ORAL ARGUMENT SCHEDULED FOR MARCH 7-9
Nos. 18-02345 and ER 18-263-000

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH GENERATING COMPANY (COMGEN)
Appellant

v.

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),
Appellee

STOP COAL COMBUSTION RESIDUAL ASH PONDS (SCCRAP),
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

COMMONWEALTH GENERATING COMPANY (COMGEN)
Intervenor for Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT/INTERVENOR COMMON WEALTH GENERATING COMPANY

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this appeal from the June 15, 2018 final order of the United States District Court for the District of Columbia ("the district court") under 28 U.S.C. § 1291. Commonwealth Generating Company ("ComGen") filed a timely notice of appeal on July 16, 2018. This Court further has jurisdiction to review the appeal of the Federal Energy Regulatory Commission's ("the Commission") decision to approve ComGen's proposed rate changes under 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES PRESENTED

1. 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 (33 U.S.C. §1342).

2.Whether surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act.

3. Is the Commission's approval of ComGen's proposed rates arbitrary and capricious where both the investors and consumers bear a portion of the remediation consequences, ComGen's rates are subject to a broad "zone of reasonableness," and ComGen's rate violates neither the matching principle nor the prudence principle?

4. Does SCCRAP's position to disallow ComGen's recovery in rates constitute an unconstitutional taking under the Fifth and Fourteenth Amendments where ComGen's shareholders would bear more than 80% of the remediation costs and ComGen's actual return would fall by nearly 7%, thus impeding ComGen's ability to maintain financial integrity and attract future shareholders?

STATEMENT OF THE CASE

This case is born out of a 71-surface-acre, coal combustion residual (CCRs) retention impoundment known as the Little Green Run Impoundment ("the Impoundment"). (R. at 4-5). As the residuals of coal combustion contain several harmful pollutants such as "mercury, cadmium and arsenic," it is necessary to confine the CCRs. (R. at 3). The Impoundment is owned by ComGen. Constructed in the late 1990s by its prior owner Commonwealth Energy Solutions (CES), the Impoundment contains about 38.7 million cubic yards of solids, primarily "CCRs and coal fines and waste material removed during the coal cleaning process." *Id*. From the Impoundment, the effluent residuals flow into Fish Creek before entering the Vandalia River. *Id*.

Unfortunately, prior to ComGen's acquisition of the Impoundment in 2014, there were several structural defects that caused arsenic to reach the groundwater and caused the Vandalia Department of Environmental Quality to require a new corrective action plan. (R. at 5). Under that plan, CES installed a liner meant to keep substances such as arsenic from leaching into the groundwater and making its way to navigable waters. *Id*.

But the liner was improperly installed in 2006. (R. at 6). Thus, arsenic could, during significant rainfall, seep into the groundwater and thereby make its way to Fish Creek the Vandalia River. *Id*. In December 2017, environmental activists known as the Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP) filed suit against ComGen in the U.S. District Court for the District Court of Columbia. (R. at 7). Filed under the citizen-suit provision of the Clean Water Act (the Act), the suit alleged ComGen violated U.S.C. § 1311(a), the Act's prohibition against unauthorized "discharge of any pollutant" into navigable waters. The Act defines the discharge of a pollutant as the "addition of any pollutant to navigable waters from any point source." Id. § 1362(12).

The district court, after a June 15, 2018 bench trial, ruled against ComGen and held that the Impoundment was a point source and that "the [Act] 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) (citing Opinion at 12); (R. at 8) (citing Opinion at 10). The District Court's remedy was an order for ComGen to "fully excavate" the Impoundment and relocate the 38.7 million cubic yards of material to a "competently lined" facility in compliance with Environmental Protection Agency's (EPA) CCR rule. (R. at 8). ComGen filed a timely appeal to this Court on July 16, 2018. *Id*.

On the same day of its appeal, ComGen alerted the Commission that, under § 205 of the Federal Power Act (FPA), it would seek to recover costs associated with the district court order. (R. at 8). That filing would revise the rates that ComGen charges its utility customers to make up the estimated $246 million in costs associated with the order. The estimated increase to monthly customer bills was between $2.15 and $3.30 depending on the time of the rate structure shift. (R. at 9).

SCCRAP filed a protest against the rate change, urging that ComGen bear either the entirety of or the vast majority of the costs associated with the district court's order, irrespective of any impact on ComGen's financial wellbeing and overall ability to continue delivering power to its customers. *Id*. Specifically, SCCRAP's counter-proposal would "effectively erase the majority of [ComGen's] profits over the proposed 10-year recovery period" and require shareholders to bear more than eighty percent of the costs of the remediation. (R. at 10). An evidentiary hearing by the Commission—with ComGen's rate change filing suspended—ultimately produced a decision approving of ComGen's revised rates, subject to judicial review of the district court's order. (R. at 11). SCCRAP sought a rehearing, which the Commission

subsequently denied. (R. at 12). SCCRAP then filed a petition for judicial review by the D.C. Circuit Court of Appeals. *Id*.

SUMMARY OF THE ARGUMENT

ComGen is not liable for the seepage of arsenic from a coal ash impoundment under the Act, and, even if ComGen is liable, its proposed rate, as approved by the Commission, properly distributes the costs of the remediation plan.

