No. 18-02345

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH GENERATING COMPANY,

Appellant,

v.

D.C. No. 17-01985

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),

Appellee,

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Docket ER-18-263-000

and

COMMONWEALTH GENERATING COMPANY,

Intervenor.

On Petition for Review of Orders
of the United States District Court for the District of Columbia and
the Federal Energy Regulatory Commission

BRIEF FOR APPELLANT-INTERVENOR
COMMONWEALTH GENERATING COMPANY

Team Number Ten

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Commonwealth Generating Company

February 4, 2019

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STATEMENT OF JURISDICTION

The jurisdiction of the district court was proper under 28 U.S.C. § 1331 as the claim in this case arose under the Clean Water Act, 33 U.S.C. §1251 *et seq.* Appellant-Intervenor Commonwealth Generating Company seeks review of the final order issued by the district court on June 25, 2018. The petition for review was timely filed on July 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

Appellee-Petitioner seeks review of one final order of the Federal Energy Regulatory Commission ("FERC"), issued on October 10, 2018, denying rehearing under the Federal Power Act ("FPA"), 16 U.S.C. §§ 791(a) *et seq*. The petition for review was timely filed on November 9, 2018, within 60 days of that order. The Court has jurisdiction under 16 U.S.C. § 825*l*(b).

ISSUES PRESENTED

(1) Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

(2) Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

(3) Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.

(4) Whether SCCRAP's position in the FERC proceeding – to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment – is an unconstitutional taking under the Fifth Amendment.

STATEMENT OF THE CASE

Commonwealth Generating Company ("ComGen") purchased the Vandalia Generating

Station in Mammoth, Vandalia in 2014 and has since been commitment to generating, transmitting, and distributing electric energy to Vandalia and its neighboring state of Franklin. In purchasing the generating station, ComGen also inherited the Little Green Run Impoundment ("Little Green Run" or "the Impoundment") built by the generating station's original developers to address the byproducts of the electricity generation process. Little Green Run was formed by the damming of the Green Run immediately to the east of the generating station.

Through it's compliance with all permit monitoring requirements, ComGen detected arsenic in the groundwater and notified the Vandalia Department of Environmental Quality ("VDEQ"). In conjunction with the VDEQ, ComGen developed and implemented a corrective action plan to mitigate the pollution and hired a competent contractor to install a high density polyethylene geomembrane ("HDPG") liner on the west embankment of Little Green Run.

In 2017, during routine water quality monitoring, the Vandalia Waterkeeper detected elevated levels of arsenic in the Vandalia River. The Waterkeeper suggested the source was rainwater leaching arsenic into groundwater which then eventually carried the pollutant into nearby Fish Creek and Vandalia River. An investigation, by the VDEQ discovered that a seam in the geomembrane liner had been inadequately welded resulting in seepage at the west embankment. The VDEQ report on Little Green Run states that "the seepage occurs only when there is significant rainfall, and that it dries up" after precipitation events. (VDEQ Specific Site Assessment, Little Green Run Impoundment, p. 14). The slope downstream of the Impoundment is in generally good condition with only some grooves in the soil and there is no evidence of internal erosion of the dam materials.

Appellee-Petitioner, Stop Coal Combustion Residual Coal Ash Ponds ("SCCRAP"), filed suit against ComGen in December 2017 as part of its programmatic initiative targeting electricity-

generation impoundments across the country. SCCRAP alleged a violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a), which prohibits the "discharge of any pollutant to navigable waters from any point source." *Id.* § 1362(12). On June 25, 2018 the district court issued its final ruling concluding that the groundwater around Little Green Run does fall within "navigable waters" for purposes of liability under the statute and that the Impoundment is a "point source" because it conveys arsenic into groundwater. ComGen timely appealed this final order.

ComGen applied contemporaneously with its notice of appeal to adjust its rate schedules with FERC. ComGen sought to amortize the cost of complying over ten years in the rates charged to Vandalia Power and Franklin Power and their retail customers. SCCRAP intervened and filed a protest in opposition to the filing. FERC called for three days of evidentiary hearings before issuing its order. The Commission's decision approved the revised rate schedule, finding that SCCRAP's proposed rates would jeopardize the financial integrity of ComGen. FERC further emphasized the need to allow utilities to recover environmental remediation costs as a way to promote environmental protection. The Commission denied SCCRAP's request for rehearing, and SCCRAP then pursued judicial review. SCCRAP, ComGen, and FERC jointly filed to have the two appeals consolidated at the D.C. Court of appeals for decision.

SUMMARY OF THE ARGUMENT

I. ComGen Is Not Liable Under the Clean Water Act Because the Affected Groundwater Is Not "Navigable Waters" Under the Statute and the Little Green Run Is Not a Point Source.

ComGen is not liable under the Clean Water Act because the groundwater at issue in this case is not "navigable waters" under the statute and Little Green Run is not a point source. A discharge of pollutants is prohibited under the Clean Water Act only if it is made into "navigable

waters," which is defined as "waters of the United States." Under both Supreme Court precedent and applicable agency regulation, the groundwater in this case is not "waters of the United States." Although the Supreme Court does not provide a single definition of the phrase, their analysis focused on the difficulty in boundary-drawing and the significant nexus between the water at issue and covered water, as well as the permanence and the navigability of the water at issue. Although the record lacks the technical information necessary to determine a significant nexus, the other three considerations all indicate that the groundwater in this case would not be considered "waters of the United States."

The fact that the groundwater in this case is not "waters of the United States" is further confirmed by the text of applicable agency regulations. Under both agency regulations pre-2015 and the rule promulgated in 2015, groundwater is categorically excluded. Because the statute does not expressly speak to the question of whether groundwater is "waters of the United States," these agency regulations are due deference and should control. Any theory of liability under the Clean Water Act based on a mere hydrological connection between the water at issue and navigable waters impermissibly expands the scope of the statute beyond what the statute's language or court precedent can support. Demanding only a clear hydrological connection is language that does not come from any statute or controlling precedent, and, in fact, is different than requiring a "significant nexus" which is a requirement that can be grounded in some applicable case law. Because this theory of liability cannot find support in statutory language, Supreme Court precedent, or agency regulation, it was improper for the district court to rely on it in this case.

