IN THE

United States Court of Appeals

For the District of Columbia Circuit

D.C. No. 17-01985

Commonwealth Generating Company

Appellants,

v.

Stop Coal Combustion Residual Ash Ponds

Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

A final order by the United States District Court for the District of Columbia granting the request of petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) for injunctive relief against Commonwealth Generating Company (ComGen) was entered on July 15, 2018. ComGen gave timely notice of appeal on July 16, 2018. A final order by the Federal Energy Regulatory Commission (FERC) accepting ComGen's Revised Rate Schedules was entered on October 10, 2018. SCCRAP promptly sought rehearing of FERC's decision on November 9, 2018. FERC denied SCCRAP's rehearing by a final order issued on November 30, 2018. SSCRAP, ComGen, and FERC jointly filed a motion in the United States Court of Appeals for the District of Columbia Circuit. This Court granted the motion on December 21, 2018, and issued a subsequent order on December 28, 2018, setting forth the issues to be briefed and argued on appeal. The district court's jurisdiction was based on the citizen-suit provision of the Clean Water Act (CWA), 33 U.S.C § 1365(a)-(b). FERC's jurisdiction was based on Title II of the Federal Power Act (FPA), 16 U.S.C. § 824(b). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Issue No. 1:

Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act when there is no support for the hydrological connection theory in either the text or statutory context of the Clean Water Act.

Issue No. 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 § 402 of the Clean Water Act when a coal ash impoundment is not a conveyance.

Issue No. 3:

Whether FERC's approval of ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.

Issue No. 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 and Fourteenth Amendments.

STATEMENT OF THE CASE

The Clean Water Act (CWA) created the National Pollutant Discharge Elimination System (NPDES), and through NPDES, the EPA shares "regulatory authority with the States, and a State can elect to establish its own permit program." (R. at 6-7). If a state chooses to create its own program, the EPA "suspends its federal permit program and defers to the State's, allowing the state discharge (SPDES) permit to authorize effluent discharges under both state and federal law." (R. at 7). Vandalia and Franklin have implemented their own permitting programs under the CWA. (R. at 7).

Coal combustion residuals (CCRs), "commonly known as coal ash, are byproducts of the combustion of coal at electric generating plants." (R. at 3). The Little Green Run Impoundment (LGRI), owned and operated by ComGen, is an on-site surface impoundment, and was "included in [the] EPA's listing of coal ash impoundments. (R. at 3, 5). The CCRs produced by the Vandalia Generating Station are disposed in LGRI. (R. at 4). LGRI contains "approximately 38.7 million cubic yards of solids, mainly CCRs." (R. at 4-5).

In 2002, through "groundwater monitoring that was required by permits issued by the The Vandalia Department of Environmental Quality (VDEQ)," Commonwealth Energy Solutions (CES) started to detect "arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards." (R. at 5). Per its permits, CES promptly notified VDEQ about the arsenic levels and started to develop a corrective action plan. (R. at 5). VDEQ approved of CES's corrective action plan in 2005, and "CES installed a high density polyethylene (HDPE) geomembrane liner on the west embankment of [LGRI] in 2006." (R. at 5).

In 2014, ComGen acquired Vandalia Generating Station and entered into power service agreements with Vandalia Power Company (FERC Rate Schedule No. 1) and Franklin Power Company (FERC Rate Schedule No. 2). (R. at 4). The power service agreement stated that 50% of power produced by Vandalia Power Company would be sold to Vandalia Power, and 50% to Franklin Power. (R. at 4).

In 2017, during a routine monitoring of the water quality, the Vandalia Waterkeeper "detected elevated levels of arsenic in the Vandalia River." (R. at 5). Further analysis "suggested that the source of the arsenic was [LGRI]; rainwater and groundwater were leaching arsenic from the coal ash in the impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River." (R. at 5-6). VDEQ's investigation "showed that a seam in the HDPE geomembrane liner installed in 2006 was inadequately welded, resulting in seepage that pooled at the downstream toe of the west embankment." (R. at 6). The subcontractor ComGen hired to install the liner did not properly weld the liner. (R. at 6). ComGen stated that the "seepage occurs only when there is significant rainfall, and that it dries up within a few weeks of the precipitation event." (R. at 6).

In December 2017, SCCRAP "filed suit against ComGen in [the] U.S. District Court for the District of Columbia under the citizen-suit provision of the [CWA], alleging that ComGen was violating U.S.C. § 1311(a)." (R. at 5, 7). SCCRAP argued that LGRI "qualified as a point source from which arsenic seeped, polluting the groundwater around ComGen's Vandalia Generating Station which was 'hydrologically connected' to Fish Creek and the Vandalia River, carrying arsenic to navigable waters." (R. at 7).

On June 15, 2018, after a bench trial, the district court held that LGRI was a "point source" as defined by the CWA, and therefore issued an order finding "ComGen liable for ongoing violations of § 1311(a)." (R. at 7-8). The district court rejected ComGen's argument that the CWA does not "cover discharges into groundwater that had a 'direct hydrological connection' to navigable waters," and found that "the CWA applies to discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced." (R. at 8). The district court also rejected ComGen's argument that LGRI was not a point source, and held that the coal ash piles were "discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River." (R. at 8).

Ruling in SCCRAP's favor, the district court ordered ComGen to fully excavate 38.7 million cubic yards of coal, which had been accumulating since 2000, into a facility that complies with the EPA's Coal Combustions Residual Rule (CCR Rule). (R. at 8-9). From the district court's final orders, ComGen filed a timely appeal on July 16, 2018, "challenging the court's conclusions that (1) the [CWA] regulates discharges into navigable waters through hydrologically connected groundwater, and (2) [LGRI] constitutes a 'point source' under the [CWA]." (R. at 8).