First, with respect to the issue of liability under the Act this Court should reverse the order of the district court. It should do so for two reasons: the district court erred in holding that seepage of arsenic from a coal ash impoundment that passes through groundwater constitutes the discharge of a pollutant from a point source in violation of §402 of the Act and the district court erred in holding that surface water pollution via hydrologically connected groundwater is actionable under the Act. These errors stem from a faulty interpretation of the Act's statutory text, a subversion of the Act's other purposes, a lack of appreciation for the relevant legislative history, and the use of judicial policymaking in over statutory text.

Second, with respect to the distribution of costs for the remediation plan, this Court should uphold ComGen's proposed ratemaking scheme in finding that the Commission's approval of such plan was neither arbitrary nor capricious. ComGen's approved and current ratemaking schedule is just and reasonable, while SCCRAP's proposed ratemaking schedule would constitute a taking under the Fifth and Fourteenth Amendments to the Constitution. Specifically, in examining the end result of ComGen's current ratemaking scheme, ComGen's proposal adequately addresses the interests of both its consumers in maintaining manageable utility rates and of its investors in ensuring a return on equity that upholds the financial integrity of the entity, regardless of the methodology employed to reach this just result. In contrast, SCCRAP's proposed plan would strip ComGen of a reasonable return on its private property for the benefit of the public and obstruct

ComGen's ability to attract future investors, thus diminishing the financial integrity of the institution.

Therefore, this Court should reverse the decision of the district court and find that ComGen is not liable under the Act and should give proper deference to the Commission in staying its decision to approve ComGen's proposed rates.

ARGUMENT

I. The Flow of Pollutants from a Coal Ash Impoundment Through Groundwater to Navigable Waters Does Not Constitute the Discharge of a Pollutant from a Point Source in Violation of the Clean Water Act.

The Clean Water Act (the Act) does not afford a cause of action for the transmission of pollutants from a coal ash impoundment through groundwater to navigable waters. The fact that groundwater does not constitute either a point source itself nor a navigable water is fatal to any such cause of action. The text of the Act does not support the determination made by the district court or the other courts of appeals, and even if it did, such a determination would frustrate an express purpose of the Act to foster federal and state cooperation on the regulation of such pollutants. The lower court articulated two theories for its ruling. First, it determined that the groundwater was a point source. (R. at 8) (citing Opinion at 12). The district court's second holding was that hydrologically connected ground water forms a conduit which, if polluted, gives rise to a claim under the Act for unpermitted pollution. (R. at 8) (citing Opinion at 10). The text of the Act contradicts both holdings, and both are unsupported judicial inventions.

As such determinations are a matter of statutory interpretation, this Court's review of both issues is *de novo*. *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014). In *de novo* review the court of appeals accepts the trial court's findings of fact unless such findings are clearly erroneous, but questions of law are not afforded such deference. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When a court of appeals reviews conclusions of law *de novo*, it conducts an independent review, and is free to arrive at its own holding. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995). Thus, the questions of what constitutes a point source and whether liability may flow under the hydrological connection theory are subject to independent

review. Under that standard, this Court should grant ComGen's appeal and overturn the findings and orders from the district court.

A. The Text of the Clean Water Act Does Not Create a Cause of Action for This Type of Pollution.

Non-point source pollution and pollution that does not reach navigable waters are not regulated by the federal government under the text of the Act. Beginning with the text, the Act prohibits the unpermitted pollution of navigable waters. 33 U.S.C. §§ 1311(a), 1342. Under the Act's definitions, it is "[the] addition of any pollutant to navigable waters from any point source" without a permit that triggers enforcement under the Act. *Id*. §1362(12)(A). Thus, any cause of action requires six elements: that there is the (1) unpermitted (2) addition (3) of a pollutant (4) 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) (discussing what is required for a National Pollution Discharge Elimination System (NPDES) permit, without which such pollution violates the Act).

Turning to the facts of this case, it is indisputable that the unintended leaching of arsenic from the Impoundment fulfills several of the aforementioned factors. The release was not permitted, arsenic constitutes a pollutant, and that pollutant reached navigable waters. Record at 3, 5-6. But does the Impoundment itself constitute a point source? In order to constitute a point source, the pollutant's "conveyance" must be "discernible, confined and discrete," with examples including "any, ditch, channel, tunnel, conduit, well, discrete fissure, container …." 33 U.S.C. § 1362(14). The Impoundment itself conveyed pollutants and is a discernible, confined and discrete body comparable to a "well, discrete fissure, [or] container." *Id*. But that is not the end of the inquiry.

The district court erred in holding that because the Impoundment was a point source and added pollutants to a navigable waterway (Fish Creek and the Vandalia River) a violation had

occurred and that was the end of the question. The Impoundment's designation as a point source is a necessary but not sufficient condition to the determination of a violation under the Act. The text of the Act requires that the discharge from the point source be "into" the navigable waters, with no allowance for an intermediary source. 33 U.S.C. § 1362(11). However, the discharge was placed into groundwater, a non-navigable water. Thus, it is the non-point source, non-navigable groundwater that is conveying the pollution to Fish Creek and the Vandalia River.

