated by EPA pursuant to § 123 of the Clean Air Act on January 12, 1979. *Id.* Pennsylvania included West Penn's construction of the Armstrong stack in the 1981 revision of its state implementation plan (SIP), "a statutorily required roadmap for achieving and maintaining air quality attainment status in each of a state's air quality regions." *Id.* EPA approved the SIP, indicating its belief that the "stack would allow Armstrong County to attain national ambient air quality standards." *Id.*

13. *Id.* at 583-84. In 1982, EPA promulgated final regulations much less stringent than those proposed in 1979, but these 1982 rules were invalidated in *Sierra Club v. EPA*, 719 F.2d 436, 440 (D.C. Cir. 1983), cert. denied, 468 U.S. 1204 (1984). In 1985, as a result of *Sierra Club*, the EPA promulgated considerably more stringent regulations. *West Penn*, 860 F.2d at 583-84.

14. *West Penn*, 860 F.2d at 584. According to § 123 of the Clean Air Act, if the height of a stack exceeds "good engineering practice" (GEP), that source of pollution receives no credit for improvements in local air quality achieved from any dispersive effect. *Id.* at 583. For the text of § 123, see *supra* note 11.

Applying the 1985 regulations, the Armstrong stack exceeded GEP height. *West Penn*, 860 F.2d at 584.

any pollution reduction credit for the area.<sup>15</sup> Without this pollution reduction credit, the entire Armstrong County air quality region was no longer in attainment status.<sup>16</sup>

Pennsylvania requested that EPA redesignate the county to attainment status,<sup>17</sup> but EPA denied the request.<sup>18</sup> West Penn then filed a petition for reconsideration with EPA.<sup>19</sup> In the meantime, West Penn petitioned the Third Circuit for review of the original EPA order while the reconsideration petition was still pending.<sup>20</sup> The court was unaware of the pending reconsideration petition until some months after oral arguments had been held on the case.<sup>21</sup> The court raised the question of jurisdiction *sua sponte*, recognizing "an independent duty to examine [its] jurisdiction."<sup>22</sup> The court found it did not have jurisdiction and, therefore, dismissed the action.<sup>23</sup>

The issue facing the Third Circuit was whether a court of appeals can exercise jurisdiction when the party seeking judicial review of an agency order has filed a pending petition for agency reconsideration of the order. The Third Circuit began by examining the statutory basis for appellate jurisdiction of an EPA order.<sup>24</sup> The court acknowledged that, had West Penn not filed the petition for reconsideration, EPA's refusal to redesignate Armstrong County to attainment status would have been a "final action" when it was issued.<sup>25</sup> Therefore, the action would have been judicially reviewable.<sup>26</sup> The court considered whether a timely pe-

15. *West Penn*, 860 F.2d at 584.

16. *Id.*

17. *Id.* The state insisted that EPA "honor its previous commitment" under the 1979 regulations and 1981 SIP approval." *Id.*

18. *Id.* EPA denied Pennsylvania's reclassification request primarily due to lack of any evidence that the Armstrong stack conformed to the 1985 stack height regulations. *Id.*

19. *Id.* West Penn argued that it relied on EPA's 1981 SIP approval and constructed the \$13 million stack solely to comply with the Clean Air Act. *Id.* at 584 n.2. West Penn termed EPA's SIP approval "an 'ad hoc rule,' which, it submits, cannot be retroactively displaced." *Id.*

20. *Id.* at 584.

21. *Id.* at 582. West Penn indicated that it had sought agency reconsideration in a footnote to a supplemental letter-brief addressing the merits of its claim. *Id.* The Third Circuit realized that this might preclude its jurisdiction and solicited memoranda from the parties addressing the jurisdiction issue. *Id.*

22. *Id.* (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986)). Both parties argued that the petition for agency reconsideration did not vitiate appellate jurisdiction. *Id.*

23. *Id.* at 588.

24. *Id.* at 584. The court's jurisdiction derives from § 307(b)(1) of the Clean Air Act. That section provides in pertinent part: "A petition for review of . . . any other final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1) (1982).

25. *West Penn*, 860 F.2d at 584.

26. For the full text of § 704, see *supra* note 8.

tion for agency reconsideration renders the original action non-final.<sup>27</sup> This issue has divided the courts of appeals ever since enactment of the APA.<sup>28</sup> If the agency action is rendered non-final, then the court of appeals has no jurisdiction over the action.<sup>29</sup> If, on the other hand, the agency action is final, regardless of whether a timely reconsideration petition has been filed, then a party may request simultaneous agency reconsideration and judicial review.<sup>30</sup>

To examine this issue, the court first considered the APA's general definition of "finality."<sup>31</sup> Section 704 states that "agency action otherwise final is final for the purposes of [judicial review] *whether or not there has been presented or determined an application for . . . any form of reconsideration.*"<sup>32</sup> If, as the statute provides, an agency action is final whether or not a party has presented a reconsideration application, then a pending petition for reconsideration should not render the original agency action non-final.<sup>33</sup> The court noted that District of Columbia Circuit Judge (now Justice) Scalia had asserted in *American Trucking Associations v. ICC*<sup>34</sup> that "[t]he Administrative Procedure Act explicitly permits judicial appeal and request for agency reconsideration to be pursued simultaneously."<sup>35</sup>

The court found that, prior to passage of the APA, it was well-accepted that a pending reconsideration petition defeated appellate jurisdiction.<sup>36</sup> After the enactment of the APA, a split arose among the circuits concerning the effect of section 704 of the APA on this body of prior case law.<sup>37</sup> Consequently, the Third Circuit in *West Penn* examined

27. *West Penn*, 860 F.2d at 584.

28. *Id.* at 582-83 (citing *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371 (7th Cir. 1986) (allowing simultaneous agency and court jurisdiction); *American Trucking Ass'ns v. ICC*, 697 F.2d 1146 (D.C. Cir. 1983) (same); *Winter v. ICC*, 697 F.2d 1056 (8th Cir.) (not allowing simultaneous jurisdiction), *cert. denied*, 109 S. Ct. 308 (1988)).

29. *Id.* at 584 (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987)).

30. *Id.*

31. *Id.* As the court stated, "[i]t makes sense to define 'finality' under the Clean Air Act in the same way that it is defined in administrative law generally. The APA provides a general definition of administrative finality." *Id.*

32. 5 U.S.C. § 704 (1982 & Supp. IV 1986) (emphasis added). For the full text of § 704, see *supra* note 8.