In conjunction with its appeal of the district court's decision, ComGen filed with FERC under Section 205 of the FPA, 16 U.S.C.S. § 824d, to recover from Vandalia Power and Franklin Power for the cost of complying with the district court's order (R. at 8.). ComGen estimated the cost of compliance to be $246 million, with half allocated to Vandalia Power and the other half to Franklin Power. (R. at 8). SCCRAP intervened in the FERC utility ratemaking hearing to challenge rate recovery of expenses associated with polluting coal ash because SCCRAP argued that 80.5% of the coal ash in LGRI is from when electricity was produced before the unit power service agreement with Vandalia Power and Franklin Power. (R. at 5, 10). ComGen argued that "the relief requested by SCCRAP . . . would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments" because disallowing recovery of all or some of the $246 million in remediation costs would "effectively erase the majority of [its] profits over the proposed ten-year recovery period." (R. at 10). If not allowed to recover the costs through rate increases, ComGen's actual earned return over the ten-year period would fall from 10% to 3.2%. (R. at 10). SCCRAP proposed an alternative revision, which would disallow 80.5% of the remediation costs, lowering ComGen's return to 3.6% over the ten-year period. (R. at 10).

ComGen noted the constitutional standards involved in setting just and reasonable rates: balanced interests of shareholders and rate payers; ability to maintain financial integrity; assure confidence in financial soundness; and maintain the ability to raise capital for investments. (R. at 11). SCCRAP responded arguing that "ComGen is not constitutionally entitled to earn a reasonable rate of return in the face of utility mismanagement." (R. at 11).

On October 10, 2018, after evidentiary hearings, FERC ultimately accepted ComGen's revisions to FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2 to recover for complying over a 10 year period with 50% of costs being allocated to

Vandalia and 50% to Franklin. (R. at 8). FERC agreed with ComGen that it should not be held strictly liable for the actions of its subcontractor, but FERC did find that ComGen "failed to properly monitor the effectiveness of the corrective action" from 2006-2017. (R. at 11). Ultimately, FERC accepted ComGen's offering that "the financial impact of such an outcome would likely jeopardize the financial integrity of ComGen, and therefore raise constitutional issues under the Fifth and Fourteenth Amendments." (R. at 12). FERC made known the importance of their decision from a policy perspective: ensuring the ability to recover environmental clean-up expenses can serve the purpose of promoting environmental protection. (R. at 12).

States have no power to contest FERC approved revisions to rates. (R. at 9). Under the revised agreements, householder bills will increase by $2.15 per month, and individual customer bills will increase by $3.30 per month. (R. at 9). ComGen submitted a compliance filing to confirm the district court's injunction and that the required compliance by ComGen would be upheld. (R. at 11.)

On November 9, 2018, SCCRAP sought a rehearing of FERC's decision. (R. at 12.) On November 30, 2018, FERC denied SCCRAP's request for rehearing. (R. at 12.) On December 3, 2018, SCCRAP sought review from this Court (R. at 12.) SCCRAP, ComGen, and FERC filed a joint motion to this Court to consolidate ComGen's appeal of the district court's decision, and SCCRAP's appeal of FERC's approval of ComGen's rate revisions. (R. at 12.) On December 21, 2018, this Court granted the motion, and on December 28, 2018, this Court issued an order setting forth the issues each party must address. (R. at 12.).

SUMMARY OF THE ARGUMENT

Because there is no support for the hydrological connection theory in either the text or statutory context of the CWA, this Court should reverse the decision of the district court, and find that surface water pollution via hydrologically connected groundwater is not actionable under the CWA. Even if this Court were to find some legal basis for the hydrological connection theory, LGRI is not a conveyance because it is not discernable, confined, and discrete, and therefore seepage of arsenic from LGRI that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of Section 402 of the CWA. As such, this Court should reverse the decision of the district court.

FERC's approval of ComGen's rate revisions was not arbitrary and capricious under 5 U.S.C. § 706(2)(b). The FPA grants FERC immense power in approving utility rates so long as a reasonable mind could find some evidence supports FERC's decision because FERC has the technical understanding to determine whether rates are just and reasonable. Under *Chevron* deference, courts should defer to FERC's determination. Moreover, courts should defer to FERC because FERC's decision comports with the matching principle by properly allocating costs and benefits. FERC's decision also comports with the prudence test of ratemaking because SCCRAP did not rebut the presumption that ComGen acted prudently and ComGen's recovery would fulfill the underlying principles of the prudence test.

SCCRAP's position in the FERC proceeding is an unconstitutional taking under the Fifth and Fourteenth Amendments. Under the constitutional standard set in *Federal Power Commission v. Hope Natural Gas*, ComGen's approved revised rates are just and reasonable, as they properly balance the interests of ComGen's shareholders, and the ratepayers. The revised

rates appropriately allow ComGen to maintain financial integrity; assure confidence in financial soundness; and maintain the ability to raise capital for investments. Furthermore, the revised rates pass the "end results" test articulated in *Hope*, whereby the Court examines the validity of the rates based on the result reached, and the total effect of the rate, rather than the method employed in calculating the rate. Even if the Court does not agree with FERC's decision, this Court should grant significant deference to FERC in its position as the ratemaking authority.

ARGUMENT

I. SURFACE WATER POLLUTION VIA HYDROLOGICALLY CONNECTED GROUNDWATER IS NOT ACTIONABLE UNDER THE CLEAN WATER ACT BECAUSE THERE IS NO SUPPORT FOR THE HYDROLOGICAL CONNECTION THEORY IN EITHER THE TEXT OR STATUTORY CONTEXT OF THE CLEAN WATER ACT.

In granting SCCRAP's injunctive relief against ComGen, the district court erred in concluding as a matter of law that the Clean Water Act covered "discharges into groundwater that had a 'direct hydrological connection' to navigable waters such that the pollutant would reach navigable waters through groundwater." (R. at 8). Because there is no support for the hydrological connection theory in either the text or statutory context of the CWA, this Court should reverse the decision of the district court.