While the arsenic from the Impoundment reached navigable waters, it did not do so from a point source as defined by the relevant case law because it went through another, non-point source conveyance, i.e. groundwater. *Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925, 936 (6th Cir. 2018) (citing *Rapanos v. United States*, 547 U.S. 715, 729-30 (2006) (plurality opinion)) (arguing that Justice Scalia's plurality opinion "sought to make clear that intermediary point sources do not break the chain of … liability [under the Act];" the opinion says nothing of point-source-to-nonpoint-source dumping like that at issue here). The text of the Act makes clear that groundwater constitutes neither a point source nor a navigable water.

1. The Text of the Clean Water Act Does Not Support the Designation of Groundwater as a Point Source.

Because point source pollution is regulated by the States and not the federal government, the district court erred in finding ComGen liable under the NPDES provisions of the Act. As noted above, a point source is a "discernible, confined and discrete," conveyance. 33 U.S.C. § 1362(14). None of the examples, however, include groundwater nor do the statute's terms include groundwater by definition.

Groundwater certainly constitutes a "conveyance" under an ordinary reading of the word. *See Convey*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/convey (last visited Feb. 3, 2019) ("[T]o bear from one place to another";

"[T]o transfer or deliver"). But such a conveyance would not be "discernible, confined and discrete." Discernible is the quality of being "recognize[d] or identif[ied] as separate or distinct." *See Discern*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/discern (last visited Feb. 3, 2019). Discrete is the quality of "constituting a separate entity" or "consisting of distinct … elements." *See Discrete*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/discrete (last visited Feb. 3, 2019). Finally, to be confined is the quality of being "limited to a particular location." *See Confined*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/confined (last visited Feb. 3, 2019). But as the Sixth Circuit Court of Appeals recognized "groundwater is none of those things." *Kentucky Waterways All.*, 905 F.3d at 933. (citing 26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth., No. 3:15-CV-1439, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017) (holding that groundwater is a "diffuse medium").

The groundwater at issue in this case, like all groundwater, is not discernible—for the purposes of the Act—because it is not recognized nor identified as separate or distinct because of the way it flows via gravity into other waters. *Id*. That very fact is also why it is not discrete under the Act because of its intermingling with other subsurface and surface waters. *Id*. Finally, groundwater is not confined given its ability to diffuse to other areas. *Id*. Lacking these characteristics, groundwater is not a point source under the Act. While the intermingling of those waters appears to provide the basis for the next theory of the case, it too is lacking statutory support.

2. The Text of the Clean Water Act Likewise Does Not Support the Designation of Groundwater as a Navigable Water.

As the states regulate pollution to non-navigable waters, the district court erred in finding ComGen liable under the NPDES provisions of the Act. The Act defines "navigable waters" as

"the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). While that definition may appear all-encompassing, no mandatory authority has held that the Act covers every single drop of water within the United States. As the plurality held in *Rapanos v. United States*, the term "waters of the United States" does not cover every collection of water in the territory of the United States. 547 U.S. at 732-33 (plurality opinion) (holding that the term "include[s] only relatively permanent, standing or flowing bodies of water," with none of the relevant definitions encompassing "transitory puddles or ephemeral flows of water.") The Court in *Rapanos* further defined navigable waters as those "forming geographical features" such as "streams, oceans, rivers, lakes, and bodies of water." 547 U.S. at 733 (plurality opinion) (citing Webster's New International Dictionary 2882 **2221 (2d ed.1954)) (internal quotations omitted). While bodies of water may appear to be a loophole through which groundwater could seep through, the very term, when used in the hydrological context, conveys "a mass of matter distinct from other masses." *See Body*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/body (last visited Feb. 3, 2019). A lack of such distinction is why groundwater does not constitute a point source under the standard articulated under *Rapanos*.

B. Bringing This Type of Pollution Under the Aegis of the Clean Water Act Frustrates an Express Purpose of the Act to Foster Joint Federal and State Regulation of Pollutants.

The fact that groundwater constitutes neither a point source nor a navigable water does not mean that pollutants entering groundwater are wholly unregulated. But the states are the regulators in the event that the pollution enters a non-navigable water or is derived from a non-point source. *Kentucky Waterways All*., 905 F.3d at 929 (noting that "nonpoint-source pollution … are within the regulatory ambit of the states" and that "federal regulation under the CWA only extends to

pollutants discharged into navigable waters … leaving the states to regulate all pollution of non-navigable waters." (internal citation omitted)).

This dual scheme of regulation was a conscious legislative choice on the part of Congress to divide the targets of the federal and state-based regulatory schemes. William L. Andreen, *Water Quality Today-Has the Clean Water Act Been A Success?*, 55 ALA. L. REV. 537, 562 (2004) (noting that "Congress could have defined a 'discharge' to include generalized runoff as well as the more obvious sources of water pollution … it chose to limit the permit program's application to the latter category."). By attempting to circumvent the text of the Act, the district court and other circuits would frustrate this purpose and put more power in the hands of federal regulators at the expense of the states.

While Congress could, potentially, add to or alter the Act's provisions to expand the scope of its regulations, it explicitly chose not to at the time of the Act's adoption. The Congressional Record shows that amendments were offered to the Act to include groundwater under federal regulation. *Kentucky Waterways All.*, 905 F.3d at 938 n.10 (6th Cir. 2018). Congress ultimately rejected all such amendments. *Id*.

Because the district court erred in its application of the Act's necessary elements in finding a violation under the Act, this Court should reverse the district court's order and finding of liability.