33. *West Penn*, 860 F.2d at 584. The court terms this a "facially correct interpretation of section 704" because the statute appears plain on its face. *Id.*

34. 697 F.2d 1146 (D.C. Cir. 1983). For a discussion of the facts of *American Trucking*, see *infra* note 39.

35. *West Penn*, 860 F.2d at 584 (quoting *American Trucking*, 697 F.2d at 1148 n.\*).

36. *Id.* at 585 (citing *Southland Indus. v. FCC*, 99 F.2d 117, 120 (D.C. Cir. 1938), as exemplifying prior practice). The court noted that there is no evidence that Congress enacted § 704 in order to alter this prior practice. *Id.*

37. See *id.* at 584-85. For a discussion of these two opposing lines of cases, see *infra* notes 38-44 and accompanying text.

these two opposing lines of cases.

Some courts, such as the Seventh Circuit<sup>38</sup> and the District of Columbia Circuit,<sup>39</sup> have allowed simultaneous agency and court jurisdiction. The *West Penn* court viewed these cases as examples of “uncritical reliance on [the] plain meaning” of section 704,<sup>40</sup> primarily because those courts of appeals either failed to consider conflicting precedent<sup>41</sup> or employed a line of reasoning too narrow to be useful after the Supreme Court’s recent decision in *Locomotive Engineers*.<sup>42</sup>

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38. See *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371 (7th Cir. 1986). In *Northside*, EPA denied a waste disposal facility’s application for a hazardous waste permit. *Id.* at 376. The facility (Northside) petitioned EPA for review of the order denying the permit application. *Id.* This petition was also denied. *Id.* Northside then filed a motion to reconsider with EPA. *Id.* at 377. Northside filed a petition for review with the Court of Appeals for the Seventh Circuit exactly 90 days after EPA’s issuance of the original order denying review, but before EPA had ruled on the subsequent motion to reconsider. *Id.* at 376-77. The EPA denied the motion to reconsider some five months later. *Id.* at 378. Northside’s petition for judicial review was timely under the Solid Waste Disposal Act, which had a 90-day time limit for appeals. *Id.* at 378-79 (citation omitted). The court also held that the pending motion to reconsider did not render the petition for judicial review premature, since § 704 of the APA permits simultaneous administrative reconsideration and judicial review. *Id.*

39. See *American Trucking*, 697 F.2d 1146. In *American Trucking*, the Interstate Commerce Commission (ICC) issued an order which effectively exempted some operators from certain regulatory requirements. *Id.* at 1148. The petitioners, associations of carriers adversely affected by the ICC order, appealed for judicial review within the 60-day statutory time limit. *Id.* The petitioners subsequently filed three motions for reconsideration which the ICC rejected in succession. *Id.* The court went directly to the merits of petitioners’ challenge to the ICC’s interpretation of provisions of the Motor Carrier Act. *Id.* The court noted in a footnote that the APA allows simultaneous judicial review and agency reconsideration. *Id.* at 1148 n.\* (citing 5 U.S.C. § 704 (1976)).

40. *West Penn*, 860 F.2d at 587.

41. *Id.* (citing *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960)).

In *Outland*, certain pilots petitioned the Civil Aeronautics Board (CAB) to challenge an integrated seniority list created incident to an airline merger. *Outland*, 284 F.2d at 225. A CAB order dismissed the petition without a rehearing. *Id.* The CAB also denied a subsequent reconsideration petition. *Id.* The applicable statute provided a 60-day time limit for the filing of a petition for judicial review. *Id.* at 227. The pilots filed a petition for judicial review more than 60 days after the original order of dismissal, but within 60 days of the order denying reconsideration. *Id.* at 226. The court construed the then-existing version of § 704 of the APA to provide that “when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board.” *Id.* at 228.

The *West Penn* court noted that “[a]lthough *Outland* . . . was binding precedent in the D.C. Circuit at the time Judge Scalia wrote *American Trucking*, he makes no attempt in *American Trucking* to reconcile his interpretation of section 704 with the prior contrary interpretation in his circuit.” *West Penn*, 860 F.2d at 587.

42. 482 U.S. 270 (1987). See *West Penn*, 860 F.2d at 587 (citing *Northside*, 804 F.2d at 378). The Seventh Circuit in *Northside* had “no prior binding precedent interpreting section 704 against its plain meaning.” *Id.* For a discussion of the facts of *Northside*, see *supra* note 38.

Other courts, notably the Ninth Circuit,<sup>43</sup> have held that filing a petition for reconsideration renders the prior agency action non-final. These cases have defined agency finality in order to determine when the time limit for an appeal will expire.<sup>44</sup> The timeliness of an appeal might depend on whether the filing of a reconsideration petition deprived the prior agency decision of finality, because the time limit for appeal begins to run once the agency decision is final.<sup>45</sup> Therefore, if the statutorily prescribed time limit passes while a party awaits the outcome of agency reconsideration, the status of the prior agency decision during the pendency of the reconsideration petition is crucial. The party cannot appeal for judicial review after unfavorable disposition of the reconsideration petition unless the filing of the reconsideration petition rendered the prior agency action non-final and thus tolled the running of the limitations period.<sup>46</sup>

On the other hand, if the agency rules on the reconsideration petition before the time limit for appeal elapses, and the party then promptly files a petition for judicial review, the limitations question is moot.<sup>47</sup> In order to avoid this problem, these circuits have held that the

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43. *Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719 (9th Cir.), *cert. denied*, 368 U.S. 888 (1961). In *Samuel B. Franklin*, a securities dealer was censured and fined by the National Association of Securities Dealers, Inc. (NASD) for a violation of the NASD's Rules of Fair Practice. *Id.* at 721. The Board of Governors of the NASD upheld this action. *Id.* The petitioner appealed to the SEC to set aside the Board of Governors' decision. *Id.* at 722. The SEC dismissed this application for review. *Id.* The petitioner's subsequent application for rehearing was also denied. *Id.* The petitioner then sought judicial review from the United States Court of Appeals for the Ninth Circuit. *Id.* The petition for judicial review was filed 86 days after the SEC denied the application for review, but only 59 days after the SEC denied the application for rehearing. *Id.* The applicable agency statute provided a 60-day time limit for filing a petition for judicial review of an SEC order. *Id.* The Ninth Circuit reversed the prior interpretation of § 704 of the APA it had established in *Consolidated Flower Shipments, Inc. v. CAB*, 205 F.2d 499 (9th Cir. 1953). *Samuel B. Franklin*, 290 F.2d at 725. The court followed the District of Columbia's decision in *Outland* and found that the appeal was timely since "the timely filing of a petition for agency reconsideration does toll the sixty-day period for appeal to this court." *Id.*