A. Standard of review.

An appellate court reviews "a district court's decision to grant a permanent injunction under several distinct standards." *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 442 (6th Cir. 2018). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion." S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Loc. Union 2359, 186 F.3d 733,

737 (6th Cir. 1999). Review of statutory construction is always reviewed de novo. *Tenn. Clean Water Network*, 905 F.3d at 442.

B. The text of the Clean Water Act bars the hydrological connection theory because the Clean Water Act Does not regulate pollutants that travels through intermediate mediums and nonpoint sources en route to navigable waters.

In order for claim to be valid under the CWA, "five elements must be present: (1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Groundwater pollution that discharges into navigable waters through hydrologically connected groundwater is actionable under the CWA only if it "fit[s] within those five elements." *Ky. Waterways All. v. Ky. Util. Co*., 905 F.3d 925, 932 (6th Cir. 2018). Groundwater "is not a point source." *Tenn. Clean Water Network*, 905 F.3d at 444. Groundwater is a "nonpoint-source conveyance," *id.*, and as such, "Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters." *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014).

1. <u>The CWA does not regulate pollutants that travel through intermediate mediums to navigable waters.</u>

Courts have recognized that the "heart of the CWA's regulatory power" is derived from the effluent limitation guidelines. *Tenn. Clean Water Network*, 905 F.3d at 444. Section 1314(b) of the CWA provides guidelines for effluent limitations, 33 U.S.C. § 1314(b) (2012), and places caps on the amount of "pollutants that may be discharged from a point source." *Tenn. Clean Water Network*, 905 F.3d at 444. Section 1362(11) defines effluent limitation as restrictions on the amount of constituents "which are discharged *from point sources into* navigable waters." 33 U.S.C. § 1362(11) (emphasis added). The term "into" denotes directness and requires "a point of

entry." *Tenn. Clean Water Network*, 905 F.3d at 444. ("Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase 'into' leaves no room for intermediary mediums to carry the pollutants.").

Vandalia and Franklin have elected to implement their own permitting programs under the CWA. (R. at 7). As such, "[w]hen a state elects to establish its own program, the EPA suspends its federal permit program and defers to the State's allowing the state discharge (SPDES) permit to authorize effluent discharges under both state and federal law." (R. at 7). Because the "CWA defines effluent limitations as restrictions on the amount of pollutants that may be 'discharged from point sources *into* navigable waters,'" *Tenn. Clean Water Network*, 905 F.3d at 444 (quoting 33 U.S.C. § 1362(11) (2012)), LGRI must dump pollutants *into* Fish Creek and Vandalia River *directly* in order to be regulated under the CWA. According to Vandalia Waterkeeper's report in 2017, the source of the arsenic in the Vandalia River was the LGRI; "rainwater and groundwater were leaching arsenic from the coal ash in the impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River." (R. at 5-6). This conduct is not covered by the CWA, as the groundwater and rainwater are "intermediary mediums" carrying the pollutants to navigable waters, and the CWA requires a point source to dump pollutants directly into navigable waters. *See Tenn. Clean Water Network*, 905 F.3d at 444.

2. <u>The CWA does not regulate pollutants that travel through nonpoint sources, like groundwater, en route to navigable waters.</u>

Section 1311(a) of the CWA states, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2012). Section 1362(12)(A) defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters *from* any point source." *Id.* § 1362(12)(A) (emphasis added). Accordingly, the text of the CWA "requires two things in order

for pollution to qualify as a 'discharge of a pollutant': (1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance." *Tenn. Clean Water Network*, 905 F.3d at 444. A point source is a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). By "its very nature, groundwater is a 'diffuse medium' that seeps in all directions, guided only by the general pull of gravity." *Ky. Waterways All. v. Ky. Util. Co*., 905 F.3d 925, 933 (6th Cir. 2018). Groundwater is "neither confined nor discrete." *Id.* Therefore, groundwater "is not a point source;" it is a "nonpoint-source conveyance." *Tenn. Clean Water Network*, 905 F.3d at 444. As such, the text of the CWA does not allow for "pollutants to travel from a point source *through* nonpoint sources, [like groundwater], en route to navigable waters." *Id.*

SCCRAP argues that the LGRI is a "point source from which arsenic seeped, polluting the groundwater around ComGen's Vandalia Generating Station which was 'hydrologically connected' to Fish Creek and the Vandalia River, carrying arsenic to navigable waters." (R. at 7). This argument is contrary to the language of the CWA. Just as in *Tenn. Clean Water Network*, where the groundwater was adding pollutants to the Cumberland River, *Tenn. Clean Water Network*, 905 F.3d at 444, the groundwater here is carrying the arsenic into navigable waters. (R. at 6). LGRI is not dumping *directly* into navigable waters; instead, the groundwater, a nonpoint source, is carrying the pollutants to the Fish Creek and Vandalia River, and the "CWA has no say over that conduct." *Tenn. Clean Water Network*, 905 F.3d at 444.

3. Reconciling the *Rapanos* Decision.

The Supreme Court in *Rapanos* held 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.'" *Rapanos v. Unites States*, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A) (2012)). It is imperative to note that this "quote has been take out of

context, and the courts and litigants that rely on it in support of the hydrological connection theory have erred for a number of reasons." *Tenn. Clean Water Network*, 905 F.3d at 444. First and foremost, the *Rapanos* decision is a four-justice plurality opinion that answered a completely different question than the one presented to this Court. *See id.* at 444-45. The *Rapanos* Court was dealing with wetlands and intermittent streams, *see Rapanos*, 547 U.S. 715, and "when Justice Scalia pointed out the absence of the word 'directly' from § 1362(12(A), he did so to explain that pollutants which travel through *multiple point sources* before discharging into navigable waters are still covered by the CWA." *Tenn. Clean Water Network*, 905 F.3d at 445 (emphasis added). Therefore, the *Rapanos* decision "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," *Tenn. Clean Water Network*, 905 F.3d at 445, like that at issue here.