In addition to the fact that the groundwater at issue is not "navigable waters" under the statute, ComGen is also not liable for any discharges from Little Green Run made without a

permit because Little Green Run is not a "point source." The permit requirement of Section 402 of the Clean Water Act is only applicable to point sources. A point source is "any discernible, confined and discrete conveyance." The Impoundment is not a discrete conveyance. Rather, it is the static recipient of the precipitation that occasionally flowed through it. Because Little Green Run is not a point source, it is not subject to the permitting requirements of Section 402.

II. FERC's Decision Should Be Upheld Because it Was Not Arbitrary and Capricious and Adopting SCCRAP's Proposed Rates Would Be an Unconstitutional Taking.

FERC's decision to approve ComGen's revised FERC Rate Schedules No. 1 and No. 2 was not arbitrary and capricious under the three requirements of the *Permian Basin Area Rate Cases*. First, the Commission acted within its statutory authority. Second, the Commission based its decision on substantial evidence gathered in both the District Court proceedings and the Commission's ratemaking hearings. Finally, FERC determined that the revised rate schedules, which allow ComGen to recover remediation costs at the Little Green Run, both protected the public interest and maintained the financial integrity of the utility. This Court's responsibility is not to supplant the Commission's balance of these interests, but to assure itself that FERC has given reasoned consideration to each of the pertinent factors. Application of the *Permian Basin Rate Cases* criteria discloses no infirmities in the Commission's order, so the order cannot be considered arbitrary and must be sustained.

SCCRAP's proposed rates of 3.2% and 3.6% qualify as unconstitutional takings under the Fifth Amendment. Such rates of return have not generally been constitutional since before World War One. Current returns on equity for utilities are 380% higher than those proposed by Appellee-Petitioner. SCCRAP has also failed to allege sufficient facts to show that ComGen's 2005 remediation rises to the level of legal imprudence, barring it from receiving a constitutional

rate of return. Utilities are entitled to a presumption of prudence which must be overcome by evidence of waste or negligence in a factually-specific inquiry. To overcome this presumption ComGen must have completely abdicated its responsibilities, employed a contractor whose efficacy was doubted industry-wide, or committed a similarly serious act before a reviewing court can substitute its judgment for that of the utility. SCCRAP did not present such evidence to FERC during ratemaking, and the Commission did not find ComGen legally imprudent. SCCRAP has failed to carry the heavy burden necessary to overturn the Commission's judgment and deny ComGen a constitutionally sufficient rate of return.

ARGUMENT

I. ComGen Is Not Liable Under the Clean Water Act Because the Affected Groundwater Is Not "Navigable Waters" and Little Green Run Is Not a "Point Source."

Any discharge of pollutants originating in Little Green Run is not actionable under the Clean Water Act because affected groundwater does not fall within the jurisdictional prerequisite of being "navigable waters" as defined by the statute. Further, the Impoundment does not violate the permitting requirements of Section 402 because Little Green Run is not a "point source" as defined by the statute.

The Clean Water Act ("CWA") does not prohibit all water pollution, but regulates the pollution of specific kinds of waters from specific pollution sources. Generally, the Act prohibits the "discharge of any pollutant by any person" unless otherwise authorized under the Act. 33 U.S.C. § 1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to *navigable waters* from *any point source*." *Id*. § 1362(12) (emphasis added). Thus, the necessary prerequisite for liability under the CWA is that the affected water is considered "navigable waters" under the statute and that the pollutant comes from a point source.

As explored below (Section I.A.), the affected water in this case is not "navigable waters" under the statute because it is ephemeral groundwater which only exists after heavy precipitation events. Although this groundwater is hydrologically connected with the nearby Fish Creek and Vandalia River, this groundwater itself is not "waters of the United States" and this mere connection is not enough to substantially expand the scope of CWA coverage.

The CWA explicitly authorizes water pollution under one of two permitting schemes, including its National Pollutant Discharge Elimination System ("NPDES"). *See id.* § 1342(a). Per Section 402 of the CWA, under NPDES the EPA may issue a permit for the discharge of any pollutant by a point source into navigable water within specific effluent standards. *Id.* Importantly, if an entity is not a "point source," it is not required to obtain a permit under NPDES and Section 402 of the CWA. In this case, as explored below (Section I.B.), Little Green Run is not a "point source" as defined by the statute. Because Little Green Run is not a point source, it cannot be held liable for violations of Section 402 as this section does not apply.

A. Surface Water Pollution Via Hydrologically Connected Groundwater Is Not Actionable Under the Clean Water Act Because the Groundwater Is Neither "Navigable Waters" Nor "Waters of the United States" Under Supreme Court Precedent and Applicable Agency Regulation.

Because the CWA only prohibits pollutant discharges into "navigable waters," defined as "waters of the United States," *id*. § 1362(7), and groundwater hydrologically connected to navigable water is not "waters of the United States," any discharge from the Little Green Run Impoundment into nearby groundwater does not fall under the regulatory scope of the CWA.

The phrase "waters of the United States" ("WOTUS") does not include groundwater, even if that groundwater is hydrologically connected to navigable waters, under both current Supreme

Court precedent and current agency rules interpreting the phrase.[1] The sparse statutory definition of "navigable waters" has spurred substantial litigation as well as numerous iterations of agency rules testing and interpreting the meaning of the phrase. As part of this complex litigation history, three key U.S. Supreme Court decisions have interpreted the term "waters of the United States" and its implementing regulations: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter "SWANCC"), and *Rapanos v. United States*, 547 U.S. 715 (2006). Two of these cases—*Riverside Bayview Homes* and *Rapanos*—addressed the questions as to whether specific wetlands were WOTUS; but the Court has never addressed the question of groundwater specifically. Thus, while these cases illuminate the Court's general interpretation of the phrase, agency regulation is left to fill in the gaps about the phrase's application to the specific instance of groundwater. These regulations are owed deference. See, *e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The groundwater in this case is not WOTUS for purposes of CWA jurisdiction based on both analysis under current Supreme Court precedent and explicit exclusion by all current versions of applicable agency rules.

