ORAL ARGUMENT SCHEDULED MARCH 8, 2019

C.A. No. 18-02345

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Commonwealth Generating Company,

Appellant,

-v.- D.C. No. 17-01985

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Appellee

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Petitioner,

-v.-

Federal Energy Regulatory Commission, Docket ER 18-263-000

Respondent,

Commonwealth Generating Company,

Intervenor

BRIEF FOR APPELLANT / INTERVENOR COMMONWEALTH GENERATING COMPANY

Team 27

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF JURISDICTION

The District Court for the District of Columbia had jurisdiction over the initial case pursuant to 33 U.S.C. §1365. This Court has jurisdiction over the appeal from the District Court for the District of Columbia pursuant to 28 U.S.C. §1291 and 5 U.S.C. §706. ComGen filed an appeal of the District Court's order on July 16, 2018 and SCCRAP appealed FERC's November 30, 2018 denial of a rehearing to this court on December 3, 2018.

STATEMENT OF THE ISSUES PRESENTED

This brief answers the following questions:

1) Whether the District Court erred in holding that surface water pollution via hydrologically connected groundwater is actionable under the Clean Water Act (CWA).
2) Whether the District Court erred in finding that seepage of arsenic from a coal ash impoundment via groundwater to navigable waters constitutes a violation of the CWA.
3) Whether FERC's approval of ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was based on a review of relevant factors and articulates a rational connection between facts gathered and policy selected.
4) Whether preventing ComGen from recovering full environmental cleanup costs is confiscatory and therefore a violation of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

Commonwealth Energy (CE) is an electric utility holding company which provides electric service to nine states, including Vandalia and Franklin, at retail and wholesale rates. In 2014, Appellant/Petitioner Commonwealth Generating Company (ComGen) was incorporated by CE to acquire the Vandalia Generating Station (VGS) from a separate CE subsidiary. VGS consists of two 550-megawatt coal-fired units located on the Vandalia River. After ComGen acquired VGS,

it signed unit power service agreements with Vandalia Power Company and Franklin Power Company, agreeing to provide 50% of VGS output to each. Both utilities are wholly-owned subsidiaries of CE that qualify as public utilities under Federal Power Act §201.

The generation of electricity at coal-fired power plants creates coal combustion residuals (CCRs, or coal ash). Due to the health risks of contaminants within the coal ash, EPA requires that coal-fired power plants dispose of coal ash with appropriate precautions. Utilities typically dispose of coal ash in either surface impoundments or landfills.

Since it opened in 2000, VGS has produced and disposed of coal ash in compliance with EPA regulations through the Little Green Run Impoundment (LGR). In 2002, ComGen detected arsenic in the groundwater around VGS at levels in excess of the standards of the Vandalia Department of Environmental Quality (VDEQ). Arsenic is known to leach from coal ash when water passes through it. ComGen notified VDEQ and quickly developed and implemented a VDEQ-approved corrective action plan. ComGen hired a competent, qualified subcontractor to install a high-density polyethylene (HDPE) geo-membrane liner on the impoundment's embankment in 2006. In 2017, a local activist organization detected elevated levels of arsenic in the Vandalia River, and argued that the source was the LGR. An investigation by VDEQ indicated that a seam in the HDPE geo-membrane liner installed by the subcontractor in 2006 was not welded adequately. As a result, seepage pooled at one end of the west embankment.

The CWA was enacted in 1972 and prohibits the discharge of pollutants into navigable waters unless it is otherwise authorized by the CWA. 33 U.S.C. §1311(a). The CWA created a permitting scheme which allows EPA to issue a permit for discharging pollutants, but also creates a joint regulatory with the states, if states choose to exercise that authority. Both Vandalia and Franklin elected to implement their own permitting programs under the CWA.

The Federal Power Act gives jurisdiction to the Federal Energy Regulatory Commission (FERC) over the actions of a public utility engaged in the transmission or sale of electric energy in interstate commerce. 16 U.S.C §824(b). FERC is primarily tasked with ensuring that the rates, terms, and conditions of electricity sales by utilities are just and reasonable, and remedying those that are not. *Id.* at §§824(d), 824(e). ComGen sells electric energy at wholesale in interstate commerce and as such must file rate increases for approval with FERC. *Id.* at §824(e).

Appellee-Petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP), filed the initial suit against ComGen, alleging that there was "hydrological connection" between the LGR's seepage and the Vandalia River. According to SCCRAP's legal theory, the "hydrological connection" between the two sufficed to bring the arsenic seepage to navigable waters and thus under the mandate of the CWA. The D.C. District Court agreed, holding 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." *Order* at 8 ¶ 1. In addition, the Court found that coal ash ponds are "discrete mechanisms that convey pollutants from the VGS to the Vandalia River" and thus, meet the definition of "point source" established by the CWA. *Order* at 8 ¶ 2. The Court also ordered ComGen to remedy the situation by fully excavating and relocating the coal ash. ComGen appealed, challenging the court's conclusions that 1) the CWA regulates discharges into navigable waters through hydrologically connected groundwater, and that 2) the LGR impoundment constitutes a "point source" under the CWA.