44. See *Outland*, 284 F.2d at 226. See also *Arch Mineral Corp. v. Office of Workers' Comp.*, 798 F.2d 215, 219 (7th Cir. 1986); *Tiger Int'l, Inc. v. CAB*, 554 F.2d 926, 931 n.10 (9th Cir.), *cert. denied*, 434 U.S. 975 (1977); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 (8th Cir. 1977); *Tallman v. Udall*, 324 F.2d 411, 416 (D.C. Cir. 1963), *rev'd on other grounds*, 380 U.S. 1 (1965); *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 151 (D.C. Cir. 1961).

45. See, e.g., 28 U.S.C. § 2344 (1982) (sets 60-day time limit for appeal from entry of final order of ICC).

46. *West Penn*, 860 F.2d at 584-85 (citing *City of Newark v. FERC*, 763 F.2d 533 (3d Cir. 1985); *Outland*, 284 F.2d 224). For a discussion of the facts in *Outland*, see *supra* note 41. In *City of Newark*, the Third Circuit interpreted the Federal Power Act to mandate a tolling of the time limit for appeal when a timely reconsideration petition is before the Federal Energy Regulatory Commission. *City of Newark*, 763 F.2d at 545.

47. Some statutes provide a time limit within which the administrative agency must rule on the motion for rehearing or reconsideration. See, e.g., *Natu-*

petition for reconsideration vitiated the finality of the agency action.<sup>48</sup> The Third Circuit in *West Penn* recognized that this line of cases basically applied pre-APA law, “[n]otwithstanding the language of section 704.”<sup>49</sup> The Third Circuit found additional support for this view in the legislative history of section 704,<sup>50</sup> which offered “no evidence that Congress intended to alter the prior practice” that a pending petition for agency reconsideration precludes judicial review and tolls the limitations period.<sup>51</sup>

Above all, the *West Penn* court analyzed the Supreme Court’s recent decision in *Locomotive Engineers*,<sup>52</sup> which unequivocally interpreted section 704 against its plain meaning.<sup>53</sup> *Locomotive Engineers*, like the influential District of Columbia Circuit case *Outland v. CAB*,<sup>54</sup> held that a pending reconsideration petition renders an agency decision non-final

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ral Gas Act, 15 U.S.C. § 717r(a) (1982) (“Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.”); Federal Power Act, 16 U.S.C. § 8251(a) (1982) (same).

48. For examples of these cases, see *supra* note 44.

49. *West Penn*, 860 F.2d at 584.

50. *Id.* at 585 (citing Comment, “Final” Orders: Section 10(c) of the APA, 6 STAN. L. REV. 531 (1954)).

51. *Id.*

52. 482 U.S. 270 (1987). In *Locomotive Engineers*, the ICC issued an order which gave two railroads the right to use the tracks of a newly consolidated carrier. *Id.* at 274. A union filed a “Petition for Clarification,” seeking a declaration that the order did not authorize the railroads to use their own crews on the new routes. *Id.* at 275. The ICC denied the petition, explaining that since the railroads’ trackage rights applications had proposed they use their own crews, the ICC’s approval order authorized such operations and no clarification was required. *Id.* at 275-76. The union next filed a petition for reconsideration, contending that the railroads’ crewing procedures violated applicable labor statutes. *Id.* at 276. The ICC denied the petition. *Id.* Shortly thereafter, the union petitioned for judicial review. *Id.* Although the petition for review was filed more than 60 days after the ICC issued the order denying the Petition for Clarification, the Court held it was timely because the petition for reconsideration stayed the running of the limitations period until the ICC ruled on it. *Id.* at 285. However, the Court held that the ICC’s refusal to reopen the proceeding, in the absence of some allegation of new evidence or changed circumstances, was an agency action “committed to agency discretion by law” and was therefore not reviewable. *Id.* at 282 (quoting APA, 5 U.S.C. § 701(a)(2)). The Court stated that the union should have filed a timely appeal from the original order many months earlier. *Id.* at 286.

53. *West Penn*, 860 F.2d at 587. The Court in *Locomotive Engineers* actually construed the language of the Hobbs Act, 28 U.S.C. § 2344 (1982), which governs judicial review of final orders of the ICC, and the Revised Interstate Commerce Act, 49 U.S.C. § 10327(i) (1982), but based its analysis on § 704 of the APA, “a similar provision.” *Locomotive Eng’rs*, 482 U.S. at 284. The Court found “no basis for distinguishing the language of § 10327(i) from that of § 704.” *Id.* at 285.

54. 284 F.2d 224 (D.C. Cir. 1960). For a discussion of the facts of *Outland*, see *supra* note 41. For a list of cases which have followed *Outland*, see *supra* note 44.



for purposes of tolling the running of a time limit for appeal.<sup>55</sup> These cases arose in a different factual context from *West Penn*, which sought to define finality for the purpose of appellate jurisdiction.<sup>56</sup> Although the *West Penn* court eventually found *Locomotive Engineers* dispositive, it considered two grounds upon which it could be distinguished from *West Penn*.<sup>57</sup>

First the court noted that the Supreme Court in *Locomotive Engineers* was concerned with parties filing needless appeals. If the law of the relevant circuit was that the timely filing of a reconsideration petition did not stay the appeals period, litigants would file “protective appeals” to avoid losing all opportunity for judicial review.<sup>58</sup> This would arise when the statutory time limit for appeal neared expiration before the agency disposed of the reconsideration petition.<sup>59</sup> In a simultaneous jurisdiction situation, by contrast, a party has chosen to petition the court and the agency at the same time.<sup>60</sup> No litigant has been compelled to pass through the procedural hoop of filing an appeal to ensure the ultimate availability of the court of appeals. Rather, the petitioner has chosen to pursue remedies in two different forums. Therefore, perhaps finality could be defined differently in this context.<sup>61</sup> The Third Circuit was unmoved by this distinction, finding “incoherence in defining [finality] differently for triggering time limits for review and for . . . making an action reviewable.”<sup>62</sup> The court also supported its conclusion with policy considerations. It noted that simultaneous agency and court jurisdiction could represent a waste of judicial resources because the outcome of agency reconsideration might render all interim judicial efforts superfluous.<sup>63</sup>

The second basis the *West Penn* court posited for distinguishing *Locomotive Engineers* was the treatment of finality in the multi-party context. The court observed that it is not unusual for a single agency action to be

55. *Locomotive Eng'rs*, 482 U.S. at 284-85.