Unlike in *Rapanos*, the pollutants here are being added to navigable waters via groundwater, and groundwater is not a point source. *See id.* at 444. Therefore, because the text of the CWA bars the hydrological connection theory, this Court should reverse the decision of the district court.

C. ***The Statutory Context of the Clean Water Act Bars the Hydrological Connection Theory Because the Hydrological Connection Theory Directly Conflicts with the Resource Conservation and Recovery Act and the Coal Combustions Residual Rule.***

Statutes relating to the same subject are "*in pari materia* [and] should be construed together." *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985). The rule that "statutes *in pari materia* should be construed together is but a logical extension of the principle that . . . whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Id.* (quoting *Erienbaugh v. United States*, 409 U.S. 239, 244 (1972)). Furthermore, courts should "interpret the words of a statute in context;" meaning that "[a] statute should be

construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Hibbs v. Winn*, 542 U.S. 88, 101, (2004).

The Resource Conservation and Recovery Act (RCRA) "is designed to work in tandem with other federal environmental protection laws, including the CWA." *Ky. Waterways All. v. Ky. Util. Co*., 905 F.3d 925, 937 (6th Cir. 2018) ("The [EPA] shall integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of . . . [the CWA].") (quoting 42 U.S.C. § 6905(b) (2012)). As such, courts have held that the RCRA and the CWA should be read as "complementary statutes," each assigned with controlling different types of environmental hazards. *See id.*; *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 445 (6th Cir. 2018). Therefore, the CWA and the RCRA are *in pari materia*, and must be construed together. *See Tenn. Clean Water Network*, 905 F.3d at 445-46.

Reading Section 1311(a) of the CWA to cover discharges into groundwater from a coal ash impoundment that has a direct hydrological connection to navigable waters is "problematic," as this "would upend the existing regulatory framework." *See Ky. Waterways All.*, 905 F.3d at 937-38. Section 1311(a) of the CWA "is limited to the discharge of pollutants from points sources[;] pollution from the storage of solid waste, such as coal ash, is regulated" by the RCRA. *Sierra Club v. Va. Elec. & Power Co*., 903 F.3d 403, 407 (4th Cir. 2018). Therefore, courts have held that because "coal ash is solid waste, and RCRA is specifically designed to cover solid waste," any reading of the CWA that "remove[s] solid waste management practices from RCRA's coverage is thus problematic." *Ky. Waterways All.*, 905 F.3d at 938 (holding that if the court were "to read the CWA to cover KU's conduct here, KU's coal ash treatment and storage practices would be exempted from RCRA's coverage").

Even "more problematic" is that "pursuant to the RCRA, the EPA has issued a formal rule that specifically covers coal ash storage and treatment," the Coal Combustions Residual Rule (CCR Rule). *Tenn. Clean Water Network*, 905 F.3d at 445-46. The CCR Rule was specifically designed to regulate coal ash ponds, and because "the EPA issued the CCR Rule under RCRA, reading the CWA to cover coal ash ponds would gut the rule." *Id.* at 446 ("Adopting Plaintiffs' reading of the CWA would mean that any coal ash pond with a hydrological connection to navigable water would require an NPDES permit, thus removing it from RCRA's coverage and with it, the CCR Rule."). As such, the CCR Rule, "not the CWA, is the framework envisioned by Congress (by delegating rulemaking authority to the EPA through RCRA) to address the problem of groundwater contamination caused by coal ash impoundments." *Id.*

It is undisputed that LGRI is a coal ash impoundment. (R. at 3, 5) (LGRI "was included in [the] EPA's listing of coal ash impoundments"). The CCRs "produced by the Vandalia Generating Station are disposed in" LGRI, and LGRI contains "approximately 38.7 million cubic yards of *solids*, *mainly CCRs* and coal fines." (R. at 3-5) (emphasis added). Coal ash is a type of solid waste, and is therefore covered by the RCRA, not the CWA. *See Ky. Waterways All. v. Ky. Util. Co*., 905 F.3d 925, 938 (6th Cir. 2018). As such, it is imperative to the regulatory framework of the CWA and the RCRA that this Court reject the district court's conclusion that the "the CWA applies to discharges of pollutants from a a point source through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced." (R. at 8). This theory is "not a valid theory of liability" under the context of the CWA, and as such, the district court's holding is "problematic." *See Tenn. Clean Water Network,* 905 F.3d at 444-45.

Furthermore, pursuant to the district court's injunction, ComGen was ordered "to 'fully excavate' the coal ash in the Little Green Run Impoundment . . . and relocate it to a 'completely lined' facility that *complies with the EPA's Coal Combustions Residual (CCR) rule.*" (R. at 8) (emphasis added). The CCR Rule is the governing rule for dealing with the "problem of groundwater contamination caused by coal ash impoundments" because the CCR Rule "establishes the minimum criteria for CCR surface impoundments, requires groundwater monitoring, and further demands corrective action where groundwater contamination exceeds accepted levels." *Tenn. Clean Water Network*, 905 F.3d at 446. Thus, it is clear that the CCR Rule should govern here because in 2002, when VDEQ began to "detect arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards," a corrective action plan was created and approved by VDEQ. (R. at 5). Additionally, in 2017, per the CCR Rule, LGRI was again inspected during a "routine monitoring of the water quality." (R. at 5). Lastly, and most importantly, as a remedy, the district court specifically told LGRI that it had to *comply with CCR Rule*. (R. at 8).

Adopting SCCRAP's argument that the hydrological connection theory is actionable under the context of the CWA is untenable, as the the hydrological connection theory directly conflicts with the CCR rule and the RCRA.

II. SEEPAGE OF ARSENIC FROM A COAL ASH IMPOUNDMENT THAT PASSES THROUGH GROUNDWATER TO NAVIGABLE WATERS DOES NOT CONSTITUTE THE DISCHARGE OF A POLLUTANT FROM A POINT SOURCE IN VIOLATION OF SECTION 402 OF THE CLEAN WATER ACT BECAUSE A COAL ASH IMPOUNDMENT IS NOT A CONVEYANCE.