II. Surface Water Pollution Via Hydrologically Connected Groundwater Is Not Actionable Under the Clean Water Act.

An alternative theory offered for ComGen's liability under the Act is what is known as either the "conduit theory" or the "hydrological connection" theory. *See*, *e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637, 650 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 748 (9th Cir. 2018). In essence, the "hydrological connection" or "conduit theory" argues that "groundwater is not considered a point source, but rather a medium

through which pollutants pass before being discharged into navigable waters." *Kentucky Waterways All*., 905 F.3d at 933. But that theory rests upon an erroneous interpretation of the *Rapanos* plurality's use of the word "directly" in the Court's discussion of point-source pollution. *Rapanos*, 547 U.S. at 739.

The error of the district court and other circuits flows from Justice Scalia's plurality opinion where he wrote that the Act prohibits not the "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Upstate Forever*, 887 F.3d at 649 (citing *Rapanos*, 547 U.S. at 743); *Hawai'i Wildlife Fund*, 886 F.3d at 748 (citing *Rapanos*, 547 U.S. at 743). But those circuits have read that quotation out of context. As the Sixth Circuit held, Justice Scalia in *Rapanos* was referring to pollution which flowed "through multiple point sources before discharging into navigable waters" as covered under the Act. *Kentucky Waterways All*., 905 F.3d at 936 (citing *Rapanos*, 547 U.S. at 743 (holding that "[t]he discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the Act], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between.")). Scalia's use of the word "conveyances"—a term that appears in the Act's definition of "point source"—shows that he predicated his argument on an uninterrupted string of point sources; not, as here, a "point-source-to-nonpoint-source dumping …." *Kentucky Waterways All.*, 905 F.3d at 936 (citing *Rapanos*, 574 U.S. at 729-30) (noting that the facts of *Rapanos* revolved around three wetlands which were all linked to navigable waters by multiple different point sources—"drains, ditches, creeks, and the like").

The hydrological connection theory thus only has a textual basis if one misreads the definitions found in the Act. Further, coopting this type of pollution into the realm of federal

jurisdiction would endanger the very sort of federal and state division of labor for water pollution that is also an express purpose of the Act as articulated above. *See also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) (noting the comparison between point-source pollution and "pollution arising from nonpoint sources is to be dealt with differently, specifically through the device of areawide waste treatment management by the states" (quoting *U.S. ex rel. Tenn. Valley Auth. v. Tenn. Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983))). Although the types of discharges at issue in this case warrant regulation, the realm of that regulation properly belongs, under the Act, to the states, not to the federal government.

III. This Court Should Decline to Extend the Provisions of the Act Beyond Its Text.

Both the Fourth and Ninth Circuits, in reaching their rulings in *Upstate Forever* and *Hawai'i Wildlife Fund* made much of the supposed frustration of the Act's purpose to remediate the nation's navigable waters if the conduit or hydrological connection theories were not adopted. *Upstate Forever*, 887 F.3d at 652 (arguing that "[s]uch an outcome would greatly undermine the purpose of the Act"); *Hawai'i Wildlife Fund*, 886 F.3d at 752 (arguing that this type of federal regulation was required because "[t]o hold otherwise would make a mockery of the [Act]'s prohibitions."). But it is important to recall that "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26, (1987) (emphasis in original).

In erroneously citing the *Rapanos* plurality, both circuits have overlooked another part of that opinion which expressly criticized that sort of judicial interpretation. *Rapanos*, 547 U.S. at 752 (arguing that "advancing the purpose of the Act" represented "that last resort of extravagant

interpretation" and "noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations"). Here the textual limitations of the Act showcase what the Congressional Record made clear: that Congress not only did not substantively authorize the course of action the Fourth and Ninth Circuits find, but that they affirmatively *rejected* such a course when offered the chance to do so in repeated amendments. *Kentucky Waterways All.*, 905 F.3d at 938 n.10.

Ultimately, the other circuits have undertaken a task that is beyond the scope of the judicial power: using statutory interpretation to achieve a policy end. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (noting that it is not the function of the courts "to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have intended" (internal quotation marks omitted)).

This Court should decline to follow the Fourth and Ninth Circuits down such a path. Instead, it should adhere to the text of the Act and reverse the order of the district court.

IV. The Commission's Approval of the Changed Rates Was Not Arbitrary and Capricious Because It Resulted in a Just and Reasonable Rate Under the Commission's Strong Discretion.

The Commission's approval of the changed rate was not arbitrary and capricious. The court of appeals reviews the Commission's ratemaking orders under the Administrative Procedure Act's (APA) arbitrary and capricious standard. 5 U.S.C.A § 551; *See e.g.*, *Emera Maine v. Fed. Energy Regulatory Comm'n,* 854 F.3d 9, 21 (D.C. Cir. 2017). Pursuant to the APA, a court may set aside agency decisions only if the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002). Review under the "arbitrary and capricious" standard is narrow and the reviewing court

may not substitute its judgment for that of the agency. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001).

A rate is only arbitrary and capricious if the result is unjust or unreasonable. *See e.g.*, *Emera Maine v. Fed. Energy Regulatory Comm'n,* 854 F.3d 9, 20 (D.C. Cir. 2017) ("[The Commission], not the Judiciary, has the principal statutory role in determining the reasonableness of rates for the transmission or sale of electric energy.") The Commission's approval of ComGen's proposed rates was neither arbitrary nor capricious, first, because the end result was a rate that adequately considered both the interests of ComGen's investors and its ratepayers and, second, because the range of reasonable rates that the Commission may impose is arbitrary and broad. Further, ComGen's rate was reasonable because it violated neither the matching principle nor the prudence principle of ratemaking. Therefore, it was neither arbitrary nor capricious for the Commission to decline to set aside ComGen's rates.