56. *West Penn*, 860 F.2d at 582.

57. *Id.* at 586. Both EPA and *West Penn* argued that the outstanding petition for reconsideration had no effect on the court's jurisdiction. *Id.* at 582. The court termed the parties' submissions “essentially conclusory.” *Id.* at 586. The court therefore formulated its own arguments against its position. *Id.*

58. *Id.* at 585 (citing *Locomotive Eng'rs*, 482 U.S. at 284-85 (citing *Outland*, 284 F.2d at 227)).

59. See, e.g., *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371, 376-77 (7th Cir. 1986). EPA had not yet ruled on *Northside's* motion to reconsider as the 90-day time limit for appeal approached, so *Northside* filed for judicial review. *Id.* For a discussion of the facts of *Northside*, see *supra* note 38.

60. *West Penn*, 860 F.2d at 586.

61. *Id.* at 585, 586.

62. *Id.* at 586. As the court stated, “[t]he reason that the time limit for appeal begins to run when a final judgment is entered is precisely that once the final judgment is entered the petitioner has the opportunity to bring its case to the Court of Appeals.” *Id.* at 585-86.

63. *Id.* at 585 (citing *Outland*, 284 F.2d at 227).

considered final for one party and non-final for another.<sup>64</sup> If a single agency action affects more than one party, one party may petition for review from the final agency action and another may request administrative reconsideration which renders the original agency action non-final.<sup>65</sup> The *West Penn* court, however, discounted this argument, explaining that the existence of the multi-party scheme does not mean that finality is a concept with no precise definition.<sup>66</sup> It only means that "finality with respect to agency action is a party-based concept."<sup>67</sup> A court can examine a certain party's exact procedural posture and interpret the finality of the agency action accordingly.

In addition, the court perceived good reasons why the possible waste of resources implicit in simultaneous agency and court jurisdiction should be tolerated when one party asks for agency reconsideration and another goes directly to court.<sup>68</sup> Congress intended the APA to relieve parties of the requirement of requesting administrative rehearings before seeking judicial relief.<sup>69</sup> As such, a goal of the statute would be thwarted if one party could file a reconsideration petition that rendered the agency action non-final for all other parties.<sup>70</sup> The filing of a reconsideration petition renders an agency action non-final with respect to the filing party, however, and the court saw "no justification for allowing a petitioner to apply to both the court and the agency at the same time."<sup>71</sup>

The court examined the circuit court opinions which allowed such simultaneous jurisdiction,<sup>72</sup> but found that they offered no grounds to

64. *Id.* at 586-87.

65. *Id.* at 587 (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970)). In *American Farm Lines*, the ICC granted *American Farm Lines* (AFL), a motor carrier, temporary operating authority. *American Farm Lines*, 397 U.S. at 536. Protesting carriers sought immediate judicial review. *Id.* A district court judge issued a temporary restraining order, and the ICC accordingly suspended AFL's operating authority. *Id.* Several reconsideration petitions were pending before the ICC when the district court issued the order. *Id.* The ICC granted these petitions, reopened the proceeding, and entered a new order granting AFL temporary operating authority. *Id.* A judge restrained operation of this new order. *Id.* After a full hearing on the merits, the court set aside both orders. *Id.* Both AFL and the ICC appealed to the Supreme Court which held that, as long as the agency's acts do not conflict with the court's jurisdiction, simultaneous court and agency jurisdiction is permissible in multi-party proceedings. *Id.* at 541 (citing *Inland Steel Co. v. United States*, 306 U.S. 153, 160 (1939)). The Court stated that "[i]n multi-party proceedings . . . some may seek judicial review and others may seek administrative reconsideration." *Id.* (emphasis added).

66. *West Penn*, 860 F.2d at 586.

67. *Id.*

68. *Id.*

69. *Id.* at 585 (citing *Locomotive Eng'rs*, 482 U.S. at 284-85).

70. *Id.* at 587. The court explained that "parties seeking immediate judicial relief would be forced to wait until the agency disposed of the reconsideration petitions filed by others." *Id.*

71. *Id.* at 586.

72. *Id.* at 587. These cases were *Northside Sanitary Landfill v. Thomas*,

distinguish *West Penn* from *Locomotive Engineers*.<sup>73</sup> The *West Penn* court noted that in *Winter v. ICC*,<sup>74</sup> decided after *Locomotive Engineers*, the Court of Appeals for the Eighth Circuit also found simultaneous jurisdiction impermissible.<sup>75</sup>

With no persuasive authority to the contrary, the *West Penn* court concluded that the APA did not embody a congressional intent to sanction the type of judicial inefficiency concomitant with simultaneous agency and court review.<sup>76</sup> In addition, the *West Penn* court perceived *Locomotive Engineers* as the Supreme Court's imprimatur on an interpretation of section 704 under which the filing of a reconsideration petition renders the prior agency action non-final.<sup>77</sup> Thus, the *West Penn* court looked beyond the plain meaning of section 704 and held that "courts of appeals cannot have jurisdiction over a petition for review when a petition for reconsideration brought by the same party is still pending before the agency."<sup>78</sup>

### III. ANALYSIS

The *West Penn* court's analysis started with the fundamental premise that a federal court will review only a final administrative order.<sup>79</sup> The

804 F.2d 371 (7th Cir. 1986) and *American Trucking Associations v. ICC*, 697 F.2d 1146 (D.C. Cir. 1983). For a discussion of the facts of *Northside* and *American Trucking*, see *supra* notes 38 and 39, respectively.

73. *West Penn*, 860 F.2d at 587. In *American Trucking*, Judge Scalia gave no explanation for following a "plain language" interpretation of § 704 which conflicted with the District of Columbia Circuit's earlier opinion in *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960). *West Penn*, 860 F.2d at 587. The Seventh Circuit in *Northside* did not consider the impact of agency "finality" on the running of the time limit for appeal. *Id.*

74. 851 F.2d 1056 (8th Cir.), *cert. denied*, 109 S. Ct. 308 (1988).