ComGen also submitted a FERC filing seeking to recover the cost of compliance with the District Court's order from Vandalia Power and Franklin Power. SCCRAP protested the proposed rate increase, arguing that ComGen should be precluded from recovering from utility ratepayers

under both the prudence and matching principles. ComGen responded that it prudently implemented the corrective plan in 2006 and that the only relevant fact in a matching principle analysis is that the alleged CWA violation occurred in 2017, after the new unit power service agreements were in place. ComGen also argues that SCCRAP's proposed relief violates the Fifth and Fourteenth Amendments because the associated earned return—3.2% or 3.6%—would fall below the 10% return on equity authorized by FERC in its 2016 rate proceeding. After FERC approved the rate revisions submitted by ComGen, SCCRAP sought a rehearing of FERC's decision and pursued judicial review after the rehearing was denied.

SUMMARY OF THE ARGUMENT

Surface water pollution through hydrologically connected groundwater is not actionable under the CWA. First, the statutory language does not support the hydrological connection theory. For there to be a violation of the CWA, either the groundwater adjacent to the LGR or the coal ash ponds in the LGR must constitute a "point source" discharging pollutants into navigable waters. Neither constitute a "point source." Second, the CWA's legislative history proves that Congress never intended for the CWA to regulate groundwater, instead leaving its regulation to the states. Third, the hydrological connection standard is too remote to establish certainty that a pollutant has reached navigable waters via groundwater and thus liability. Finally, expanding the CWA's scope to cover surface pollution via groundwater is contrary to cooperative federalism and would overburden states by imposing additional oversight and regulation costs.

In the challenged orders, FERC reasonably approved the proposed rate revisions to include any costs of complying with the District Court's injunction. First, FERC has significant discretion within its ratemaking authority to balance policy-related and cost-relted considerations. Allowing ComGen to recover the full cost of environmental cleanups through rates incentivizes utilities to

proactively seek environmental compliance without compromising their financial integrity. Moreover, FERC did not make an imprudent finding after thorough review of the record. Second, FERC's determination that Petitioner's alternative proposed rate threatens ComGen's financial integrity, thereby violating the Fifth and Fourteenth Amendment Takings Clause, is due deference. A 3.2% or 3.6% return on equity suggested by Petitioners falls far below the 10.0% return previously approved by FERC. Such a meager return is confiscatory under the "end results test." Moreover, ComGen's prudent efforts to comply with environmental regulations are constitutionally protected.

We urge this Court to reverse the District Court findings and conclude that 1) the CWA does not cover discharges into navigable waters through hydrologically connected groundwater and that 2) the LGR is not a point source under the CWA. We also urge this Court to 3) affirm FERC's approval of the revised rates recovering the costs ComGen would incur to comply with the injunctive relief imposed by the District Court and 4) affirm that disallowing all or a portion of these costs is an unconstitutional taking under the Fifth and Fourteenth Amendments.

ARGUMENT ISSUES ON THE CLEAN WATER ACT

I. THE CLEAN WATER ACT

In 1972, Congress enacted the Clean Water Act (CWA) to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. §1251(a). The CWA distinguishes between point source pollution, which the federal government regulates, and nonpoint source pollution, which states regulate. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* at §1362(12). In turn, "point source," refers to "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from

which pollutants are or may be discharged." *Id.* at §1362(14). The CWA grants authority to the federal government to regulate "navigable waters," which are defined as "waters of the United States, including the territorial seas." *Id.* at §1362(7). States regulate non-navigable waters.

To regulate surface water pollution, the CWA established the National Pollutant Discharge Elimination System (NPDES), which issues permits for "the discharge of any pollutant" on the condition that the discharge complies with the effluent standards. 33 U.S.C. §1362. "Effluent standard" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." *Id.* at §1362(11). States can administer their own NPDES programs as long as the regulations are as stringent as federal ones. *Id.* at §1342(b).

The case in point raises two related questions. First, is surface pollution through hydrologically connected groundwater actionable under the CWA? Second, does seepage of arsenic from a coal ash impoundment reaching navigable waters via groundwater constitute a *discharge of a pollutant from a point source*? Only under the hydrological connection theory does pollution reaching surface waters after travelling through groundwater constitute a violation of CWA standards. Moreover, even if both questions are answered in the affirmative, the pollutant must still be discharged to navigable waters from a "discernible, confined, and discrete source" to fall within the scope of the CWA. If not, it is a nonpoint source and not federally regulated. Federal Water Pollution Control Act Amendments of 1972, § 101 *et seq.*, 33 U.S.C. § 1251 *et seq.*

II. THE STATUTORY LANGUAGE OF THE CLEAN WATER ACT DOES NOT SUPPORT THE HYDROLOGICAL CONNECTION THEORY.

The hydrological connection theory contends that pollution reaching navigable waters after moving through groundwater is actionable under the CWA and thus, requires a permit under the NPDES program. In order for the CWA to cover surface pollution through hydrologically

connected groundwater, one of two scenarios must hold: 1) the groundwater adjacent to the LGR is a "navigable water" and the LGR a "point source" transporting the pollutant; or, alternatively, 2) the groundwater is the point source conveying the pollutant into navigable waters. However, neither scenario holds. First, groundwater does not meet the definition of "navigable waters" or "point source." Second, the LGR does not qualify as a "point source." In essence, the CWA does not include surface water pollution through hydrologically connected groundwater, whether the source of the discharge is a point source or a coal ash impoundment.