In granting SCCRAP's injunctive relief against ComGen, the district court erred in concluding as a matter of law that LGRI constituted a point source as defined by the CWA. Even "if there were some legal basis for the hydrological connection theory," *Ky. Waterways All. v.*

Ky. Util. Co., 905 F.3d 925, 934 n.8 (6th Cir. 2018), LGRI is not a conveyance, and therefore seepage of arsenic from LGRI that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of Section 402 of the CWA. As such, this Court should reverse the decision of the district court.

A. Standard of Review.

An appellate court reviews "a district court's decision to grant a permanent injunction under several distinct standards." *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 442 (6th Cir. 2018). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion." S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Loc. Union 2359, 186 F.3d 733, 737 (6th Cir. 1999). Review of statutory construction is always reviewed de novo. *Tenn. Clean Water Network*, 905 F.3d at 442.

B. The Little Green Run Impoundment is not a point Source as defined by the Clean Water Act Because it is not a conveyance that is discernable, confined, and discrete.

The CWA "regulates parties that pollute navigable waters where the pollution comes from a 'point source.'" *Ky. Waterways All.*, 905 F.3d at 933. Point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, . . . from which pollutants are or may be discharged." 33 U.S.C § 1362(14) (2012). For "pollution to be governed by the CWA, it must have traveled through a conveyance, and that conveyance must have been discernable, confined, and discrete." *Ky. Waterways All.*, 905 F.3d at 933. The term "conveyance" thus requires "a channel or medium—i.e., a facility—for the movement of something from one place to another." *Sierra Club v. Va. Elec. & Power Co*., 903 F.3d 403, 410 (4th Cir. 2018). A simple causal link between arsenic from a coal ash impoundment reaching navigable waters via "having been leached from the coal ash by rainwater and groundwater and

ultimately carried by groundwater into navigable waters," is not enough to meet the CWA's requirement that the discharge be from a facility that "functions as a discrete, not generalized, 'conveyance.'" *Id.*

The Fourth Circuit has held that coal ash ponds are not discrete conveyances, as they are "not created to convey anything and [do] not function in that manner." *Id.* at 411. Additionally, when the actual means of conveyance of arsenic to navigable waters is rainwater and groundwater "flowing diffusely through" coal ash ponds, courts have held that this diffuse seepage is "a generalized, site-wide condition." *Id.* As such, courts have held that coal ash ponds cannot be described as discrete "points" because they do not function like discrete, non generalized conveyances. *Id.* at 410-11.

The report from Vandalia Waterkeeper clearly shows that "rainwater and groundwater were leaching arsenic from the coal ash in the [LGRI], [thus] polluting the groundwater," and the groundwater was carrying the "arsenic into the navigable waters of the nearby Fish Creek and Vandalia River." (R. at 6). Therefore, the diffuse seepage of arsenic from the coal ash at LGRI into the groundwater does not make LGRI a point source, as the coal ash piles and ponds "can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act." *Sierra* Club, 903 F.3d at 412.

Furthermore, Congress amended the RCRA in 2016 to require that operators of coal ash surface impoundments "obtain permits incorporating the EPA's regulations pertaining to the disposal of coal combustion residuals." *Id*. Here, the CCRs "produced by the Vandalia Generating Station are disposed in" LGRI, which is in an on-site surface impoundment. (R. at 3-4). Per the permits issued by the VDEQ, LGRI is subject to routine monitoring to determine if the arsenic in the groundwater exceeds Vandalia's groundwater quality standards. (R. at 5).

Because LGRI is regulated by the CCR Rule, and RCRA, the district court in this case "blurred two distinct forms of discharge that are separately regulated by Congress—diffuse discharges from solid waste and discharges from a point source." *Sierra Club*, 903 F.3d at 412. Similar to the district court in *Sierra Club*, the district court here incorrectly "concluded that any discharge from an identifiable source of coal ash, even that resulting from precipitation and groundwater seepage, is regulated by the Clean Water Act." *Id*. As such, the district court misunderstood the "distinctions Congress made between the Clean Water Act and the RCRA," *id*., as LGRI is not a point source and thus not regulated by the CWA.

The district court further erred in holding that the coal ash ponds conveyed "arsenic directly into the groundwater and thence into the surface waters;" essentially equating coal ash ponds as "discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River." (R. at 8). This finding by the district court was an attempt to abstractly construct a "facility of conveyance." *See Sierra* Club, 903 F.3d at 412 (stating that the district court, in "recognizing the need for finding a facility of conveyance, . . . attempted abstractly to construct one, stating: 'Dominion built the piles and ponds concentrate coal ash, and its constituent pollutants, in once location,' and '[t]hat one location channels and conveys arsenic directly into the groundwater"). Just as the Fourth Circuit held that this process was not a "discrete conveyance at all," as "[t]hat movement of pollutants . . . was not a function of the coal ash piles or ponds, but rather the result of a natural process of 'precipitation percolat[ing] through the soil to the groundwater," *id.*, this Court should follow suit and find that LGRI is not a discrete conveyance since the seepage of arsenic through groundwater "occurs only when there is significant rainfall." (R. at 6).

Lastly, the only "conveying" action here is the rainwater and groundwater moving through the coal ash and carrying arsenic into the groundwater, and the groundwater in turn carrying the arsenic to navigable waters. (R. at 6-7). Groundwater "cannot itself be the requisite point source." *Sierra* Club, 903 F.3d at 412. Groundwater by its very nature "is a 'diffuse medium' that seeps in all directions, guided only by the general pull of gravity." *Ky. Waterways All. v. Ky. Util. Co*., 905 F.3d 925, 933 (6th Cir. 2018). Groundwater is neither "confined nor discrete," and it is not discernible. *Id*. Because groundwater is a "diffuse medium," *id.*, and because coal ash piles are not "discernible, confined, or discrete conveyances," *Sierra* Club, 903 F.3d at 412, LGRI does not constitute a point source as defined by the CWA. Therefore, seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of Section 402 of the CWA.