First, whether a rate is just and reasonable is determined not by the methodology employed to reach the resulting rate but rather by the end result itself. *See Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944). *Hope* reversed a decision by the Court of Appeals for the Fourth Circuit that had invalidated a Federal Power Commission ("FPC") order fixing rates under the Natural Gas Act. *Id.* at 619. The Fourth Circuit set aside the FPC's order on the grounds that the FPC had improperly failed to consider reproduction costs and trended original costs in computing the utility's rate. *Id.* at 600. However, the Supreme Court found that the FPC was not required to account for "the various permissible ways" in which the rate might be computed but only need ensure that the end result would be fair. *Id.* Under the *Hope* end results test, therefore, the court does not inquire into the transactions of the utility, its associated costs, investments, or earnings, but only whether it produces a fair end result. *See id*.

A return on equity, or ratemaking scheme, produces a fair end result when the interests of both the consumers and investors are adequately balanced. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1178 (D.C. Cir. 1987) ("In reviewing rate order of [the Commission], courts must determine whether end result of that order constitutes reasonable balancing, based on factual findings, of investor interests in maintaining financial integrity and access to capital markets and consumer interest in being charged nonexploitative rates."). In 1987, the Jersey Central Power and Light Company petitioned for review of the Commission's orders modifying the electric utility's proposed rate schedules. *Id.* at 1169. The Jersey Central Power and Light Company had recently suspended construction of its nuclear generating station upon the realization that demand for energy had not risen as much as expected and had resulted in tremendous costs to the utility. *Id.* at 1171, 1172. The electric company sought to recover the $397 million in costs incurred over fifteen years from ratepayers, but the Commission denied the utility's recovery of the unamortized portion of the investment. *Id.* at 1171. However, in doing so the Commission did not provide an explanation for their decision to deny this portion of the recovery. *Id.* at 1170. Jersey Central alleged that it had paid no dividends on its common stock for four years and faced a further prolonged inability to pay such dividends in addition to an inability to establish external capital. *Id.* at 1178. The court remanded in favor of Jersey Central Power and Light Company, finding that the Commission had not adequately balanced the interests of consumers and investors. *Id.* at 1170. In requiring the Commission to adjust the rate base, the court reasoned that the electric utility was entitled to a higher degree of financial integrity. *See id*. at 1187, 1188.

Second, "statutory reasonableness of a rate for the transmission or sale of electric energy is an abstract quality that allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." Federal Power Act § 205, 16 U.S.C.A. § 824d(a). *See e.g.,*

Emera Maine, 854 F.3d at 20. In 2017, the Court of Appeals for the District of Columbia found that the Commission had acted arbitrarily in changing a utility's rate without first finding that the current rate was unreasonable. *Id.* at 30. In *Emera Maine*, a group of privately-owned utilities objected to a new base return on equity recoverable under rates charged for the transmission of electricity. *Id.* at 16. Initially, the utilities had a base return on equity of 11.4%. *Id.* at 16. Even though the Commission found a new "zone of reasonableness" for the utilities' return and the original 11.4% return fell toward the higher end of that zone, the court found that this old rate was still reasonable given it fell within the new zone of reasonableness. *Id.* at 18, 30. In finding in favor of the electric utilities, the court further reasoned, "[The] provision of the FPA that enables a utility to propose changes in its own rates is intended for the benefit of the utility, and [the Commission] plays an essentially passive and reactive role under that provision." *Emera Maine*, 854 F.3d at 24;16 U.S.C.A. §§ 824d, 824e(a). Thus, to show that the rate is arbitrary and capricious and that it should be set aside, the party opposing the rate "has the heavy burden of making a convincing showing that the order is invalid because it is unjust and unreasonable in its consequences." *See Nader v. FCC*, 520 F.2d 182, 192 (Cir. D.C. 1975).

To show that the rate was arbitrary and capricious and that it should be set aside, SCCRAP bears the heavy burden of showing that the Commission misjudged the reasonableness and justness of the rate in its approval and, therefore, that the rate was unreasonable and unjust. SCCRAP cannot show that the Commission's approval was arbitrary because it cannot show that the rate imposed was unjust or unreasonable. Specifically, the approved return of 10% for ComGen is reasonable, first, because it likely falls within a broad range of reasonable rates that would produce an adequate end result and second, because such end result considers both the interests of the consumer in managing reasonable rates and the interests of the investor in maintaining financial

integrity in the institution. Because reasonableness exists within an arbitrary zone rather than at one particular figure, as demonstrated by *Emera Maine*, it is unlikely that a rate of ten percent, when considering the balanced interests of consumers and investors, would be so exorbitant that it would fall entirely outside of this range of possibilities. Further, in determining what is arbitrary and capricious, the court does not inquire into the transactions of ComGen, its costs, revenues, or investments, but only whether the end result balances the interests of its consumers and shareholders. In this case, ComGen concedes that the public will bear an additional cost averaging an increase in rates between $2.15 and $3.30 a month, but instead of imposing the entirety of this cost to recover its fees in the immediate, ComGen's proposed rate spreads the cost over the course of the next ten years to avoid imposing an undue burden on its ratepayers. In doing so, unlike the utility in *Jersey Light Co*., who only considered consumer interests, ComGen balanced the interests of its investors in ensuring financial integrity through cost recovery while also maintaining the interests of its consumers in charging reasonable rates. This resulting balance stipulates that ComGen's rate was reasonable and, therefore, that the Commission was not arbitrary and capricious in its approval of the plan.