A. Groundwater Does Not Qualify As A "Navigable Water" Under The CWA.

Groundwater does not qualify as a "navigable water" under the CWA, which regulates the amount of pollutants that travel from point sources to navigable waters. 33 U.S.C. §1362(11). While the Fish Creek and the Vandalia River do constitute navigable waters, it is widely established that groundwater is not navigable under the CWA. *Rice v. Harken*, 250 F.3d 264, 269 (5th Cir. 2001), *Exxon Corporation v. Train*, 554 F.3d 1310, 1322 (5th Cir. 1977), *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962, 965 (7th Cir. 1994), *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1141 (10th Cir. 2005) ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.") In discussing what constitutes "navigable waters", the Supreme Court cautioned against a broad interpretation. *Rapanos v. U.S.*, 547 U.S. 715, 737 (2006). At issue in *Rapanos* was whether wetlands lying near ditches constitute "navigable waters." *Id*. The Court answered in the negative by excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall[.]" *Id.* at 739. A more "expansive theory" of the CWA is "unlikely" since it "would have brought virtually all planning the development and

use ... of land and water resources by the States under federal control." *Id.* at 737 (quotations omitted). Under the CWA, the term "navigable water" does not include groundwater.

The statutory language also rules out groundwater as a "navigable water." The CWA regulates effluents "discharged from point sources *into* navigable waters." 33 U.S.C. §1362(11) (emphasis added). "Thus, for a point source to discharge *into* navigable waters, it must dump *directly.*" *Ky. Waterways All. v. Ky. Utilities Company,* 905 F.3f 925, 934, (6th Cir. 2018). Here, pollutants would need to be discharged from the LGR directly *into* Fish Creek or the Vandalia River to fall under the CWA's scope. Instead, the pollutants traveled through the groundwater before reaching both bodies of water. Thus, neither case law nor the statutory language of the CWA supports identifying groundwater as "navigable water."

B. Groundwater Does Not Qualify As A "Point Source" Under the CWA.

The CWA defines "point source," as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). A point source must be "the means by which pollutants are ultimately deposited into a navigable body of water." *Sierra Club v. Abston Const. Co., Inc.,* 620 F.2d 41, 44-5 (5th Cir. 1980). Otherwise, the CWA cannot regulate the discharge since nonpoint source pollution falls under state authority because of its diffuse nature. Indeed, nonpoint and point source pollution are differentiated by the way in which they reach navigable water. *Greater Yellowstone Coal v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010). Under this definition, groundwater adjacent to the LGR is not a point source.

First, groundwater is neither discernable, confined, nor discrete but rather an inherently diffuse medium that "seeps in all directions, guided only by the general pull of gravity." *Ky. Waterways All.*, 905 F.3f at 933. Point source pollution encompasses confined and discrete sources

because these can be measured and thus, regulated under the NPDES. Indeed, even the presence of dye traces in groundwater roughly indicating the flow of pollutants is not enough to make groundwater "discernable." *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010). Thus, any interpretation of "point source" that covers groundwater misses the key distinction between point and nonpoint source pollution.

Second, point sources must convey the pollutant to navigable waters, meaning they must determinately move the pollutants from one place to other. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). "Tellingly, the examples of "point sources" listed by the CWA include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them." *Id.* at 105. While groundwater may convey water as a medium through which pollutants may flow, it is a generalized conveyance rather than a confined source. But to constitute a discharge, the point source must "introduce the pollutant into navigable water from the outside world," thus identifying the source "when the pollutant first enters navigable water[.]" *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175, (D.C. Cir. 1982). Again, the confined character of pollution is at the core of the CWA. If pollution is not traceable, it cannot be measured and thus, falls outside the scope of federal regulation. Here, the groundwater is not introducing the pollutant into navigable waters, but merely holding any water that percolates through. Therefore, groundwater does not meet the definition of a point source under the CWA.

C. Coal Ash Ponds Do Not Qualify as a "Point Source" Under The CWA.

Under the CWA, a point source must be a conveyance, meaning it must move or transport something from one place to another. Coal ash ponds like the LGR are not "point sources" or "conveyances" because they do not "take or carry [pollutants] from one place to another." *Ky. Waterways All.*, 905 F.3f at 935. Instead, coal ash ponds are specifically designed

to store coal ash in one place. *Id.* Coal ash impoundment ponds are also "static recipients" and therefore cannot be point sources. *Sierra Club v. Virginia Electric,* 903 F.3d 403, 405 (4th Cir. 2018) (reversing the District Court finding that coal ash piles are discrete mechanisms that convey pollutants to the river by allowing precipitation to percolate through them to the groundwater). The Court in *Sierra Club* ruled that while arsenic from a coal pond had reached navigable waters by leaching from the "static accumulations" of coal ash through rainwater and groundwater, that "simple causal link does not fulfill the CWA's requirement that the discharge be *from a point source*." *Id.* at 410-11.

The facts in our case are almost identical to *Sierra Club v. Virginia Electric,* which held that the dispersed percolation from the impoundment into groundwater demonstrates the absence of a discernible, confined, and discrete point source. 903 F.3d at 411. Similarly, passive coal ash piles and ponds such as the LGR impoundment fail to constitute affirmative conveyances because they merely store and accumulate coal ash. A settling pond is not a device for conveyance but rather a "stationary feature of the landscape through which rainwater or groundwater can move diffusely." *Id.* at 409. The movement of pollutants from the LGR into groundwater was "the result of a natural process" in which rainwater percolated through the soil and resulted in the diffused seepage of arsenic, not a discernible conveyance that meets the statutory definition of point source. *Id.* at 412.