75. *Id.* at 1062. In *Winter*, the ICC granted a railroad an exemption from certain regulatory requirements pursuant to a trackage rights agreement. *Id.* at 1059. A union filed a petition to revoke the exemption, but the ICC denied this petition. *Id.* at 1059-60. The union then petitioned to reopen the decision. *Id.* at 1060. While this petition was still pending, the union sought judicial review. *Id.* The court held that the ICC decision denying the petition to revoke was rendered non-final when the union filed the petition to reopen. *Id.* at 1062. Relying upon the Supreme Court's interpretation of § 704 of the APA in *Locomotive Engineers*, the court refused to allow simultaneous judicial and administrative review. *Id.* at 1061-62. Therefore, it dismissed the petition. *Id.* at 1064.

76. *West Penn*, 860 F.2d at 587.

77. *Id.* at 585.

78. *Id.* at 587.

79. Agency action is not final, and hence not judicially reviewable, until the agency has reached a clear and definite statement of its position. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967). This finality requirement, a precondition to appellate jurisdiction, is incorporated in the APA through § 704. For the text of § 704, see *supra* note 8.

Commentators have noted that the language of the APA is less than helpful in determining when an agency action is final and, therefore, judicially reviewable. See, e.g., Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1453 (1971) (noting § 704 leaves "finality"

*West Penn* problem arises in a factual setting of parties dissatisfied with agency orders. Each party has a clear idea as to the course of action that will most effectively protect its interests.<sup>80</sup> A party may want to proceed directly to court without pursuing optional agency remedies,<sup>81</sup> or seek agency reconsideration while preserving an opportunity for judicial review.<sup>82</sup> An optimal system of administrative procedure would allow parties to proceed according to their self-defined best interests with minimal waste of administrative and judicial resources.<sup>83</sup>

#### A. Exhaustion Under Pre-APA Law

Prior to the APA, petitioners were uncertain whether they were required to apply for a rehearing in order to exhaust administrative remedies.<sup>84</sup> If the relevant agency statute did not mandate agency reconsideration but merely indicated that rehearing was available, courts differed as to whether rehearing was truly optional or was in fact a prerequisite to judicial review.<sup>85</sup> A party adversely affected by an agency order might prefer to appeal the order directly to a federal court. However, the relevant circuit might have indicated in a similar factual context that agency reconsideration was necessary for judicial review.<sup>86</sup> Therefore, the party would file a rehearing petition solely because this was a

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undefined); Comment, *Limiting Judicial Intervention in Ongoing Administrative Proceedings*, 129 U. PA. L. REV. 452, 475 (1980) ("The term 'agency action' is defined in the APA . . . . 'Finality,' however, finds no similar definition, although it is ultimately the most critical term.").

80. See *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960) (§ 704 of the APA "does not command a motion for rehearing . . . ; it leaves that to each litigant's choice"). See also Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 867, 871 (1976) ("Unless conservation of judicial time was among the reasons for providing [for rehearing or reconsideration], public policy reasons for requiring [either] as a prerequisite to judicial review are not strong; the objector to agency action may pursue the remedy or not . . . without effect upon his right to judicial review.").

81. See, e.g., *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 536 (1970) (protesting carriers sought direct judicial review).

82. See, e.g., *Locomotive Eng'rs*, 482 U.S. at 276 (union petitioned for judicial review after agency denied petitions for clarification and reconsideration).

83. See S. Doc. No. 248, 79th Cong., 2d Sess. 187 (1946). According to the Senate Judiciary Committee Report, "[t]here should be some simple and standard plan of administrative procedure." *Id.*

84. See Comment, "Final" Orders: Section 10(c) of the APA, 6 STAN. L. REV. 531, 533 (1954) (law prior to APA was unclear on exhaustion of agency remedies).

85. See, e.g., *Southland Indus. v. FCC*, 99 F.2d 117, 121 (D.C. Cir. 1938) ("Whether a petition for rehearing should be filed . . . must be decided on the merits as each case arises."). See also *Livers v. Anderson*, 326 U.S. 219, 221-22 (1945) ("[Exhaustion doctrine] does not automatically require that judicial review must always be denied where rehearing is authorized but not sought.").

86. See, e.g., *Red River Broadcasting Co. v. FCC*, 98 F.2d 282 (D.C. Cir.) (appeal dismissed for failure to seek available administrative remedies, particularly rehearing), *cert. denied*, 305 U.S. 625 (1938).

requirement for the court's jurisdiction.<sup>87</sup> The party may not have desired agency reconsideration because it was prejudicial to its case, or because it felt agency intransigence would make rehearing futile.<sup>88</sup> This problem of "token" rehearings was effectively eliminated by section 704.<sup>89</sup>

### B. Section 704: Congressional Intent Versus Impact

In formulating section 704, Congress was aware that federal courts would review only final administrative orders.<sup>90</sup> It was perceived as wasteful to compel litigants to request administrative rehearing unless they choose to do so or are required by statute.<sup>91</sup> Therefore, Congress probably intended that the original agency order should operate as final for purposes of appellate jurisdiction even if no agency rehearing has been requested.<sup>92</sup> But while section 704 solved the token rehearing problem, its plain language created more confusion.<sup>93</sup> Section 704 led to uncertainty as to the effect on appellate jurisdiction and the limitations period when a party actually files a rehearing petition.<sup>94</sup>

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87. See Comment, *supra* note 84, at 534 (some litigants filed for rehearing "to insure a day in court").

88. See, e.g., *Red River*, 98 F.2d at 288 (appellant claimed that had it sought administrative reconsideration "its request would have been denied").

89. See Fuchs, *supra* note 80, at 872 ("[Section 704] . . . abolishes the need for resort to administrative appeals which are not made prerequisites by statute . . . . [T]his position is contrary to the doctrine of exhaustion as previously understood . . . .").

90. For a discussion of the finality requirement, see *supra* note 79 and accompanying text.

91. See Comment, *supra* note 84, at 534 (noting wasteful effects of requiring exhaustion of agency remedies).

The enabling legislation of the administrative agency will take precedence over the general provisions of § 704 of the APA. Therefore, a federal court might not have jurisdiction over an otherwise final and reviewable agency order. For examples of statutes that mandate a rehearing, see Natural Gas Act, 15 U.S.C. § 717r(a) (1982) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."); Federal Power Act, 16 U.S.C. § 825l(a) (1982) (same). Provisions such as these reflect the results of a legislative cost/benefit analysis. The legislature has determined that it is not wasteful to require a party to apply for a rehearing prior to seeking judicial review.