A. The Matching Principle Does Not Invalidate ComGen's Proposed Rate Because the Cost Was Not Imposed Until After the Acquisition of Vandalia and Franklin and, alternatively, the Remediation Costs Is a Permissible Deferred Cost.

SCCRAP asserts that the current ratemaking scheme is arbitrary and capricious because it violates the "matching principle" of ratemaking, which provides that the customers who benefited from electricity production from the Vandalia Generating Station should bear the burdens of the costs associated with producing that electricity. However, SCCRAP's assertions with regards to the "matching principle" are misguided. First, ComGen's ratepayers justifiably experience a rate increase from the remediation costs because ComGen did not accumulate the remediation cost

until 2017 after it acquired its current consumer base. Second, even if ComGen did accumulate the costs prior to the acquisition of Vandalia Power Company and Franklin Power Company, the Commission, as an exception to the "matching principle," may permit utilities to recover from costs that have previously accumulated but which were only presently realized. Therefore, the Commission's approval of ComGen's rate proposal was not in violation of the matching principle.

The remediation cost passed onto ComGen's consumers in its proposed rate plan is a present cost properly attributable to ComGen's present consumers. ComGen's proposed rate does not violate the matching principle because the cost of the remediation was not imposed until after its acquisition of the Vandalia Power Company and the Franklin Power Company. Because the "closure-by-removal" plan, if upheld, is presently imposed, it is thus a cost associated with the present production of electricity because ComGen must effectuate the plan to continue providing a service to its consumers. SCCRAP commenced its action resulting in the district court's implementation of the "closure-by-removal" plan in December of 2017, more than three years after ComGen executed its agreement with Vandalia Power Company and Franklin Power Company. Thus, the costs of the "closure-by-removal" plan is attributable to the ratepayers of Vandalia Power Company and Franklin Power Company.

Alternatively, the Commission may permit utilities to recover from ratepayers to make up for a cost that has already accumulated. *See Town of Norwood, Mass. v. F.E.R.C.*, 53 F.3d 377, 381 (D.C. Cir. 1995); *See also Virginia Electric & Power Co.,* 15 F.E.R.C. ¶ 61,052 at 61,105, *modified,* 17 F.E.R.C. ¶ 61,150 (1981) (The Commission "authorized utilities to amortize over ten years the costs of disposing of previously spent nuclear fuel once the utilities realize that the fuel must be disposed of rather than reprocessed as originally planned"). In 1995, the Court of Appeals for the District of Columbia determined that a utility could recover the accumulated cost

of retiree benefits for current employees over the last twenty years because the utility had not realized the cost until it switched from a pay-as-you-go approach to an accrual method. *Town of Norwood*, 53 F.3d at 378. Ordinarily, requiring its current customers to bear the retirement plan costs even though they had been accrued as a result of the work by employees that benefited past customers would violate the matching principle. *Id.* at 381. However, in reasoning that the utility could recover the costs from ratepayers, the court provided, "[W]hen ratemaking conventions change to recognize a previously unrecognized cost, some of which has already accumulated, the Commission allows the utility to make up for the amount that has already accumulated: the 'make-up' provision 'is a permissible way to make a utility whole for properly deferred, prior period costs.'" *Id.* at 381.

Therefore, ComGen may recover the cost of the remediation from consumers even though it realized that cost several years after SCCRAP suggests it began to accumulate. Like the electric utility in *Town of Norwood*, ComGen was unaware that it would incur a remediation cost until the district court imposed the "closure-by-removal" plan. Even if the court finds that this is not a new cost but instead a cost that accumulated over the last eighteen years of operations, the matching principle's "make-up" exception permits ComGen to distribute these costs to its current ratepayers. Thus, the Commission's approval of ComGen's rate proposal was not arbitrary and capricious for violating the matching principle.

B. The Prudence Principle Does Not Invalidate ComGen's Proposed Rate Because ComGen Was Not Imprudent and, Alternatively, the Activity that Produced the Cost Was Beneficial to Ratepayers.

Finally, SCCRAP asserts that investors are not entitled to a return on costs that did not arise from prudent activity. Specifically, SCCRAP asserts that ComGen's investors are not entitled to a return on the cost of remediations for ComGen's environmental noncompliance if its "closure-by-

removal" plan is upheld. However, SCCRAP's assertions are misplaced, as ComGen's actions pursuant to controlling the water seepage were not imprudent and, further, the activity that produced the cost was beneficial to the ratepayers in allowing for the providence of electricity.