III. FERC's approval of ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was not arbitrary and capricious.

Courts reviewing FERC decisions regarding power service agreements may only set aside FERC decisions if FERC abused its discretion under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(b) (2018). A court cannot substitute its own judgment because it disagrees with FERC's decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The party challenging FERC's decision—SCCRAP in the instant case—has the burden of proving FERC abused its discretion. *Ind. Mun. Elec. Ass'n v. FERC*, 629 F.2d 480, 480 (7th Cir. 1980).

FERC's approval of ComGen's revised rates was not arbitrary and capricious because FERC is entitled to immense deference under the FPA. 18 U.S.C. § 824d(a) (2018). Even if FERC was not allowed extensive deference, FERC's decision should be upheld because

ComGen's rate revisions do not violate the matching principle of utility ratemaking as Vandalia Power's and Franklin Power's shareholders and customers benefit from ComGen's compliance with EPA regulations and its coal production. *See Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009). Moreover, FERC's ruling satisfies the ratemaking prudence test, which allows for utility companies, such as ComGen, to be reimbursed for costs incurred, because SCCRAP did not rebut the presumption that ComGen acted competently. *See Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136, 141 (1st Cir. 1987). Since FERC did not abuse its discretion, this Court should uphold FERC's approval of ComGen's rate revisions.

A. The FPA bestows extensive power upon FERC in its approval of rate revisions.

1. A court must defer to a FERC decision so long as a reasonable mind could find evidence supports FERC's decision.

Under Section 205 of the FPA, FERC has "exclusive" authority to determine whether utility rates are "just and reasonable." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988). So long as a "reasonable mind might" find the evidence supports FERC's decision, courts must defer to FERC. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)). A reasonable mind might accept FERC's determination that Vandalia Power and Franklin Power should bear the cost of ComGen excavating its impoundment, *Id.*, because SCCRAP filed its action in 2017, three years after ComGen, Vandalia, and Franklin executed the power service agreement. (R. at 4, 7.) Therefore, FERC's approval of ComGen's rate revisions must stand.

While SCCRAP asserts FERC's ruling was incorrect in holding Vandalia Power and Franklin Power should bear the cost, (R. at 12), this Court need not decide whether FERC's ruling is correct. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 53. Rather, this Court must only decide whether a reasonable mind could find the evidence supports FERC's ruling. *Id.* Because a reasonable

mind may find SCCRAP filing its action after Vandalia Power and Franklin Power signing the power service agreement with ComGen supports FERC's determination that Vandalia Power and Franklin Power should bear the costs, FERC's ruling must not be disturbed. *Id.*

2. Courts defer to FERC because FERC has the technical understanding to determine whether rates are just and reasonable.

Courts give immense deference to FERC's decisions because ratemaking is highly technical. *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 503 (5th Cir. 2016). For instance, FERC through its own precedent, may utilize specialized knowledge of rate cycles and how much bills typically rise over a 10-year period to discern whether an increase in Vandalia Power's and Franklin Power's customers' bills by $2.15 per month over a 10-year period is just and reasonable. (R. at 9.) Moreover, FERC is able to factor in complicating circumstances such as the fact that individuals outside Vandalia's and Franklin's jurisdiction benefitted from LGRI's coal production before the execution of the power service agreement, and what percentage of those who benefitted in total resided in Vandalia and Franklin. (R. at 9.) Also, FERC is well-equipped to discern how fluctuating arsenic leakage due to cyclical rainfall patterns may affect ratemaking calculations in allocating costs. (R. at 6-7.) Because FERC is able to account for complicating factors in discerning whether utility rates are just and reasonable, courts should defer to FERC's approval of ComGen's rates. *El Paso Elec. Co.*, 832 F.3d at 503.

3. Under *Chevron* deference, courts should to defer to FERC's rate approval decisions.

Courts should defer to FERC's approval of ComGen's rate revisions because FERC, as the federal agency that oversees utility ratemaking, should interpret the FPA. 16 U.S.C. § 824(e) (2018). Under the doctrine of *Chevron* deference, the court must first ask whether Congress has directly spoken on the issue at hand. *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). If so, the court must give effect to Congress' intent; if not, the court may defer to the

administrative body. *Id.* at 843. Congress has not directly spoken on what is deemed a just and reasonable rate. *See* 16 U.S.C. § 824d(a) (2018) (minimally stating rates "shall be just and reasonable"); *Id.* § 824e(a) (mandating the "Commission shall determine the just and reasonable rate" without elaboration). Since the FPA does not elucidate what makes rates just and reasonable, courts should defer to FERC under *Chevron* deference. *Chevron, U.S.A. Inc.*, 467 U.S. at 842. Since FERC is entitled to extensive deference in determining the reasonableness of rates, FERC's approval of ComGen's revised power service agreement should be affirmed.

B. FERC correctly approved ComGen's rate revisions because the rate revisions satisfy the matching principle of utility ratemaking.

1. Under the matching principle, FERC need only establish a loose correlation between costs and benefits.

The matching principle of utility ratemaking ensures customers who benefit from energy production also bear the costs. *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992). FERC must determine whether rates reflect "to some degree the costs" associated with energy production. *Id.* FERC does not have to weigh the costs and benefits with "exacting precision" when approving utility rates. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004). Courts also define costs and benefits loosely. *See Pub. Serv. Co. v. FERC*, 832 F.2d 1201, 1215 (10th Cir. 1987) (reasoning a company could include in rates the cost of conducting research and inspection taxes because customers would benefit in the long run).