1. The Groundwater in this Case Is Not WOTUS when Analyzed Under Current Supreme Court Precedent.

The groundwater at issue in this case would not be considered WOTUS under current Supreme Court precedent because, despite its hydrological connection to navigable waters, the

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[1] Additionally, the plain text of the CWA supports the assertion that groundwater does not fall within the term navigable waters as there are places in the statute where the two terms are used separately, which would be superfluous if groundwater fell within navigable waters. *See e.g.* 33 U.S.C. § 1314(f)(2)(F) ("changes in the movement, flow, or circulation of any navigable waters or ground waters").

groundwater can be clearly delineated from those navigable waters, is itself nonnavigable, and is merely ephemeral. The Supreme Court has examined these three characteristics of waters in its three cases considering the meaning of WOTUS.

In *Riverside Bayview Homes*, the Supreme Court deferred to the Army Corps of Engineers' assertion of jurisdiction over wetlands actually abutting traditionally navigable waters, stating that the Corp's determination that such wetlands are "inseparably bound up" with navigable waters was not unreasonable. 474 U.S. at 134. The Court recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which *water ends and land begins*." *Id.* at 132 (emphasis added). The Court also "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

The Court next analyzed the question in *SWANCC*, specifically addressing whether an abandoned sand and gravel pit located some distance from traditionally navigable water was WOTUS under the statute. 531 U.S. at 162. The Court rejected the government's assertion of jurisdiction over such "*nonnavigable*, isolated, intrastate waters" as outside the scope of CWA jurisdiction. *Id.* at 171-2 (emphasis added). In doing so, the Court noted "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" *Id.* at 167.

The Court in *SWANCC* also reemphasized the significance of "navigable waters" in the language of the CWA. Although the term "navigable" in the Act is broader than the traditional understanding of the term, and does not require navigability in fact, "'navigable' is not devoid of significance." *Rapanos*, 547 U.S. at 731 (citing *SWANCC,* 531 U.S. at 171). "[I]t is one thing to

give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172.

The Court revisited the meaning of WOTUS a third time in *Rapanos v. United States*, 547 U.S. 715, specifically examining wetlands that did not actually abut but that ultimately connected to traditionally navigable water. A fractured opinion from the Court vacated the Sixth Circuit's decision upholding the asserted jurisdiction over the wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment but on alternate grounds. *Id.* at 757 (plurality), 787 (Kennedy, J., concurring). The plurality of the Court determined that WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Id.* at 739 (Scalia, J., plurality) (internal quotations omitted). "The phrase does not include channels through which water *flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall*." *Id.* (emphasis added). Because the *Rapanos* wetlands had a physically remote hydrologic connection to navigable waters and no continuous surface connection, the plurality determined that the wetlands did not raise the same boundary-drawing problem as those in *Riverside Bayview Homes* and that they lacked the "inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin." *Id.* at 740-41. Justice Kennedy's concurrence focused on the "significant nexus" between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is subject to CWA jurisdiction. *Id.* at 782 (Kennedy, J., concurring). Justice Kennedy also acknowledged that "environmental concerns provide no reason to disregard limits in the statutory text." Id. at 778.

The limits of the statutory text, such as the use of the term "navigable," are critical when applying precedent to this case. "The Clean Water Act does not attempt to assert national power to the fullest. 'Waters of the United States' must be a subset of 'water'; otherwise why insert the qualifying clause in the statute?" *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962, 965 (7th Cir. 1994). The Court's analysis has focused on the difficulty in drawing a line between the water at issue and truly navigable water, the nexus between the water at issue and truly navigable water, the navigability of the water at issue, and the permanence of the water at issue. Although "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus,'" *Rapanos*, 547 U.S. at 728 (Scalia, J., plurality), "mere hydrologic connection should not suffice in all cases," *id.* at 784 (Kennedy, J., concurring). The determination of a "significant nexus" is a highly technical. Because this case arises from a citizen suit the record lacks any highly technical input from the EPA or the Army Corps of Engineers as to the significance of the ecological or hydrological connection between the ephemeral groundwater around Little Green Run and Fish Creek and Vandalia River. Critically, however, all of the other considerations focused on by the Supreme Court indicate that the ephemeral groundwater at issue in this case is not WOTUS.

The groundwater in this case poses no boundary drawing issues, is not navigable, and is ephemeral such that it would not be WOTUS under current Supreme Court precedent. As the Court stated in *Riverside Bayview Homes*, in determining the limits of Act's power to regulate discharges, some point must be chosen "at which *water ends and land begins*." 474 U.S. at 132 (emphasis added). Groundwater does not pose the same issue as adjacent wetlands. An easy line can be drawn in the case of groundwater where the land ends and the truly navigable waterways of Fish Creek and the Vandalia River begin. Although the CWA does extend to water that is not

navigable in fact, "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. Groundwater was not what Congress had in mind in declaring the jurisdictional reach of the Act extended to discharges in "navigable waters." Lastly, the seepage at issue in this case "occurs only when there is significant rainfall, and that it dries up" after precipitation events. VDEQ Specific Site Assessment, Little Green Run Impoundment, p. 14. This is very similar to water the plurality in *Rapanos* explicitly excluded from WOTUS. 547 U.S. at 739 (Scalia, J., plurality) ("The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall").