First, ComGen's oversight of VDEQ's corrective plan from 2006 was consistent with prudent utility practice. ComGen was not responsible for the installation of the liner and has since exercised due care in its oversight of the liner. When VDEQ released its corrective plan in 2006, due care was exercised in retaining a competent subcontractor to install the liner. (R. at 10). Further, ComGen did not own the Vandalia Generating Station until 2014, eight years after the implementation of VDEQ's corrective plan by the Station's former owner, CES. (R. at 5). Thus, even if there were a failure to retain a competent subcontractor, that liability would fall on CES and not on ComGen. Additionally, ComGen was prudent in its oversight of the liner, no evidence exists to indicate that ComGen knew or should have known of the tear until the Vandalia Waterkeeper released its report in 2017. Specifically, the seepage occurred only when there was significant rainfall and dried up within just a few weeks of the precipitation event. (R. at 6). Had the seepage been a regular and persistent consequence of tear in the liner, ComGen may have had constructive knowledge of the tear, but given the infrequency with which the tear posed even a minor threat, ComGen was not imprudent in its oversight.

If an activity involving economic noncompliance benefits ratepayers, then it is a prudent activity. *See Iroquois Gas Transmission Sys., L.P. v. F.E.R.C.*, 145 F.3d 398, 402 (D.C. Cir. 1998). In *Iroquois Gas Transmission System*, the court held that the Commission inadequately explained its decision to exclude from natural gas pipeline's rate base legal fees to defend against claims of environmental violations in constructing pipeline. *Id.* In that case, a gas utility was liable for violating the Clean Water Act and incurred significant litigation costs. *Id.* at 399. The gas utility

passed these costs onto its ratepayers via increased rates. *Id.* at 399. In finding that the utility could to recover rates for environmental noncompliance from ratepayers, the court rejected the Commission's contention that all environmental violations presumptively disadvantage ratepayers. *Id.* (noting that "[A]lthough ratepayers have interest in compliance with environmental and safety laws, they also have interest in timely and efficient pipeline construction."). This scenario is, of course, distinguishable from imposing on ratepayers the cost of an activity that does not benefit consumers. *See NAACP v. Federal Power Commission*, 425 U.S. 662, 671 (1976) (holding that the utility could not impose on its ratepayers the costs for noncompliance with employee discrimination laws).

Because ComGen's activity benefited ratepayers by providing them with a vital utility, its noncompliance was the result of prudent utility practice. Like the ratepayers in *Iroquois Gas Transmission Sys.*, ComGen's ratepayers had an interest in receiving the benefits of the electric utility provided by ComGen and resulting in the seepage from the Impoundment. Because the benefit of receiving a vital utility is so great to the consumer, even if it results in environmental noncompliance, like the gas pipe violations of the Act in *Iroquois Gas Transmission Sys.*, the activity of providing electric, despite resulting noncompliance, is consistent with prudent utility practice.

V. SCCRAP's Position to Disallow the Change in Rate Constitutes a Taking Under the Fifth and Fourteenth Amendments.

SCCRAP's position that the FERC should not allow ComGen's change in rate constitutes a taking under the Fourth and Fifteenth Amendments. The pertinent portion of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." This provision is incorporated through the states under the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 234 (1897). Further, when a

regulation goes too far, it is recognized as the equivalent of taking private property for the sake of the public. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A regulation that strips ComGen, a private utility, of nearly 7% of its return on equity for the benefit of lowered rates for the public constitutes a taking under the Fifth and Fourteenth Amendments because it deprives ComGen of its private earnings for the benefit of the public and discourages future investors from engaging with ComGen, thus diminishing the company's financial stability and opportunity for growth.

Whether SCCRAP's position to disallow the change in rate constitutes an unconstitutional taking is a question of law to be reviewed on a *de novo* basis. The court of appeals accepts the trial court's findings of fact unless clearly erroneous but decides questions of law *de novo*. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When a court of appeals reviews conclusions of law *de novo*, it makes an independent review, and is free to arrive at its own holding. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995). Thus, the constitutional question under the Taking Clause in this case is subject to independent review. *See id*.

A. SCCRAP's Position Constitutes a Taking Because It Deprives ComGen of a Reasonable Return on the Value of Its Property.

SCCRAP's position, which would provide ComGen with a mere 3.6% return on equity, constitutes a regulatory taking because it deprives ComGen of a significant portion of its private returns and instead distributes these returns to the public. In *Bluefield Water Works v. Public Service Commission*, 262 U.S. 679, 690 (1923), the Supreme Court held: "Rates which are not sufficient to yield a reasonable return on the value of the property used in public service at the time it is being so used to render the service … deprives the public utility company of its property, in violation of the Fourteenth Amendment of the Constitution." *See also Duquesne Light Co. v. Barasch,* 488 U.S. 299, 309 (1989) ("If rate set for public utility does not afford sufficient

compensation, state has taken use of the utility's property without paying just compensation and thus violated the Fifth and Fourteenth Amendments.") Disallowing ComGen's proposed rate change and instead following SCCRAP's proposed rate change, which requires ComGen and its shareholders to bear 80.5% of the remediation costs, would constitute a taking under the standard establish in *Bluefield Water Works.* The 3.6% return on equity that SCCRAP's proposal would yield for ComGen is insufficient to yield a reasonable return on the value of ComGen's property used in public service. Therefore, SCCRAP's proposal to disallow ComGen's change rate constitutes a taking and is unconstitutional under the Fifth and Fourteenth Amendments.