Vandalia Power's and Franklin Power's shareholders and customers benefit from ComGen's ability to continue operating LGRI and its production of coal, as well as ComGen's relocation of the coal ash to provide a clean water supply, and therefore, should bear the cost of its operation. *See K N Energy, Inc.*, 968 F.2d at 1300. While individual customer bills will increase by $2.15 per month, (R. at 9), costs must only be roughly commensurate with benefits. *See Midwest ISO*

Transmission Owners, 373 F.3d at 1369. Similar to *Indiana Municipal Power Agency*, in which this Court chose not to address whether customers bearing the cost of a contract premium or "sweetener" was unreasonable—because the customers' rates were within the normal market range—slightly adjusting customers' bills to account for LGRI's operating costs keeps customers' rates well within a range of reasonableness. *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 250 (D.C. Cir. 1995). Since Vandalia Power's and Franklin Power's costs are within a range of reasonableness, FERC's approval of ComGen's rates satisfies the matching principle.

2. When applying the matching principle, FERC factors in to what extent rates economically impact the utility company.

When FERC analyzes proposed rates, the FPA requires FERC factor in the "economically efficient transmission and generation" of energy. 16 U.S.C. § 824k(a) (2018). By allocating the costs to Vandalia Power's and Franklin Power's customers and shareholders, FERC is allowing ComGen to continue to be economically viable. (R. at 12.) If ComGen's shareholders bore all of the costs of moving the coal ash to an EPA complaint facility, ComGen's ability to make reasonable profits would be compromised. *Id.* In turn, jeopardizing ComGen's viability harms Vandalia's and Franklin's citizens because ComGen, a significant electricity provider in both states, would be unable to efficiently provide energy. (R. at 3-4.) Therefore, FERC promoted economic efficiency when it approved ComGen's revised rate schedules. 16 U.S.C. § 824k(a).

SCCRAP asserts it is unjust for ComGen to allocate costs to Vandalia Power and Franklin Power when coal currently in LGRI has been accumulating prior to the power service agreement. (R. at 9.) However, costs may be allocated to customers even when the costs are the result of business decisions made prior to the utility company establishing a contractual relationship with the customer. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 84 (D.C. Cir. 2014). For example, in *South Carolina Public Service Authority*, the court held that under

Section 206 of the FPA, rates which put the costs of building transmission facilities on a company which had no prior contractual or customer relationship with the utility provider were just and reasonable. *Id.* The court reasoned Section 206 states FERC may fix "any rate" by "any public utility," but does not require a prior commercial relationship to allocate costs to customers. *Id.* (quoting 16 U.S.C. § 824e(a)). Under this reasoning, SCCRAP asks this Court to put limitations on FERC's approval of rates that cannot be found in the FPA. *See id.* Since Vandalia Power and Franklin Power benefit from ComGen moving the coal ash to a new facility and ComGen continuing to provide efficient energy, Vandalia Power and Franklin Power should also bear the costs as required by the matching principle.

C. Because ComGen should be able to recover for relocating coal ash under the prudence test of utility ratemaking, FERC correctly approved ComGen's rate revisions.

1. ComGen satisfies the prudence test because SCCRAP does not rebut the presumption that ComGen acted prudently.

In order to determine whether a utility company should be compensated for costs incurred, FERC applies the prudence test. *Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136, 141 (1st Cir. 1987). Utility companies easily satisfy the prudence test—which only requires utility companies act prudently in incurring the costs for which they seek to be compensated—because the test presumes the utility company acted prudently in making its business decision. *See Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986). Moreover, the prudence test factors in various circumstances that make prudent business decisions difficult to reach, such as fluctuating markets or changes in regulation requirements to determine whether a company acted prudently. *See id.* at 281 (reasoning "licensing delays, regulatory requirements, and uncertainty surrounding…other aspects of [a] project" should be factored into the prudence test).

Similarly to the business judgment rule, companies do not fail the prudence test solely because their business decisions in hindsight were inadvisable. *See id.* at 281; *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989). Instead, a company may recover for a business decision that caused unfortunate consequences so long as it exercised some degree of prudence. *See Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986) (upholding the reimbursement of the reconstruction of a nuclear power plant even though the company abandoned the plant's reconstruction project).

The prudence test hinges on whether the company "knew, or could have known" at the time the costs were incurred that the costs were imprudent. *Id.* ComGen could have reasonably believed by working alongside VDEQ, and VDEQ ultimately approving ComGen's corrective plan, that arsenic was no longer seeping into the water supply. (R. at 5.) While FERC found ComGen failed to monitor the effectiveness of the corrective plan, ComGen did not know or should not have known there was arsenic in Vandalia River because VDEQ, the local authority on water quality, approved ComGen's remedial plan and did not require ComGen to monitor the water supply. *Id.* Because nothing in the record suggests ComGen should have known about further arsenic leakage and the prudence test gives ComGen a presumption of managerial competence, ComGen should recover under the prudence test. *See Violet*, 800 F.2d at 282.

2. ComGen should recover for moving the coal ash because compensating ComGen fulfills the underlying principles of the prudence test.

Compensating companies for unintended consequences of business risks incentivize companies to take future risks, which as a whole benefits its customers. *See Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 473 (7th Cir. 2009). For example, in *Illinois Commerce Commission*, the Seventh Circuit reasoned a company should be allowed to put the cost of building facilities on customers because if the company could not allocate costs to its customers,

it would struggle to remain profitable and have little incentive to build future facilities. *Id.* at 473-474. Similarly, without the ability to recover from Vandalia Power and Franklin Power, ComGen's financial integrity will be comprised, and ComGen will be less likely to take risks in order to better discern how to provide efficient energy for its customers. (R. at 12.) In turn, other utility companies will be deterred from taking risks as well because they will see ComGen has been penalized for taking business risks. *See Ill. Commerce Comm'n*, 576 F.3d at 473.