92. See S. Doc. No. 248, 79th Cong., 2d Sess. 187 (1946) (legislative history of APA). See also *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960) ("The legislative history of [§ 704] indicates that it was adopted to achieve harmony with the [Supreme Court's] holding in *Levers v. Anderson* to the effect that a motion for rehearing was not necessary to exhaust administrative remedies.") (citation omitted).

93. For a discussion of the resulting split among the circuit courts, see *supra* notes 38-44 and accompanying text.

94. Some post-APA cases have held that a pending reconsideration petition does not defeat appellate jurisdiction. For a list of these cases, see *supra* note 9. Other circuits have held that simultaneous jurisdiction is impermissible. See *Winter v. ICC*, 851 F.2d 1056, 1062 (8th Cir.), *cert. denied*, 109 S. Ct. 308 (1988);

To illustrate, suppose a party adversely affected by an agency action chooses to seek agency reconsideration. Under a literal interpretation of section 704, the original agency action is final when issued even though a reconsideration petition has been filed.<sup>95</sup> The petition for reconsideration might remain pending when the time limit for judicial appeal is about to expire.<sup>96</sup> The time limit for appeal will run from the issuance of the order, and the litigant might well lose all opportunity for judicial review while awaiting the outcome of agency reconsideration.<sup>97</sup> This is a harsh and undesirable outcome.<sup>98</sup>

One way to mitigate the potential unfairness resulting from a literal interpretation of section 704 is to read it to allow simultaneous agency

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*Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493 (11th Cir. 1985); *ECEE, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980).

Similarly, some post-APA cases have held that the filing of a reconsideration petition tolls the time limit for appeal. For a list of these cases, see *supra* note 44. On the other hand, certain circuits have not allowed tolling in that circumstance. See *Selco Supply Co. v. EPA*, 632 F.2d 863, 865 (10th Cir. 1980) (relevant statute requiring prompt resolution of EPA orders did not provide for tolling upon motion for reconsideration), *cert. denied*, 450 U.S. 1030 (1981); *Laminators Safety Glass Ass'n v. Consumer Prod. Safety Comm'n*, 578 F.2d 406 (D.C. Cir. 1978) (distinguished *Outland*; relevant statute did not provide for rehearing or reconsideration); *Consolidated Flower Shipments v. CAB*, 205 F.2d 449, 451 (9th Cir. 1953), *overruled by Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719, 725 (9th Cir.), *cert. denied*, 368 U.S. 888 (1961).

95. For the text of § 704, see *supra* note 8.

96. This was the case in *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371 (7th Cir. 1986). *Northside* petitioned for judicial review exactly 90 days (the statutory limit) after the disputed agency order was issued. *Id.* at 377. Therefore, the court did not have to decide whether filing a motion for reconsideration suspends the time limit for appeal. *Id.* at 378-79. Had the court found simultaneous jurisdiction impermissible and dismissed the petition for review as premature, *Northside* would probably have sought a ruling that judicial review would still be available after the agency ruled on the pending petition. That is, *Northside* would have contended that the pending petition rendered the prior agency order non-final for purposes of tolling the time limit for appeal as well as for purposes of appellate jurisdiction. For the facts of *Northside*, see *supra* note 38.

97. This scenario occurred in a post-APA case, *Consolidated Flower Shipments v. CAB*, 205 F.2d 449 (9th Cir. 1953). In *Consolidated Flower*, the appellant sought judicial review 62 days after the issuance of the original agency order but only seven days after a rehearing petition was denied. *Id.* at 450. The statutory time limit for judicial review of CAB orders was 60 days. *Id.* The court interpreted § 10(c) of the APA, the then-existing version of § 704, according to its literal meaning and held that the petition was untimely. *Id.* at 451. Because this holding changed the law of the circuit, the court found that petitioner had reasonably relied on established law and granted a motion to file the petition after the 60-day limit. *Id.* at 452.

98. See Comment, *supra* note 84, at 536-37 (noting that such interpretation may force choice between agency and judicial review). Indeed, the Ninth Circuit later reversed itself and adopted the *Outland* rule that the timely filing of a petition for reconsideration tolls the time limit for appeal to a federal court. See *Samuel B. Franklin*, 290 F.2d 719. For the facts of *Samuel B. Franklin*, see *supra* note 43.

and court jurisdiction.<sup>99</sup> This interpretation is merely a further extension of the “plain language” rationale. Because section 704 states that an agency order is final whether or not a reconsideration petition has been filed, a pending reconsideration petition does not deprive the agency action of finality. An appellate court can exercise jurisdiction over the final agency order while the agency considers the request for reconsideration.<sup>100</sup> Under this interpretation of section 704, a litigant might request judicial review while its reconsideration petition is pending solely to avoid the expiration of the time limit for appeal and to ensure its day in court. However, this is precisely the protective appeal problem addressed in *Locomotive Engineers*.<sup>101</sup>

### C. *The West Penn Approach*

In holding that such simultaneous jurisdiction is impermissible, the *West Penn* opinion is consonant with *Locomotive Engineers*. Both cases interpreted section 704 against its plain meaning.<sup>102</sup> This appears to be the only approach which solves the token rehearing/protective appeals problem without creating more inequity and inefficiency.

It is submitted that the Third Circuit in *West Penn* was correct in holding that finality should be defined the same for purposes of providing appellate jurisdiction and for triggering a time limit for appeal. The court remarked that “there is no principled way to distinguish between” the two concepts of finality.<sup>103</sup> Yet the *West Penn* opinion, for the sake of arguing against dismissing the petition for review, distinguished the facts before it from those of *Locomotive Engineers*.<sup>104</sup> Though the *West Penn* holding is in accord with *Locomotive Engineers*, the Third Circuit elucidated the difference between the precise issue of *Locomotive Engineers* and that of the instant case.<sup>105</sup> Both cases decided whether the filing of a petition for reconsideration renders a prior agency action non-final.<sup>106</sup> *Locomotive Engineers*, however, considered the question for the purpose of determining when the time limit for appeal expires, while *West Penn* addressed the same question in deciding whether an appellate court has

99. See *Northside*, 804 F.2d at 378-79 (allowing simultaneous jurisdiction); *American Trucking Ass'ns v. SCC*, 697 F.2d 1146, 1148 n.\* (D.C. Cir. 1983) (same). For the facts of *Northside* and *American Trucking*, see *supra* notes 38 and 39, respectively.