"The plain language of the [CWA] simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Id.* at 734. The rational that a bare hydrological connection eventually to some traditionally navigable water is enough to call ephemeral groundwater WOTUS for the purposes of the CWA is dangerous logic under which all groundwater *could* be thought within the power of the national government. This would represent a massive expansion of the reach of the CWA well beyond what Congress intended. Because the groundwater in this case is clearly delineable from the nearby navigable water, is ephemeral, and is not navigable it is not WOTUS under current Supreme Court precedent.

2. The Groundwater in this Case Is Not WOTUS when Analyzed Under Current Applicable Agency Regulation.

The groundwater at issue in this case is also not WOTUS under applicable current agency regulation, several of which have explicitly addressed this question. WOTUS has been the subject of complex litigation history, resulting in many proffered and reproffered definitions by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps"), the two

agencies in charge of implementing the CWA. In 2015, responding to repeated calls for a more precise definition of WOTUS, the agencies jointly promulgated a new rule ("the 2015 Rule"). 40 C.F.R. §230.3(s) (2017). This rule was challenged in circuit court, but the Supreme Court ruled that such challenges must begin at the district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). Because of this, the rule is being upheld or stayed on a court-by-court basis, and jurisdictions are currently split as to whether the pre-2015 regulations or the 2015 Rule applies.

Under either the pre-2015 rules or the 2015 Rule itself, groundwater is categorically not considered WOTUS. The agency rule defining WOTUS in jurisdictions that have stayed the 2015 Rule has remained largely unchanged since it was promulgated in 1986/1988. *See* 40 C.F.R. §230.3(s) (2014). The rule lists the categories of waters which are considered WOTUS. *Id.* Although this definition does not explicitly exclude groundwater, groundwater does not readily fit within any of the seven categories listed in the rule. Further, this rule carried with it an implicit exclusion of groundwater which had been the agencies' long-standing practice. This reality was acknowledged in the preamble to the final 2015 Rule. 80 Fed. Reg. 37053, 37099 (Jun. 29, 2015) ("the agencies have never interpreted 'waters of the United States' to include groundwater").

This long-standing implicit exclusion of groundwater in the pre-2015 regulations was explicitly codified in the 2015 Rule. The 2015 Rule separates waters into three jurisdictional groups: waters that are categorically jurisdictional (e.g., interstate waters); waters that require a case-specific showing of their significant nexus to traditionally covered waters; and those that are expressly and categorically excluded from jurisdiction. 33 C.F.R. §328.3 (2017). The beginning of the subsection on categorical exclusions states "[t]he following are not 'waters of the United States' even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section." *Id.* at §328.3(o)(2). Paragraphs (o)(1)(iv) through (viii) include the subsection listing

waters that are subject to the case-by-case significant nexus analysis. Therefore, under the 2015 Rule, the question of analyzing a significant nexus is not even raised when it comes to those waters that fall under the categorical exclusions. Some such waters which are explicitly, categorically excluded from being WOTUS include "(iv)(F) Erosional features, including gullies, rills, and other ephemeral features … (v)Groundwater, including groundwater drained through subsurface drainage systems." 33 C.F.R. § 328.3(o)(2) (2017).

Under both the 2015 Rule and the pre-2015 regulations[2], the groundwater at issue in this case would not be considered WOTUS. Therefore, regardless of which rule is applicable in Vandalia and Franklin, the ephemeral groundwater around the Little Green Run would be categorically excluded from and thus not actionable under the CWA. Given the fact that the statute does not explicitly address the question of whether groundwater is WOTUS for purposes of the statute, the rules put forth by the EPA and Corps are entitled to *Chevron* deference. *See Chevron,* 467 U.S. 837. Because of the long-standing practice of the relevant agencies and the explicit language of the 2015 Rule, any affected groundwater in this case would not be considered WOTUS, and thus not "navigable waters," under the statute and so ComGen cannot be liable under the CWA.

A theory of extending liability under the CWA based solely on hydrological connection is contrary to Supreme Court precedent and relevant agency rules. This theory, relied on by the district court in this case, would impose CWA liability for discharges that are eventually introduced to navigable waters only through groundwater—which itself is not WOTUS—so long as the hydrologic connection between the source of the pollutants and navigable waters is direct,

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[2] The explicit exclusion of groundwater is included in the new WOTUS rule proposed by the EPA and the Corps on December 11, 2018 to replace the 2015 Rule.

immediate, and can generally be traced. *See Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436, 442 (6th Cir. 2018), *see also Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018). The court in *Upstate Forever* relied on this problematic theory in stating "a discharge that passes from a point source through ground water to navigable waters may support a claim under the CWA" when "the connection between a point source and navigable waters must be clear." *Upstate Forever*, 887 F.3d at 651. This "clear connection" requirement finds no support in the language of the CWA, in Supreme Court precedent, or in applicable agency rules. The court may have been justified in analyzing the issue under the significant nexus test of *SWANCC* and Justice Kennedy's *Rapanos* Concurrence, however as explained above, groundwater is categorically excluded from significant nexus analysis under the 2015 Rule. A test based on clear hydrological connection is a circuit court construction, and thus inapposite in appropriate analysis of this issue.

Such a theory of liability would massively and impermissibly expand the scope of liability under the CWA. The CWA does not attempt to assert national power to the fullest or exert control over all water with a bare hydrological connection to some navigable waters. Adopting this hydrological connection test would read "navigable" out of the statute entirely. It is also based on a logic that could extend up through chains of minimal and insignificant but "traceable" hydrologic connections to capture any puddle. Such an interpretation is unworkable and represents a gross expansion on the limits of what Congress intended to be covered by the statute.