In addition, Congress created NPDES permitting to address *measurable* discharges (the statute places restrictions on the "quantities, rates, and concentrations" of pollutants and this scheme lies at the heart of the CWA). *Sierra Club v. Virginia Electric* 903 F.3d at 411. When enacting the CWA, Congress intended to only target point source pollutants. This is evident not only in "the definitional text of 'point source,' but also in the "effluent limitation enforcement

scheme employed by the CWA" seeking "to cover pollution from discrete, confined, and discernable sources." *Id*. However, when the discharge in question is diffused and "not the product of a discrete conveyance, the task is virtually impossible." *Ky. Waterways All.*, 905 F.3f at 935 (citing *Sierra Club v. Va. Elec. & Power Co*.). Imposing liability because pollutants are somewhat traceable "would eviscerate the point source requirement and undo Congress' choice." *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224 (2d Cir. 2009). Thus, authoritative case law and legislative intent conclusively exclude categorizing coal ash ponds as a "point source."

D. Coal Ash Ponds Are Not Expressly Covered By the CWA.

Our case can be distinguished from other decisions which upheld the hydrological connection theory. Unlike *Hawaii Wildlife Fund v. County of Maui*, which found that injection wells constitute point sources in line with the hydrological connection theory, the present case deals with coal ash ponds. 866. F.3d. 737, 744 (9th Circ. 2018). In *Maui,* the Court found that pollutants entering the navigable waters of the Pacific Ocean could be regulated because they were traced back to wells that had been identified as point sources. *Id.* Wells are expressly mentioned under the CWA as a type of collection or channeling system while coal ash ponds are not. 33 U.S.C. §1362(14).

Similarly, our case is fully consistent with *Upstate Forever v. Kinder Morgan*, which also upheld the hydrological connection theory in finding that pipelines qualify as "point source." 887 F.3d at 647 (4th Cir. 2018). Pipelines are explicitly mentioned in the CWA. 33 U.S.C. § §1362(14). *Upstate Forever* did not hold that "the CWA covers discharges to groundwater itself" as some proponents of the hydrological connection theory claim. 887 F.3d at 652. Rather, the Court held that only in very specific conditions will a discharge fall under the CWA's scope: namely, when there is a discharge of pollutants reaching navigable waters located 1000 feet or less from a

pipeline that percolates through groundwater with a direct hydrological connection to navigable waters *Id.* The Court carved out a small exception while reinforcing the general principle that the CWA does not regulate discharge of pollutants from nonpoint sources.

III. JUDICIAL EXPANSION OF CWA TO INCLUDE GROUNDWATER RUNS COUNTER TO LEGISLATIVE INTENT.

Congressional recognition of the relationship between surface and ground waters, and intentional exclusion of the latter from the CWA indicates that Congress was making a policy choice to reserve groundwater regulation for the states. "Congress believed it was not granting the [EPA] any power to control disposals into groundwater." *Exxon Corporation v. Train,* 554 F.3d at 1329. Indeed, the Senate Committee on Public Works considered and rejected proposals to add groundwater under the scope of the CWA: "Several bills pending before the Committee provided authority to establish federally approved standards for groundwater which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwater is so complex and varied from State to State, the Committee did not adopt this recommendation." S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1972).

During the enactment period, Congress members debated specific proposals to extend the NPDES to groundwater. Water Pollution Control Legislation (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. on Public Works, 92nd Cong., at 230 (1971). The EPA stressed the importance of expanding NPDES permits for pollutants discharged into groundwater since they could affect navigable waters, but Congress nonetheless rejected these and other similar proposals. 118 Cong. Rec. 10,666 (1972). Thus, the omission of groundwater from the CWA is not an oversight, but an intentional policy decision by Congress to preserve state control over groundwater. *Village of Oconomowoc Lake,* 24 F.3d at 965.

Adopting the hydrological connection theory would cause an unwarranted expansion of the CWA that would displace rules on coal ash storage and treatment promulgated under the Resource Conservation and Recovery Act (RCRA). *Ky. Waterways All.*, 905 F.3f at 937. RCRA is designed to complement the CWA through solid waste regulation and oversight of groundwater contamination remediation, including impoundments. *Id.*, 40 C.F.R. §257.90 *et seq.* When a permit to pollute is required by the CWA, RCRA does not apply. Thus, if the CWA covered pollution coming from coal ash and flowing through groundwater to surface water, RCRA would not regulate coal ash treatment and storage at all. *Ky. Waterways All.* 905 F.3f at 937. This would make the coverage of any pollution subject to CWA redundant, precisely because RCRA was "expressly intended" to address gaps in environmental regulations. 42 U.S.C. §6903(27), *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984). The hydrological connection theory would remove coal ash ponds from RCRA coverage, disrupting the design of Congress' statutory scheme. *Ky. Waterways All.* 905 F.3f at 938.

Some supporters of expanding the CWA to cover surface water pollution via hydrologically connected groundwater claim that not doing so creates a regulatory loophole. *Ky. v. Waterways All.*, 905 F.3f at 941 (Clay, J., dissenting). They claim polluters can avoid CWA liability by adding any pollutant as long as it travels through any kind of intermediate medium (groundwater, soil, fields, air), especially if it is not directly discharged into navigable waters. However, Congress has the power to amend the CWA or pass a new law. The judiciary should not reinterpret clear statutory language out of fear of potential consequences if it contravenes legislative intent. *Id.* at 188-89. As *Sierra Club v. Virginia Electric Co.* states, "[t]he fact that such pollution falls outside the scope of [CWA] regulation does not mean that it slips through the regulatory cracks." 903 F.3d at 412. To the contrary, EPA classifies coal ash and other coal

combustion residuals as non-hazardous waste governed by RCRA. 40 C.F.R. §§257.50, 257.53. In essence, courts should not blur two different types of discharge: diffuse discharges from solid waters and point-source discharges.