"It is not the theory but the impact of a rate order which counts in determining whether it results in an unconstitutional taking … and the fact that the method employed to reach that result may contain infirmities is not then important." *Hope Natural Gas.*, 320 U.S. at 602. In 1989, the Supreme Court analyzed a claim challenging a Pennsylvania state law that permitted for rate recovery only on those investments actually built and used. *Duquesne Light Co.*, 488 U.S. at 301. The Court found that the end result provided a reasonable return on the value of the property with respect to its input to the public regardless of the methodology employed to reach that result. *Id.* at 316. Thus, in considering whether a return constituted a taking, the Court found that the nature of the company's investments and costs was irrelevant, so long as the end result weighed the interests of both ratepayers and shareholders. *Id.* at 316. The ultimate determination as to whether a rate constitutes a taking against a company thus rests solely on the question of whether its investors were deprived of an adequate return on their investments. *See id*. at 316.

SCCRAP's proposal, which would yield an actual return of 3.6% for ComGen is constitutionally unreasonable. This proposal diminishes the majority of ComGen's profits over the ten-year remedial period. By taking the majority of ComGen's profits and distributing them to the

public, SCCRAP's proposal would provide an unreasonable return in giving ComGen the ultimatum to either continue providing its service to the public at essentially no profit over the next ten years or discontinue its service altogether. SCCRAP's proposal would thus constitute a taking in the most literal sense—a taking of the vast majority of a private company's profits for the benefit of the public's receiving a utility service at a lower rate.

Further, *Duquesne Light Co.* is clear that utility mismanagement is not to be considered in determining whether a rate of return is reasonable or unreasonable so as to constitute a taking. The Court in *Duquesne Light Co.* provided that whether the utility's property was used and useful was irrelevant to a determination of whether the company's rates adequately weighed the interests of its ratepayers and investors. Like Duquesne Light Company, who challenged the reasonableness of the rate, SCCRAP has asked this Court to consider additional factors, including environmental noncompliance, in assessing whether its proposed rate is reasonable and non-confiscatory. However, the law provides that those historical costs and factors may not be considered in assessing whether the proposed rate is confiscatory, only whether the interests of the investors and ratepayers are adequately balanced. Under SCCRAP's proposal, ComGen would lose the vast majority of its profits and, thus, its ability to pay dividends to its shareholders would be greatly diminished, thus failing to provide shareholders with a reasonable return on their investment and instead distributing funds that would go to private investors to public ratepayers. This failure to adequately consider the interests of and to payout to private shareholders is confiscatory of the shareholders' property.

B. SCCRAP's Position Constitutes a Taking Because It Deprives ComGen of the Opportunity to Compete for the Investor's Dollar.

SCCRAP's plan constitutes an unconstitutional taking because it discourages future investments into the company. Specifically, SCCRAP's plan gives unequal weight to the consumer

interests and not enough weight to the investor interest. In *Emera Maine*, the D.C. Circuit provides that "an ROE should allow a utility to adequately compete for the investor's dollar." 854 F.3d at 20. A rate of return of 3.6%, resulting in the diminishing of the vast majority of the company's profits over a ten-year period, does not provide ComGen with the opportunity to compete for the investor's dollar because it erodes the financial integrity of the institution, thus erasing incentive for investor's to pursue an interest in ComGen.

In determining whether a utility has adequate opportunity to compete for an investor's dollar, past performance and opportunity is a vital consideration. In 1923, the Supreme Court in *Bluefield Waterworks* determined that a water utility was entitled to a rate of over 6% return on equity because it had earned a low rate of return through a long period up until the time of the inquiry. *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 695 (1923). In determining that the utility could not be justly compensated at a lower rate the court reasoned that a rate of over 6% was necessary to afford the utility the opportunity to compete for the investor's dollar "[s]ince the investors take into account the result of past operations as well as present rates in determining whether they will invest." *Id*.

ComGen cannot compete for an investor's dollar if not given a proper rate. Even provided that ComGen's current shareholders consist of CE alone, SCCRAP's proposed ratemaking scheme prevents ComGen from acquiring new shareholders. Further, as a newly-incorporated company a 3.6% rate of return on equity prevents ComGen from establishing financial integrity. As suggested by *Bluefield Water Works*, the history of the company is just as important in determining whether investors are likely to pursue an investment as is the present, and companies that have not been able to establish financial integrity in the past are entitled to a higher return on equity to compensate. Because ComGen, like the utility in *Bluefield Water Works*, faces a historical

disadvantage, a return on equity should weigh in its favor. ComGen has not had adequate time to establish this financial integrity and prove itself in the market to consumers, and thus it is even more vital that ComGen be accorded a rate of return that will allow it to attract investors. Without an established history, a return on equity of merely 3.6% will virtually preclude ComGen from attracting any investors and from competing for the investors' dollar. Without the potential for investments, ComGen cannot survive as an entity, and, thus, SCCRAP's proposal would amount to a confiscatory action in facilitating ComGen's expiration.

Therefore, by preventing ComGen from competing for future investments and erasing the vast majority of its profits over a ten-year period, SCCRAP's proposal would amount to a confiscatory taking under the Fifth and Fourteenth Amendments to the Constitution.

CONCLUSION

Because the district court erred in interpreting the Act's statutory provisions on liability for pollution reaching navigable waters from groundwater, this Court should overturn its order and remove the finding of liability for ComGen. Further, this Court should uphold ComGen's approved rate and find that the alternative rate proposed by SCCRAP constitutes a taking under the Fifth and Fourteenth Amendments to the Constitution.

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. __19__