Further, any argument supporting this hydrological connection theory based on the absence of the word "directly" in the CWA's general prohibition is ill-considered. This argument relies on taking a quote from the *Rapanos* plurality out of context. Writing for the plurality in *Rapanos*, Justice Scalia recognized that the CWA does not forbid the "'addition of any

pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 748 (9th Cir. 2018) (quoting *Rapanos*, 547 U.S. at 743 (plurality opinion) (emphasis in original) (quoting 33 U.S.C. §§ 1311(a), 1362(12)). However, when Justice Scalia pointed out the absence of the word "directly," he did so to explain that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA. *Rapanos*, 547 U.S. at 743. ("the discharge into intermittent channels of any pollutant…likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through *conveyances*' in between." (emphasis added)). "Justice Scalia's reference to 'conveyances'—the CWA's definition of a point source—reveals his true concern. He sought to make clear that intermediary point sources do not break the chain of CWA liability; the opinion says nothing of point-source-to-nonpoint-source dumping." *Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925, 936 (6th Cir. 2018). While some "indirect" discharges may fall within the scope of the CWA, discharges directly into groundwater are beyond the scope of the CWA because groundwater is not WOTUS.

B. Any Chemical Seepage From Little Green Run that Passes through Groundwater to Navigable Waters Does Not Constitute a Discharge of a Pollutant from a Point Source in Violation of Section 402 Because Neither the Impoundment nor the Groundwater Are Discrete Conveyances.

ComGen is not liable for a violation of Section 402 of the CWA because Little Green Run is not a "point source" and therefore is not required to obtain a Section 402 NPDES permit. Although the CWA generally prohibits "any addition of any pollutant to navigable waters *from any point source*." 33 U.S.C § 1362(12) (emphasis added), Section 402 of the CWA authorizes discharges made in compliance with a NPDES permit. *Id*. § 1342(a). NPDES permits only apply to entities that are point sources and nonpoint source dischargers are not subject to Section 402

permitting. Because Little Green Run is not a point source, it does not require a NPDES permit and any possible discharges from Little Green Run, if into navigable waters, do not violate Section 402 of the CWA nor violate the general prohibition in 33 U.S.C. § 1311(a).

The CWA defines a point source as "any *discernible, confined and discrete conveyance*...from which pollutants are or may be discharged." *Id*. § 1362(14) (emphasis added). Such conveyances include a "pipe, ditch, channel, tunnel, [and] conduit." *Id*. "'Conveyance' is a well-understood term; it requires a channel or medium—*i.e.*, a facility—for the movement of something from one place to another." *Sierra Club v. Virginia Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018). The statute's definition "makes plain that a point source need not be the original source of the pollutant; it need only *convey* the pollutant." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). "[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Trustees for Alaska v. EPA,* 749 F.2d 549, 558 (9th Cir.1984). "Nonpoint source pollution is, generally, runoff…and other substances washed by rain, in diffuse patterns, over the land and into navigable waters." *United States v. Plaza Health Labs., Inc*., 3 F.3d 643, 652 (2d Cir.1993) (Oakes, J., dissenting); *see also Trustees for Alaska,* 749 F.2d at 558 ("Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants"), Frank P. Grad, *Treatise on Environmental Law* § 3.03 (updated 2009) ("Nonpoint sources include pollution from diffuse land use activities…that enter the waters primarily through indiscrete and less identifiable natural processes such as runoffs, precipitation and percolation.") The case law is clear that some type of collection or channeling is required to

classify an activity as a point source. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010).

The simple causal link of arsenic ultimately reaching Fish Creek and the Vandalia River, leached by rainwater and groundwater, does not fulfill the Clean Water Act's requirement that the discharge be *from a point source*. *See Virginia Elec. & Power Co.,* 903 F.3d at 410. The Impoundment does not convey pollutants; it does not move them from one place to another in the way that a "pipe, ditch, channel, tunnel, conduit," etc. does. In this case, precipitation is percolating into and through Little Green Run and any seepage is being diffused by that precipitation into groundwater. It is the groundwater that is then eventually adding pollution to the Vandalia River and Fish Creek. "But groundwater is not a point source. Thus, when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance." *Tennessee Clean Water Network*, 905 F.3d at 444 (emphasis in original).

The court in *Virginia Power & Electric* addressed the exact question at issue here, examining whether coal ash ponds and landfills were point sources where they were leaching arsenic into groundwater. The court determined that

> the arsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and *ponds were not created to convey anything* and did not function in that manner; *they certainly were not discrete conveyances*, such as would be a pipe or channel, for example. Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing diffusely through the soil.

Virginia Elec. & Power Co., 903 F.3d at 411 (emphasis added). In this case, any seepage from Little Green Run is on the initiative of rainwater. The Impoundment was not created to convey anything and, as the coal ash ponds and landfill in *Virginia Electric & Power*, is not a discrete

conveyance. Rather, it was the static recipients of the precipitation that flowed occasionally flowed through it. The district court in this case determined that Little Green Run was a point source essentially on the mere fact that they existed. *See* District Court Opinion at 10 ("ComGen built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters.") In doing so, the district court fails to give proper meaning to the word "conveyance" and puts forth a logic that would dramatically expand what was considered a point source under the statute.

In describing how precipitation falls through the coal ash and percolates into the groundwater via the soil, the court identified a process that does not employ a discrete conveyance at all. Because there is no *conveyance* producing the discharge at issue in this case, the discharge is not from a point source would not be regulated by the CWA. A decision to the contrary would greatly expand the scope of CWA liability. Critically, such an expansive reading of the "point source" would put the CWA in conflict with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et. seq.* RCRA covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater. 40 C.F.R. §§ 257.50, 257.53. As part of its rulemaking authority under RCRA, the EPA promulgated a rule in 2015 addressing disposal of coal combustion residuals from electric utilities. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) (hereinafter "CCR Rule"). Interpreting the CWA to cover coal ash impoundments like Little Green Run would render the CCR Rule superfluous because "any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA's coverage and, with it, the CCR Rule." *Kentucky Waterways All.,* 905 F.3d at 938.

Because Little Green Run is not a discrete conveyance and determining it to be so would put the CWA in conflict with another statute, it is not a "point source" under the CWA. Because Little Green Run is not a point source, it is not subject to the Section 402 permit requirements, and therefore it cannot be held liable for violating Section 402.