Proponents of the hydrological connection theory have claimed that EPA's position on the subject supports extending the CWA's scope to point source discharges via groundwater where there is a direct hydrological connection. *Upstate Forever*, 887 F.3d at 651. However, EPA opened a public comment process in 2018 precisely on this question, which indicates that the issue is not settled from EPA's perspective. 83 Fed. Reg. 7126, 7128 (Feb. 20, 2018). In addition, there is no regulatory framework that sets a standard on this question. Therefore, courts should be wary of expanding the scope of the CWA since doing so would overstep legislative intent.

Finally, *Sierra Club v. Virginia Electric Co.* misinterpreted the CWA's scope by upholding that the CWA regulates discharge of arsenic into navigable waters through hydrologically connected groundwater. NPDES was designed to address, sample, and monitor *measurable* pollutants and thus the *Sierra Club* ruling missed the fundamental distinction Congress established between point and nonpoint source pollution. Following the flawed logic of these cases, NPDES permits would indiscriminately apply to pollutants regardless of the potentially attenuated nature of the link between groundwater and surface water. Under such logic, even if it took the pollutants months or years to reach navigable waters (which would make measuring the pollutants or attributing them to any cause near impossible), the CWA would still apply. This would make measurement or attribution of the pollutant to a cause nearly impossible. Expanding the scope of CWA in this way would also make compliance virtually impossible due to the difficulty of measuring nonpoint source pollution. Thus, upholding the hydrological connection theory would

be upholding an interpretation that Congress refused to legislate, and then forcing agencies to comply with an impossible mandate.

IV. HYDROLOGICAL CONNECTION IS TOO REMOTE TO ESTABLISH CAUSAL CERTAINTY AND THUS LIABILITY.

Upholding the hydrological connection theory would be an unwarranted expansion of the CWA. The CWA's text does not assert authority over groundwater because these may be somehow hydrologically connected with navigable waters. *Village of Oconomowoc Lake*, 24 F.3d at 965. While "the possibility of a hydrological connection cannot be denied . . . neither the statute nor the regulations make such a possibility a sufficient ground of regulation" *Id*. Similarly, *Rice v. Harken* held that "a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater" was outside the scope of the Oil Pollution Act, which amended the CWA to prevent and respond to catastrophic oil spills. 250 F.3d at 272, 33 U.S.C. §2701 *et seq* (1990). Ultimately, the connection between a point source and navigable waters has to be clear, and this is not the case with the diffuse percolation of pollutants through groundwater. *Upstate Forever*, 887 F.3d at 651. Thus, the hydrological connection theory attempts to establish a connection that may be too remote and gradual to establish liability under the point source definition of the CWA.

In addition, determining the standard of traceability is a fact-based inquiry that will vary case by case and thus far, there is no clean or uniform standard in place. Determining whether pollutants reached navigable water would require expensive and time-consuming technical studies that may place significant costs and operation restrictions on a number of firms, including utilities and railroads. In *Rice v. Harken*, the Fifth Circuit found that the link between groundwater and the polluted surface waters was too indirect, remote, and attenuated to support the hydrological connection theory. 250 F.3d at 272. The Court determined that there needs to be a close, direct,

and proximate link instead. *Id.* Furthermore, the only evidence in *Rice* to support the hydrological connection was a general assertion by an expert, which failed to account on specific flow rates or estimates indicating the level of the threat or the extent of the pollution. Similarly, in *Ky. Waterways All.*, the Court found that only one out of three dyes that had been injected into the wells in order to trace pollutants was recovered, which was insufficient evidence to establish a clear connection. 905 F.3f at 933. In short, "[T]he more complex the pathway, the more difficult the proof." *Id.* at 943 (Clay, J., dissenting). Both cases highlight the complexity and the difficulty in asserting what constitutes a clear and direct link to establish liability, especially when there is no uniform standard in place.

V. EXPANDING THE CLEAN WATER ACT WOULD UNDERMINE COOPERATIVE FEDERALISM AND IMPOSE AN UNDUE BURDEN ON STATES.

Restoring and maintaining the Nation's water is only one of many expressed purposes of the CWA. The Act also seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Congress does not pursue its goal of restoring and maintaining the nation's waterways "at all costs," but rather sets a specific framework with clear limitations. *Ky. Waterways All.*, 905 F.3f at 937. The CWA established a cooperative federalism scheme and left the regulation of non-navigable water and nonpoint source pollution to state governments. *Id.*

Historically, regulation of nonpoint source pollution reaching navigable waters has been under "the level of government closest to the sources of the problem" S. Rep. No. 95-370. States adopt EPA-approved programs "for controlling pollution added from nonpoint sources to the navigable waters within the state and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). Today, a majority of states already have some form of groundwater regulation. Thus,

expanding the CWA ignores the balance between state and federal powers. In the words of fifteen Attorneys General in a 2018 letter submitted to EPA during the public comment process:

> Given the ubiquitous presence of groundwater in state lands, the natural tendency of groundwater to migrate downhill, and the high likelihood that migrating groundwater will connect with navigable waters at some point, nearly all state land could fairly be said to have a hydrological connection to the waters of the United States. An infinitely elastic view of federal jurisdiction could all-but envelop the core element of state sovereignty, instead authorizing the federal government 'to function as a *de facto* regulator of immense stretches of intrastate land'

Office of the Attorney General of West Virginia, Comment Letter on Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrological Connection to Surface Water (May 21, 2018), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0667, at 6.