100. See Comment, *supra* note 84, at 537 (“[U]nder a plain meaning interpretation of [§ 704] . . . the litigant could file for judicial review even while he seeks relief from the agency.”).

101. 482 U.S. 270 (1987). For a discussion of *Locomotive Engineers*, see *supra* notes 52-55 and accompanying text.

102. See *Locomotive Eng'rs*, 482 U.S. at 284-85; *West Penn*, 860 F.2d at 587-88.

103. *West Penn*, 860 F.2d at 585.

104. *Id.*

105. *Id.*

106. See *Locomotive Eng'rs*, 482 U.S. at 284-85; *West Penn*, 860 F.2d at 585.

jurisdiction over a petition for review.<sup>107</sup>

When a litigant files for reconsideration of an otherwise final agency order, the prior agency action may become non-final. This question of finality is potentially significant in two contexts. The outcome of the finality issue determines whether a time limit for appeal is stayed and whether an appellate court has jurisdiction.

In *West Penn*, the Third Circuit considered whether finality should be defined the same in both contexts or could have incongruent definitions.<sup>108</sup> There are four possible resolutions of the finality issue when a party files a petition for reconsideration. First, the agency action could be final for both purposes. The limitations period would not be stayed and judicial review would be available.<sup>109</sup> Second, the agency action could be non-final in both contexts. The time limit for appeal would be tolled and judicial review would be premature.<sup>110</sup> Third, the agency action could be final in that the time limit for appeal is running and yet non-final insofar as judicial review is unavailable.<sup>111</sup> Finally, the agency action might be non-final so that the limitations period is stayed and final to allow appellate jurisdiction.<sup>112</sup>

It is submitted that the most equitable and efficient outcomes will result when section 704 operates such that the two concepts of finality are applied congruently. In other words, when an action is "final," the time limit for appeals is running and the litigant should have the opportunity to appeal to a federal court.<sup>113</sup> When an action is "non-final," the appellate court has no jurisdiction and the time limit for appeals should be stayed.<sup>114</sup> A party should never face a situation in which the time

107. See *Locomotive Eng'rs*, 482 U.S. at 284 (issue is whether "the pendency of reconsideration motions . . . render[s] Commission orders nonfinal for purposes of triggering the . . . limitations period"); *West Penn*, 860 F.2d at 585 (issue is whether agency action is final in terms of appellate court jurisdiction despite pendency of reconsideration petition).

108. See *West Penn*, 860 F.2d at 585 ("In analytic terms, the question is whether we can hold that an agency decision is non-final for purposes of the timing of a Petition for Review but final in terms of conferring jurisdiction upon the appellate court.").

109. See Comment, *supra* note 84, at 536 (suggesting that this was implicitly the law of Ninth Circuit after *Consolidated Flower Shipments v. CAB*, 205 F.2d 499 (9th Cir. 1953)).

110. This is the *West Penn* result. See *West Penn*, 860 F.2d at 587-88.

111. Under this option, the litigant might be forced to abandon the reconsideration request or relinquish the chance for judicial review. For additional discussion of this option, see *supra* notes 95-98, *infra* note 115, and accompanying text.

112. This option was rejected in *West Penn*. See *West Penn*, 860 F.2d at 587-88. For additional discussion of this option, see *infra* notes 120-22 and accompanying text.

113. The *West Penn* court seems to assume that this is the ultimate result of its holding. See *supra* note 62.

114. Were this a well-established rule of administrative procedure, the factual situation in *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th



limit for appeals is running and yet the appellate court has no jurisdiction.<sup>115</sup> Similarly, no party should be able to enjoy judicial review while the time limit for appeal is stayed.<sup>116</sup>

This congruence is assured under the system outlined by *West Penn*. The Supreme Court in *Locomotive Engineers* held that a timely filed reconsideration petition renders the prior agency action non-final for purposes of the limitations period.<sup>117</sup> The Third Circuit in *West Penn* rejected the argument that finality should be defined differently for purposes of appellate jurisdiction and the running of the limitations period.<sup>118</sup> Therefore, the Third Circuit reached a logical conclusion in

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Cir. 1986), might have evolved in a different manner. For the facts of *Northside*, see *supra* note 38. The court in *Northside* held that the pendency of a reconsideration petition does not defeat appellate jurisdiction. *Northside*, 804 F.2d at 379. If the court had held instead that such simultaneous jurisdiction was impermissible, it would have dismissed *Northside*'s petition for review as premature. *Northside*, however, would have been secure in the knowledge that the time limit for appeal of the order was stayed until the agency acted upon the reconsideration petition. Therefore, there would have been no incentive to file a protective appeal on the day before the time limit for appeal elapsed.

115. This might have been the case in *Consolidated Flower Shipments, Inc. v. CAB*, 205 F.2d 449 (9th Cir. 1953), had the appellant filed for judicial review while the reconsideration petition was still pending. The *Consolidated Flower* court held that the filing of a timely reconsideration petition does not stay the time limit for appeal. *Id.* at 450. If the petition for judicial review had been filed within the statutory time limit and while the reconsideration petition was still pending, then the court would have had to decide whether such simultaneous jurisdiction was permissible. If the court then held that petitioner could not yet appeal to the court and the agency at the same time, and the agency had not yet ruled on the reconsideration petition as the time limit for appeal approached, the appellant would have had to abandon the agency proceeding or lose all opportunity for judicial review. This is one example of an incongruent application of "finality." This scheme cuts rather harshly against petitioners, who would face the running of the time limit and yet be unable to seek judicial review. For the facts of *Consolidated Flower*, see *supra* note 97.

116. There are no cases on this point, perhaps because petitioners awaiting the outcome of agency reconsideration reflexively file protective appeals when the time limit for judicial review approaches. If *West Penn*, for instance, had filed its petition for review more than 60 days after EPA denied Pennsylvania's reclassification request, the court, in accord with its actual holding, would have found the appeal timely because the filing of the reconsideration petition rendered the prior agency order non-final and tolled the time limit for appeal. For purposes of illustration, suppose the court also permitted simultaneous jurisdiction in that instance. *West Penn* would have enjoyed judicial review while the time limit for appeals was stayed. This would be another example of an incongruent application of the two concepts of finality, and the petitioner would enjoy both the benefit of the tolling of the time limit and the availability of judicial review. For the facts germane to the jurisdictional issue in *West Penn*, see *supra* notes 16-23 and accompanying text.