II. FERC's Decision Should Be Upheld Because It Was Not Arbitrary and Capricious and Rejecting FERC's Decision Would Be an Unconstitutional Taking.

This Court should review FERC's determinations under a limited and highly deferential standard of review. Appellate courts have limited discretion to reverse an agency's decision made within its special area of expertise, *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). The Commission's technical findings in ratemaking cases are entitled to "considerable deference," *Public Service Com. v. FERC,* 813 F.2d 448, 451 (D.C. Cir. 1987), and those who would overturn the Commission's judgment undertake a heavy burden. *Permian Basin Area Rate Cases* 390 U.S. 747, 767 (1968). In reviewing the Commission's order, this Court's task is merely to ensure that FERC examined the relevant data when amending ComGen's rate schedules, and articulated a rational connection between the facts found in the ratemaking and the choices made. *City of Mesa v. FERC*, 993 F.2d 888, 895 (D.C. Cir. 1993). Based on these well-established principles of rate review, and broader deference to agency decisions, FERC's decision to approve the revised rate schedules cannot be held arbitrary and capricious.

FERC is statutorily mandated to execute all Federal ratemaking within the purview of the FPA. It regularly examines the technical data of utilities in setting "just and reasonable" rates and determining if proposed rates are confiscatory. *Public Service Com.* 813 F.2d at 451. The Commission's determination that SCCRAP's proposed rates raise takings questions should also be viewed with deference. FERC rejected SCCRAP's rates and found that it had failed to carry its

heavy burden to produce particularized evidence that ComGen acted imprudently. Because SCCRAP failed to carry its burden, and FERC's decisions are afforded considerable deference, enacting SCCRAP's proposed rates would be a taking under the Fifth Amendment.

A. FERC's Decision To Approve ComGen's Revised Rate Schedules Was Not Arbitrary and Capricious Because the Order Was Completed Pursuant to FERC's Statutory Authority, Was Supported by Substantial Evidence, and Balanced the Public Interest with Maintaining the Utility's Financial Integrity.

Based on the well-established principles of rate review, as well as broader deference to administrative agencies, FERC's decision to approve revised Rate Schedules No. 1 and 2 was not arbitrary and capricious.

In the *Permian Basin Area Rate Cases* the Supreme Court established three essential tasks for appellate courts reviewing the Commission's rate orders pursuant to the FPA or Natural Gas Act, 390 U.S. 747, 791-92 (1968). First, the court must determine whether the order abused or exceeded the Commission's authority when viewed in light of the facts and the Commission's broad regulatory duties. *Id*. Second, the court must examine the manner of regulation the Commission has selected, and must decide whether each element of the order is supported by substantial evidence. *Id*. Third, the court must determine whether the order may reasonably expect to provide protection to the public interest and maintain the financial integrity of the regulated utility, attract necessary capital to the utility, and fairly compensate investors for the risks they have assumed. *Id*. Finally the Court remarked that "the [appellate] court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to it's liking, *but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors*." *Id*. at 792, emphasis added. Where application of these criteria discloses no infirmities, the order cannot be said to produce an 'arbitrary result,' and must be

sustained. *Mobil v. FPC*, 417 U.S. 283, 308 (1974) citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

As to the first task, FERC's authority to issue this order is supported by Section 201 of the FPA, 16 U.S.C. §824, which establishes its jurisdiction over the transmission and sale of electricity in interstate commerce. ComGen owns the Vandalia Generating Station, with power service agreements with both Franklin Power and Vandalia Power, constituting sale for resale of electric energy in interstate commerce. On July 16, 2018 ComGen submitted a filing to FERC under §205 of the FPA to seek a change of rates following the District Court ruling. There is no contention that FERC did not have proper jurisdiction over this matter or abused its authority in approving a rate schedule change, and so the Commission's order passes the first *Permian Basin* test.

Second, FERC has adequately supported its order with substantial evidence to change ComGen's rate schedules. In response to SCCRAP's protest, FERC called for a three-day evidentiary hearing to take testimony and consider the parties' written motions. Information on the technical specifications, remediation costs, and timeline for the Little Green Run Impoundment project were available to the Commission from the District Court ruling. This information was also available from the parties as part of the ongoing rate filing and adversarial hearing. Appellee-Petitioner does not dispute the substantiality of the evidence presented to or relied on by FERC, so the second *Permian Basin* task is satisfied.

The crux of contention in this case is the third *Permian Basin* Task; whether FERC, as an expert agency, properly balanced the public interest with the needs of ComGen to maintain its financial integrity, attract necessary capital, and compensate investors for the risks they have assumed. In *Columbia Gas Transmission Corp. v. FERC*, this Court was particularly concerned

that "missing facts, gross flaws in agency reasoning, and statutorily irrelevant or prohibited policy judgments will come to a reviewing court's attention." 628 F.2d 578, 593 (D.C. Cir. 1979). This Court's task then is "merely to ensure that the FERC examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *City of Mesa*, 993 F.2d at 895 (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance CO.*, 463 U.S. 29, 43 (1983)).

None of the concerns expressed in *Columbia Gas* are present in this case. FERC's decision addressed all the facts related to the ratemaking and District Court Decision. FERC relied on these facts to determine that without recovering remediation costs at the Little Green Run Impoundment would endanger ComGen's financial integrity, and that this consideration took precedence over the factors preferred by SCCRAP. This decision is within the broad discretion granted FERC when determining if rates are "just and reasonable" under §205 of the FPA. Even if the rate is not in accord with the "matching principle" of ratemaking, it is the Commission's prerogative to balance the interests of customers with the concern of retaining operational regulated utilities. FERC chose to uphold the constitutional right of regulated utilities to earn a reasonable return on their investments. It did so by examining the relevant data and articulating a rational connection between the facts found and the choices made, as required by *City of Mesa* and *State Farm*. *City of Mesa*, 993 F.2d at 895.