Furthermore, the hydrological connection theory could open the door to the conduit theory, whereby discharges of pollutants from an extensive number of point sources, including groundwater, air, and runoff would constitute actionable violations under the CWA. As several Attorneys General state:

> Expanding NPDES liability to groundwater pollution would take a program built to regulate discharges from discrete conveyances, and expand it to cover the entire network of underground capillaries that ultimately lead to navigable waters. Expanding the permit review process to encompass every flow, seep, or fissure implicated by a "direct hydrological connection" theory would also likely require complex and expensive environmental impact studies.

Id. at 8. This unjustified expansion of the CWA would demand additional permits to cover activities that states have historically regulated through nonpoint source pollution programs.

In essence, expanding the CWA and upholding the hydrological connection theory for natural seepage processes would result in impracticable ramifications and rests on a flawed interpretation of the CWA. The Supreme Court has already warned against interpreting the CWA in such a way that it would "re-adjust the federal-state balance" absent a "clear statement from Congress." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531

U.S. 159, 174 (2001). That outcome is the precise result of an expanding the CWA to cover groundwater.

ARGUMENT ISSUES ON THE FERC ORDER

I. STANDARD OF REVIEW FOR FERC RATEMAKING DECISIONS

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is not whether the Commission's decision is the "best one possible" or "better than alternatives." *Louisiana Pub. Service Comm'n v. FERC,* 866 F.3d 426, 429 (2017) (citing *FERC v. Elec. Power Supply Ass'n* 136 S.Ct. 760, 782 U.S. (1983)) (alterations omitted). Rather, a decision must be upheld when the Commission has articulated "a rational connection" between facts found and the choice made. *Id.* "Highly deferential" review is owed for "matters of rate design" because they are "technical and involve policy judgments at the core of FERC's regulatory responsibilities." *Maine Pub. Utilities Com'n v. FERC*, 454 F.3d 278, 287-88 (2006) (citing *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)). Agency discretion is "at zenith" when the challenged order relates to "remedies and sanctions" or "fashioning of policies." *Louisiana Public Service Com'n v. FERC*, 866 F.3d at 159. Under the FPA, FERC must ensure the rate is "just and reasonable." 16 U.S.C. §824(a).

II. THE COMMISSION REASONABLY APPROVED INTERVENOR'S REVISED RATE SCHEDULE.

In approving ComGen's proposed rates, the Commission exercised its regulatory duty to oversee ratemaking. 16 U.S.C. § 824(e). The reviewing court must determine whether "the Commission has given consideration to each of the pertinent factors[,]" *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 20 L.Ed. 2d 312 (1968), namely, "whether the [rate] order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly

compensate investors for the risks they have assumed." *Id*. Here, the Commission found that 1) Petitioner's alternative proposal would jeopardize ComGen's financial integrity. *Order* at 12 ¶ 1. 2) Allowing ComGen to recover full remediation costs provides an important incentive for utilities to seek environmental protection in the future. *Id*. The Commission has not only considered all of the legally required factors, but has provided reasoning beyond the minimum of establishing a "rational connection" and warrants judicial deference.

A. The Commission's Policy Judgment About Appropriate Incentives In Ratemaking Cases Warrants Judicial Deference

The Commission's conclusions reflect a *balance* of policy goals and *predictions* about the utilities' behavior—judgments "at the core" of the Commission's rate setting authority and expertise. *Maine Pub. Utilities Com'n v. FERC,* 454 F.3d at 287. "The court's responsibility is not to supplant the Commission's balance of these interests" but rather to "assure itself that the Commission gave reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases,* 390 U.S. at 791-92. "[P]articularly deferential review" is owed to complex judgments about how regulated entities will respond to incentives. *Wisconsin Pub. Power, Inc. v. FERC,* 493 F.3d 239, 260 (D.C. Cir. 2007). Indeed, such judgments rely on the Commission's expert economic knowledge and informed assessment of how regulated entities interact with each other, ratepayers, and other agencies. Thus, "even if the record does not show 'for certain that the Commission's incentive policy *will* work[,]'" absent evidence that the policy *will not* work, "we cannot say that the Commission's incentive theory lacks logic." *Electricity Consumers Resource Council v. FERC,* 407 F.3d 1232, 1241 (D.C. Cir. 2005) (quoting *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 463 F.2d 824, 828 (D.C. Cir. 1972).)