117. See *Locomotive Eng'rs*, 482 U.S. at 284-85.

118. See *West Penn*, 860 F.2d at 587-88. But see *CAB v. Delta Air Lines*, 367 U.S. 316, 326-27 (1961) (questions of administrative finality do not present same problems, or deserve same solutions, as questions concerning timeliness of appeal).

holding that the filing of a timely reconsideration petition renders an otherwise final agency action non-final in both contexts.<sup>119</sup> The only other option available to the *West Penn* court that would not have conflicted with *Locomotive Engineers* represented an incongruent application of finality. An otherwise final agency action could remain final, strictly for purposes of judicial review, despite the pendency of a timely filed reconsideration petition.<sup>120</sup> A party would have no incentive to file a protective appeal, because *Locomotive Engineers* assured litigants that a pendent reconsideration petition tolls the running of the limitations period. However, this “simultaneous jurisdiction” option presents the same “obvious potential for duplication or wasted effort” as a bona fide protective appeal,<sup>121</sup> without offering any significant countervailing benefit to the petitioner, which can bring its case to the court of appeals after the agency disposes of the reconsideration petition.<sup>122</sup>

It is submitted that *West Penn* articulates a rational, consistent and efficient plan of administrative procedure.<sup>123</sup> The course prescribed by

119. The decision is logical in that it describes the only resolution of the finality issue that both incorporates the holding of *Locomotive Engineers* and fosters judicial efficiency. For additional discussion of the options available to the *West Penn* court, see *supra* notes 110 and 112 and accompanying text.

120. Neither the Seventh Circuit nor the District of Columbia Circuit addressed the issue of whether the filing of the reconsideration petition stayed the time limit for appeal. See *Northside Sanitary Landfill v. Thomas*, 824 F.2d 371 (7th Cir. 1986); *American Trucking Ass'ns v. ICC*, 697 F.2d 1146 (D.C. Cir. 1983). This issue was moot because petitioners in both cases had petitioned for judicial review within the statutorily prescribed time period. These pre-*Locomotive Engineers* cases, therefore, do not stand for an incongruent application of finality. For the facts of *Northside* and *American Trucking*, see *supra* notes 38 and 39, respectively.

121. *West Penn*, 860 F.2d at 586. See also *New York v. United States*, 568 F.2d 887, 893 (2d Cir. 1977) (citing “deeply rooted policies of the federal courts against piecemeal appeals and in favor of allowing administrative proceedings to run their course without interference from the courts”), *cert. denied*, 449 U.S. 887 (1980); *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960) (“[W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary.”).

122. The *West Penn* court explains that the policy in favor of simultaneous jurisdiction in the multi-party context is due to just such countervailing benefits, namely concerns for efficiency and fairness to petitioners. See *West Penn*, 860 F.2d at 587 (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970)). For a discussion of agency finality in the multi-party context, see *supra* notes 64-71 and accompanying text.

123. A system under which an agency order is not rendered non-final upon the filing of a reconsideration petition could also represent a congruent application of the two concepts of finality. The agency order could be final for both the purposes of the time limit for appeal (i.e., the time limit would be running) and for purposes of appellate jurisdiction (i.e., judicial review would be available). The thrust of the court’s analysis in *West Penn* is that such an arrangement, although in accord with the plain language of § 704, is a far inferior option in terms of policy considerations. For a discussion of those considerations, see *supra* note 63 and accompanying text.

In addition, this option represents the protective appeal problem resolved

*West Penn* is supported by legislative history which indicates that Congress never intended section 704 to change the prior practice that a final agency action is rendered non-final when a party seeks a rehearing.<sup>124</sup>

#### IV. CONCLUSION

It is submitted that the problems of inefficiency and analytic inconsistency arose simply because, congressional intent notwithstanding, section 704 does not acknowledge the possibility that a final agency action may subsequently become non-final.<sup>125</sup> Congress' failure to anticipate the potentially conflicting applications of the term "finality" led to confusion and conflict among the courts of appeals.<sup>126</sup> The Supreme Court's recent decision in *Locomotive Engineers*, together with compelling policy considerations, allowed the Third Circuit in *West Penn* to overcome the plain meaning interpretation of section 704.<sup>127</sup>

Congress' avowed purpose in enacting section 704 could be accomplished in two ways. First, the section could be drafted in language that embraces only the issue of exhaustion of administrative remedies.<sup>128</sup> Second, Congress could add a provision to section 704 that adequately circumscribes its impact when parties seek optional administrative remedies.<sup>129</sup> Until and unless section 704 is modified in some manner, the *West Penn* decision represents the most comprehensive and workable interpretation available.

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by the Supreme Court in *Locomotive Engineers*. Because the agency order would remain final in both contexts, petitioners would lose all opportunity for judicial review unless they filed a timely, "protective" petition for judicial review. As such, this application of administrative finality, although a congruent one, conflicts with the Supreme Court's holding in *Locomotive Engineers* which was concerned with such protection appeals. See *Locomotive Eng'rs*, 482 U.S. at 284-85.

124. See generally Comment, *supra* note 84, at 534-35 (reviewing legislative history of § 704 of APA). But see Kozinski, *Hunt for Laws' "True" Meaning Subverts Justice*, Wall St. J., Jan. 31, 1989, at A16, col. 3 (criticizing modern trend of relying on examination of legislative history to overcome plain meaning of statute).

125. For the text of § 704, see *supra* note 8.

126. For a discussion of the subsequent split among the circuit courts, see *supra* note 94. See also Vining, *supra* note 79, at 1454 (suggesting that term "final" has different meanings within § 704).

127. See *West Penn*, 860 F.2d at 587-88.

128. See, e.g., MODEL ADMIN. PROC. ACT § 4-218(1), 14 U.L.A. 134 (Supp. 1984). It provides in part: "The filing of [a petition for reconsideration] is not a prerequisite for seeking . . . judicial review." *Id.*

129. An easy example of such qualifying language is found in *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960) ("Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied.").