FERC further emphasized, as a matter of policy, that utilities should be able to recover the costs of environmental cleanups as a means of promoting environmental protection. This policy is not statutorily irrelevant nor forbidden. As environmental awareness continues to grow with the nation's energy consumption, there will be a need to manage and remediate environmental

concerns. FERC will need to account for these costs when determining just and reasonable rates. Even if this Court does not find that encouraging environmental remediation is a proper policy analysis for FERC to consider in ratemaking, FERC's technical finding on the proper rate of return to maintain ComGen's financial integrity is entitled to "considerable deference." *Public Service Com.,* 813 F.2d at 451. Because the order satisfies all three *Permian Basin* tasks this Court should allow the revised rate schedules to take effect.

Not only is the Commission's order a result of reasoned decision making, but the rates themselves are just and reasonable when considering customer base rates and ComGen's rate of return. FERC found consumers of Vandalia Generating Station's power, Franklin and Vandalia Electric Companies and their customers, could justly and reasonably be charged for the entire remediation, at an average of $3.30 per customer per month, for the 10 year amortization period. This permits ComGen to earn a 10% rate of return, which is well within the 'zone of reasonableness' demanded by *Permian Basin*. 390 U.S. at 697. Under *Hope* determining the reasonability of a rate does not concern the methods of calculation, such as including or not including the remediation of the Little Green Run, but whether the "end results" are just and reasonable. *Hope*, 320 U.S. at 603. It is informative to examine the end results from each of this line of cases.

The Supreme Court upheld a return of 12% in *Permian Basin* itself. 390 U.S. at 761. The Court upheld a rate of return of 15% in *Mobil*. 417 U.S. 283 footnote 38. The only FERC decision overturned in these cited cases was *Columbia Gas*. In *Columbia Gas* this Court found the Commission failed to articulate its reason to approve a shift of $3 million in fixed cost responsibilities solely onto one quarter of the customer base, even though all customer profiles were substantially similar. 628 F.2d at 590, 593. The Appellee-Petitioner has provided no

evidence that a 10% rate of return, or the increase of $3.30 per month to customer returns, grossly exceeds the rates paid by similar customers or the rates of return earned by similarly situated utilities. Absent such a showing, or other extraordinary circumstances, this Court is "without authority to set aside any rate selected by the commission which is within a 'zone of reasonableness.'" *Public Service Com.* 262 U.S. at 451.

Because the FERC order was completed pursuant to FERC's statutory authority, was supported by substantial evidence, and balanced the protection of the public interest with the need to maintain ComGen's financial integrity, it is not susceptible to judicial remand. Because the order articulated a satisfactory explanation between the facts and the choice made in that balancing it cannot be considered "arbitrary" under the requirements of *Permian Basin* and must be upheld. *Mobil*, 417 U.S. at 308. A presumption of validity attaches to each exercise of the FERC's expertise, and those who would overturn the Commission's judgment undertake a heavy burden. *Permian Basin*, 390 U.S. at 767. The Appellee-Petitioner has failed to carry this burden to show either that the amended rate schedules are 'unjust and unreasonable' or that FERC's order was arbitrary and capricious.

B. Disallowing Recovery of All or a Portion of Remediation Costs at the Little Green Run Impoundment Would Be an Unconstitutional Taking Under the Fifth Amendment Because the Resulting Rates are Unconstitutionally Low and SCCRAP has Failed to Allege Sufficient Facts to Bar ComGen's Entitlement to a Constitutional Rate of Return.

Appellee-Petitioner has proposed rates which are themselves confiscatory, and has failed to sufficiently allege legal imprudence which would permit such rates of return. Supreme Court precedent demonstrates that SCCRAP's proposed rates of 3.2% or 3.6% have not been sufficient returns within the last 100 years. Such rates cannot be imposed on ComGen without a

particularized showing of negligence or waste, which the Appellant-Petitioner has failed to provide.

Regulated utilities are guaranteed a reasonable rate of return to render services to the public as part of the regulatory compact, recognized in this country since the 19th century. *Bluefield Water Works v. Public Service Comm'n,* 262 U.S. 679 (1923). As the Supreme Court announced in 1865 when ruling on *The Binghamton Bridge*, "The legislature therefore says to public spirited citizens: 'If you will embark, with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and skill.'" 70 U.S. 51 (1865).[3] In the modern context shareholder investment in the utility is private property, an obligation to invest those funds by the government for public use is a taking of that property, and the production of rates is the compensation. *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 290 (1923) (Brandeis, J., concurring). Thus, the discretion of regulators when setting just and reasonable rates is bounded by the Takings Clause of the Fifth Amendment.

In *Bluefield* the Supreme Court surveyed a range of cases from 1905 to 1923, upholding rates of 6%, 8%, and 7.5% against the plaintiff's charge that the rates were *excessive*. 262 U.S. at 693-694. The Court in *Bluefield* quoted *Lincoln Gas Co. v. Lincoln* to explain that increases in costs and capital returns since the First World War had made lower rates acceptable earlier in the century improper for 1919 and the future. *Id*. at 694-95. Bluefield Water Works' own rates at

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[3] For a description of the relationship between the legislature and the commission, *See Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679, 683 (1923). ("The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment of the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void.")

issue in the case were under 6%, and the Court found considered this too low to be "just compensation."

Whether a rate yields enough return so as not to be confiscatory depends on FERC balancing the factors above, as "no proper rate can be established in all cases." *Bluefield*, 262 U.S. at 693. Under SCCRAP's proposal and alternative proposal, ComGen's actual earned return would fall from 10% to 3.2% or 3.6% respectively. As of January 2019 general utilities averaged 12.17% return on equity ("ROE"), and total market ROE was 15.57%,[4] which are 380-480% higher than those proposed by SCCRAP. Even suspending the deference given to FERC's expert determination, it is clear that rates which were confiscatory in 1923 are confiscatory in the current market.