The judiciary has deferred to FERC expertise in similar cases of policy uncertainty in the past. For example, in *Electricity Consumers Resource Council v. FERC,* this Court upheld the

Commission's approval of a proposed rate change designed to increase utility investment in generation facilities over a prior rate scheme that discouraged investment by causing price volatilities. 407 F.3d 1232-34, 1236. The Commission concluded that the rate change would yield "net benefits" and "long-term savings" by improving reliability, even though it would not "alone result in more financing." *Id*. at 1236, 1240. Rejecting the argument that the Commission had ignored short-term costs to ratepayers imposed by the rate change, the Court upheld the Commission's policy choice. *Id.* at 1240. "[T]he balancing of short-term costs against long-term benefits [to markets and customers] is within the Commission's discretion[.]" *Id.*

The facts in this case similarly call for judicial respect for the Commission's policy judgment in the face of significant uncertainty and complexity. The Commission's approval represents its informed conclusion that full recovery of cleanup costs balances the long-term benefits of environmental protection and financial integrity against the short-term cost of increased rates for ratepayers. *Order* at 12 ¶ 1. Comparable to the policy judgment that encouraging construction of generation facilities is worth higher rates in the short-term, the Commission concluded here that compliance with environmental regulation creates long-term value for both utilities and ratepayers. But investing in environmental compliance is risky: the unexpected $246 million cleanup cost here can be directly traced to ComGen's 2002 notice to VDEQ about the groundwater arsenic leak. *Order* at 5 ¶ 4. Without ComGen's proactive compliance efforts, the resultant environmental damage may have far exceeded current levels. Assuring full compensation of these costs incentivizes proactive compliance. A fragmented compensation plan incentivizes regulatory evasion. "The idea that firms respond to financial incentives is, of course, hardly revolutionary." *Conn. Dept. of Public Utility Control v. FERC*, 593 F.3d 30, 34 (D.C. Cir. 2010). The soundness of the policy judgment underlying the Commission's decision is not in dispute.

Thus, the Commission has established beyond the minimum "rational connection" required to uphold its decision.

B. The Commission's Decision was Based on a Sufficient Prudency Review.

SCCRAP argues that the Commission failed to adequately consider ComGen's imprudent implementation of the VDEQ-prescribed corrective plan, which should preclude ComGen from recovering any cleanup costs from ratepayers. *Order* at 9 ¶ 2. This argument misses the mark. Not only did the Commission decline to make an imprudence finding after fully reviewing the record, but courts often uphold beneficial investments that could have been avoided in hindsight, such environmental cleanups, as prudent decisions.

i. The Commission Did Not Make an Imprudence Finding After Thorough Record Review.

The commission made a conclusive judgment that did not find ComGen's actions imprudent. "When the record would support more than one outcome," the court upholds the Commission's order because the relevant inquiry "is not whether record evidence supports [the petitioner's desired outcome], but whether it supports FERC's." *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d at 470 (alteration in original, citation omitted). Here, after the Commission thoroughly reviewed ComGen's implementation of the VDEQ plan, it found in favor of ComGen. The Commission concluded that ComGen is not strictly liable for the leak caused by the actions of its subcontractor, even though better monitoring by ComGen would have revealed the imperfectly-welded liner. *Order* at 11 ¶ 3. The Commission's overall reasoning is clear: Based on the information reasonably available while implementing the corrective plan, ComGen's actions were prudent even if more could have been done in hindsight.

This finding is owed deference. The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313 (b), 16 U.S.C. § 825*l*(b). Substantial evidence

"requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (citations omitted). The relevant inquiry "is not whether record evidence supports [the petitioner's desired outcome], but whether it supports FERC's." *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d at 470 (alteration in original, citation omitted).

Additionally, the Commission's order is fully consistent with *Anaheim, Riverside, Banning, Colton and Azusa v. FERC.*, 669 F.2d 799 (D.C. Cir. 1981), which held that the Commission properly disallowed a utility from recovering costs after abandoning a nuclear power plant. In finding that "a serious doubt as to the prudence of an expenditure" was raised, the Commission relied on evidence that the state public commission in prior proceedings disallowed those expenses as "improvident." *Id.* at 809. In contrast, here, no official finding of imprudence exists. To the contrary, the Commission found that the subcontractor's incompetence in implementing the corrective plan should not be attributed to ComGen. *Order* at 11 ¶ 3.

ii. Beneficial Investments That Could Have Been Avoided in Hindsight Are Still Prudent.

The Commission judges beneficial investments that could have been avoided in hindsight to be "prudent but cancelled investments." *Town of Norwood Mass. v. FERC*, 80 F.3d 526 (D.C. Cir. 1996) ("*Town of Norwood Mass. I*"). Environmental remediation costs fall squarely in this category. In *Town of Norwood Mass. I*, this Court affirmed the Commission's approval of full rate recovery of the remaining construction costs of a power plant, despite the fact that it was shut down in response to safety concerns. *Id.* Alternatively, the plant could have run until its license expired to recoup costs. *Id.* There, the Commission's approval was based on two determinations: 1) Anything below full recovery would give utilities "perverse incentives" to continue operating power plants beyond cost-effectiveness. *Id*. at 529. 2) Full recovery is appropriate when

investments were "made in an attempt to ensure that an already used and useful plant could continue to remain used and useful." *Id* (quotation marks omitted).

The cleanup costs ordered by the District Court are analogous to the recovery of construction costs of a shutdown power plant. Like capital improvements on a power plant that is ultimately shut down, environmental remediation costs are beneficial investments that could be wholly avoided in hindsight. In *Town of Norwood Mass. I*, hindsight revealed that capital investments for a plant destined to be shut down were completely unnecessary. 80 F.3d 526 at 532. Here, hindsight reveals that cleanup costs ordered by the District Court could have been avoided had the subcontractor or ComGen taken more care. *Order* at 11 ¶3.