Furthermore, in determining whether rates are just and reasonable, FERC must weigh whether the rate adversely affects the public interest, by impairing the "financial ability of the public utility to continue its service." *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 354-55 (1956). In weighing the financial ability of ComGen to continue providing energy and a slight rise in customer utility bills, customers would be harmed more from ComGen's inability to remain financially viable than a slight increase in monthly bills. (R. at 9, 12.) Additionally, when utility companies bear the burden of complying with regulations, they are entitled to recover for the cost of their services, so these companies can provide their "investors with a reasonable rate of return." *Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980). Since FERC's approval of ComGen's rate revisions satisfies the prudence test and allowing ComGen to recover serves the policies underlying the prudence test, ComGen should be allowed to recover for moving coal ash to an EPA compliant facility.

IV. 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 AND FOURTEENTH AMENDMENTS.

Federal Energy Regulatory Commission decisions are reviewed under an arbitrary and capricious standard, upholding factual findings so long as those findings are supported by

substantial evidence. *See American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). With respect to ratemaking, "[the Court's] review is highly deferential, as issues of rate design are fairly technical and . . . involve policy judgements that lie at the core of the regulatory mission." *Southern California Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013). Commission decisions are presumed valid, thus SCCRAP bears the burden of proof. *Fed. Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 602 (1944). Under the constitutional standards for ratemaking set forth in *Federal Power Commission v. Hope Natural Gas*, ComGen's revised rates are just and reasonable, and therefore, are constitutional. The rates successfully enable ComGen to operate, maintain its financial integrity, attract capital, and compensate its investors for their risk. Furthermore, the revised rates pass the "end results" test articulated in *Hope.* Lastly, this Court should uphold FERC's decision because it promotes good public policy.

A. FERC's decision approving ComGen's rate revisions are constitutional under the Fifth and Fourteenth Amendments because the revised rates are just and reasonable.

A public utility rate is just and reasonable if it "enable[s] the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed[.]" *Hope Nat. Gas Co.*, 320 U.S. at 605. This Court has determined that "[t]he Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942).

In *Federal Power Comm'n v. Hope Nat. Gas Co.*, the Court examined the validity of a rate order issued by the Federal Power Commission that reduced Hope Natural Gas Co.'s chargeable rates. 320 U.S. at 593. The Circuit Court had determined the rates to be too low,

reversing and remanding the Commission's order with instruction. *Id*. at 591. At Hope's original proceedings before the Commission, the company argued they should receive a return of no less than 8%, but the Commission disagreed, finding that "an 8% return would be unreasonable, but that 6 1/2% was a fair rate of return." *Id*. at 599. The Court considered whether the Commission's fixed rate of return would allow Hope to maintain its financial integrity. *Id*. at 604. Because the Commission had properly considered the array of evidence before it when fixing the rate, the Court concluded that the rate was just and reasonable. *Id*. The Court explained the factors leading to their conclusion that the rate was valid: "Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid [.]" *Id*. at 605.

In the case at bar, FERC made the correct decision to accept ComGen's revised rate schedule in order to ensure compliance with the constitutional standards set in *Hope*. To take SCCRAP's position in the FERC proceeding and disallow the revised rates would have resulted in an unjust constitutional taking of ComGen's property. (For ComGen's argument in the FERC proceeding, see R. at 10). ComGen followed proper procedure in proposing its revised rate schedule. (R. at 8). The revised schedule allowed for the cost of compliance with the district court order to be recovered from Vandalia Power's and Franklin Power's retail customers. (R. at 9). ComGen submitted testimony showing that without the revised rate schedule, their profits would fall from 10% to 3.2% over the ten-year period. (R. at 10).

Like the Commission's procedure explained in *Hope*, FERC extensively reviewed and analyzed the evidence presented by ComGen and SCCRAP in a three-day evidentiary hearing. (R. at 11). FERC came to the ultimate conclusion that ComGen's rates were appropriate under the circumstances. (R. at 11). Importantly, FERC accepted ComGen's offering that "the financial

impact of such an outcome would likely jeopardize the financial integrity of ComGen, and therefore raise constitutional concerns under the Fifth and Fourteenth Amendments." (R. at 12). While SCCRAP did argue that "ComGen is not constitutionally entitled to earn a reasonable rate of return in the face of utility mismanagement," FERC agreed with ComGen that it should not be held strictly liable for the actions of its subcontractor. (R. at 11). Under the standard articulated in *Hope* above, forcing ComGen to charge a rate that would hinder the company's ability to maintain its financial integrity would presumably make the rate not just nor reasonable. *See Hope*, 320 U.S. at 605. As the Court did in *Hope*, this Court should uphold the rate as it was determined by the Commission so as to ensure compliance with the constitutional standard of maintaining just and reasonable rates.

B. The revised rates pass the "end results" test articulated in Federal Power Commission v. Hope Natural Gas.

In *Hope*, the Supreme Court reviewed the decision of the Circuit Court, noting that "rate-making is indeed but one species of price-fixing." *Hope Natural Gas,* 320 U.S. at 601 (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876). "[F]ixing . . . prices . . . may reduce the value of the property which is being regulated. But . . . that does not mean that the regulation is invalid. It does . . . indicate that 'fair value' is the end product of the process of rate-making not the starting point . . . ." *Hope Natural Gas,* 320 U.S. at 601.

Under *Hope*, the relevant analysis considers the end result reached: "if the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry is at an end." *Hope Natural Gas*, 320 U.S. at 602. This Court in *Wisconsin v. Federal Power Commission*, followed this holding, noting, "It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates." 373 U.S. 294, 309 (1963). Other more recent cases including *Petition of Public Service Co. of N.H.*, 130 N.H. at 275

(1988), and *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), discuss the Court's heightened interest in the impact of the rate order over the theory used to reach that rate.

Given the procedure and result of the FERC evidentiary hearing, disallowing ComGen to recover the cost of compliance would create a total effect that is unjust and unreasonable. FERC used its desired method to analyze the revised rates and determined that the end result would be highly detrimental to ComGen's well-being.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this court uphold the ruling of the Federal Energy Regulatory Commission and reverse the ruling of the United States District Court for the District Columbia.

Certificate of Service

Pursuant to Official Rule IV, Team Members representing 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 5, 2018.

Respectfully submitted,

Team No. 28