Appellee-Petitioner contends that a utility is not constitutionally entitled to a rate of return in the face of utility mismanagement. This is true. However, the Appellee-Petitioner has failed to allege sufficient mismanagement for ComGen's actions to be legally imprudent. To the contrary, FERC found that ComGen acted prudently, and could not be held strictly liable for the failed seam at the Little Green Run impoundment. The prudence standard requires reasonable standards based on industry norms, and the inquiry is necessarily fact-intensive. In *W. Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio* the Supreme Court reversed the Ohio Commission's reduction in lost gas allowance saying "the waste or negligence… must be established by evidence… In all the pages of this record, there is neither a word nor a circumstance to charge the management with this fault." 294 U.S. 63, 68 (1935). It is useful to examine this standard of evidence applied in FERC decisions implicating the work of subcontractors.

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[4] NYU Stern School of Business, *Return on Equity by Sector (US), January 2019*, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/roe.html

In *Virginia Electric Power Co.* FERC permitted the utility to recover repair costs of an oil-fired boiler, after it imploded, through amortization over the remaining life of the unit. 11 FERC ¶ 63,028, 65,190 (1980) (initial decision), *aff'd in relevant part, 15 FERC* ¶ 61,052 (1981) The facts and procedure of *Virginia Electric* are similar to the instant case. Virginia Electric Power Company ("VEPCO") applied for a rate increase with FERC for wholesale electric services to retail utilities. A coalition of utility ratepayers, two states, and the Commission Staff intervened. *Id*. at 65,143-144. FERC ordered hearings on a plethora of issues, including the amortization of repair costs for the boiler. *Id*. During the hearing it became clear that the explosion occurred when an employee of the general contractor responsible for the unit's installation shut off its main supply of power. *Id.* at p. 65,185. There was no backup power to the boiler as the result of a design defect, the analog safeguards on the unit failed, and the boiler imploded. *Id*. VEPCO knew of the design defect but did not take actions to correct it before putting the unit into operation. *Id.* at 65,187.

Despite VEPCO's prior knowledge of the defect, FERC concluded that "there has been no showing that…VEPCO violated some standard of good engineering judgment, some norm of prudent public utility behavior." *Id*. at 65,189. The Commission explained that, while looking at the matter with hindsight and with the results of an investigation, it was easy to say the company was careless. However, the Commission recognized that "accidents *do* happen even to the most careful souls in the most prudent corporations." *Id*. In short, even though the operations of VEPCO's contractor caused the operation of the unit to fail, and VEPCO knew of a design defect, VEPCO itself was not found "imprudent." *Id.*

Virginia Electric demonstrates the length to which a plaintiff needs to overcome the utility's "presumption of prudence" which allows a court to substitute its judgment for that of the

utility. *W. Ohio Gas Co.* at 72. Successful examples of this showing rise to levels of imprudence not present in ComGen's operations. One company used self-dealing to procure scrubbers for a coal-fired powerplant, the efficacy of the scrubbers was doubted industry-wide, and the scrubbers subsequently failed. *Minnesota Power & Light Co.*, 11 FERC ¶ 61,313, 61,659 (1980). In Pennsylvania, a minority owner in a nuclear power plant had 4,000 workers at the construction site and an annual cost contribution of $46 million, but no permanent on-site representatives. The utility only visited the site an average of three times per year for seven years and the project quickly exceeded planned costs. The state Commission declined to incorporate cost overruns into the rate base because of the utility's "total abdication of responsibility for the management and construction of…the project." *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, Docket No. 438, 31 P.U.R. 4th, 15, 29 (Pa. Pub. Util. Comm'n May 7. 1989).

Prudence analysis must evaluate a utility's decision on the basis of information available to the utility at the time the decision was made, and neither FERC nor this Court can properly evaluate the reasonableness of a decision's effects on rates with the benefit of hindsight. *City of New Orleans v. FERC*, 67 F.3d 947, 954 (D.C. Circ 1995). The record does not indicate that ComGen knew of any design defect in the HDPG prior to its installation, as VEPCO did. The record does not indicate that the contractor on which ComGen relied, nor its processes were considered questionable by the industry as in *Minnesota Power & Light Co.*. The record also does not indicate that ComGen completely abdicated its responsibility to monitor its corrective action as in *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*. Instead, FERC made a factual finding that better monitoring *likely* would have revealed the problem with arsenic seeping through the imperfect weld in the liner. This factual finding does not amount to a decision that the corrective action in 2005 was legally imprudent, nor is it a decision that the ongoing monitoring was legally

imprudent. The facts did not support such a drastic finding during rate setting, and the record cannot support it here on judicial review. Absent the kinds of evidence pointed to above, neither the commission nor a reviewing court can use the hindsight of corrective failure to overcome ComGen's presumption of prudence. *W. Ohio Gas Co.* 294 U.S. at 72.

Appellee-Petitioner has proposed rates which are themselves confiscatory, and has failed to sufficiently allege legal imprudence which would permit such rates of return. A presumption of validity attaches to each exercise of the FERC's expertise, and those who would overturn the Commission's judgment undertake a heavy burden. *Permian Basin* 390 U.S. at 767. Rates of return on equity of 3.2% and 3.6% are clearly confiscatory when compared to *Bluefield* and the associated cases on takings, as well as contemporary returns for utilities and equity investments generally. The commission's ruling on ComGen's prudence should also be given that presumption of validity. The Commission regularly considers the affect of ratemaking on utilities as well as claims that their operations were not sufficiently prudent. SCCRAP failed to bring sufficient evidence to charge ComGen with imprudence which would disallow an otherwise constitutional rate of return. *W. Ohio Gas Co.* 294 U.S. at 68. This Court should not substitute its opinion for FERC or ComGen's based on such a record. *Id.* at 72.

CONCLUSION

For the foregoing reasons, the district court's order should be REVERSED and FERC's decision should be UPHELD.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellant-Intervener Commonwealth Generating Company certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 P.M. Eastern Time, February 4, 2018.

Respectfully submitted,
Team No. 10