But this imaginative exercise does not make the subsequent costs imprudently incurred. Instead, this Court agreed with the Commission that denying full recovery of construction costs "might discourage companies . . . from making capital improvements necessary to keep their plants safe and efficient." *Town of Norwood Mass. I*, 80 F.3d at 532. Similarly, denying full recovery of cleanup costs might discourage utilities from taking any initiative to minimize the environmental degradation caused by their activities. *Order* at 12 ¶1. The Commission's policy judgments about appropriate incentives are central to prudency determinations, and deserve deference here.

iii. The Commission Allows Regulated Entities to Recover Environmental Remediation Costs.

The Commission's decision here is in line with past precedent allowing full recovery of environmental remediation and compliance costs through rates and tariffs. For example, despite FERC staff findings that an oil pipeline operator incurred expenses imprudently, an administrative law judge approved an oil pipeline operator's recoupment of environmental remediation expenses from its current customer base. *Chevron Prod. Co., Bp W. Coast Prod. LLC Exxon Mobil Oil Corp., & Conoco Phillips Co.*, 127 FERC ¶ 63024, 66174 (2009) (Initial Decision). The judge held that recovery of the remediation expenses was appropriate because FERC staff "fail[ed] to

create 'serious doubt' that [the pipeline operator] acted imprudently in incurring the remediation costs" and therefore that the utility did not have to affirmatively prove that it did act prudently. *Id.* at 66179 (internal citations omitted). As discussed above, the Commission did not make an imprudence finding against ComGen in this case even after a thorough examination of the relevant facts. This finding is due deference and is fully consistent with recovery of remediation expenses through rates and tariffs.

FERC has also approved the recovery of the costs of compliance with EPA regulations through an "extraordinary" pipeline tariff. *Magellan Pipeline Company, L.P.*, 115 FERC ¶ 61276 (2006). In that case, EPA imposed new regulations on shipping sulfur, and to recoup the costs of compliance Magellan proposed a set of surcharges that would impact its customers. The customers protested, arguing that Magellan should only be able to recover costs through indexed rates rather than surcharge rates. Nonetheless, FERC held otherwise, allowing Magellan to charge a specific surcharge to pay for compliance as long as it did not try to double count those expenses when it reapplied for a review of the indexed rates. *Id.* at 61992. In the instant case, ComGen's efforts to repair the LGR are analogous to Magellan's expenses for investing in pipeline technology. Both companies made financial outlays to comply with environmental regulations. Allowing ComGen to collect its expenditures therefore aligns with FERC precedent.

C. The FERC Decision was Based on Sufficient Consideration of the Matching Principle.

Petitioners argue that the Commission inadequately considered the matching principle, under which ComGen's shareholders should bear 80.5% of cleanup costs, in proportion to the amount of time the coal ash accumulated in the LGR. *Order* at 9 ¶ 3. However, strict adherence to the matching principle is unnecessary. The Commission has determined that unrecognized costs may be properly deferred to future ratepayers.

i. Previously Unrecognized Costs May Be Properly Allocated to Non-Matching Customer Class.

"Some violation" of the matching principle is appropriate when rates "change to recognize a previously unrecognized cost." *Town of Norwood Mass. v. FERC*, 53 F.3d 377, 380-81 (1995) ("*Town of Norwood Mass. II*"). Environmental cleanups belong in this category. In *Town of Norwood Mass. II*, this Court upheld the Commission's approval of a rate that accounted for current employees' future retirement benefits, over a previous rate that only accounted for benefits actually paid to current retiree employees. *Id*. The "large and sudden" transition cost of the new rate was to be recovered from ratepayers over two decades. *Id*. at 380. This Court agreed with the Commission's conclusion that the plan does not "unfairly saddle[]" ratepayers with past costs, even though it "unquestionably charg[es] for costs incurred to provide service to other, earlier ratepayers." *Id*. Utilities may "make up for previously unrecognized costs, some of which have already accumulated" consistent with the Commission's policy. *Id*. "Previously unrecognized costs" also include the costs of disposing nuclear waste used to generate electricity for previous ratepayers once the utility recognizes that the fuel must be disposed. 53 F.3d at 381 (citing *Virginia Electric & Power Co.*, 15 F.E.R.C. ¶ 61,052).

Environmental remediation is precisely such a "previously unrecognized cost." *First*, like the costs of dealing with nuclear waste amidst technological and legislative uncertainty, environmental cleanup costs are highly unpredictable. It is impossible to charge then-unknown cleanup costs to the "responsible" ratepayer class. Thus, these costs are "properly deferred" and appropriately spread over future customers to "make the utility whole." 53 F.3d at 381. *Second*, this general cost allocation does not unfairly burden present ratepayers. Under the same rate scheme, ComGen will charge future ratepayers any unknown environmental compliance costs accruing now from servicing present ratepayers. The risks would be evenly spread among different

generations of customers. The overall cost allocation is fair and follows the spirit of the matching principle even if it violates the letter.

The Commission's decision is also fully consistent with prior decisions. In *Chevron Products Co.,* FERC staff raised concerns about the matching principle to argue that the pipeline company's remediation expenses should not have been reimbursable. *Chevron Prod. Co., Bp W. Coast Prod. LLC Exxon Mobil Oil Corp., & Conoco Phillips Co.*, 127 FERC ¶ 63024, 66174 (2009) (Initial Decision). The presiding administrative law judge did not even bother to address the matching principle in ruling that the remediation expenses were reimbursable due to a "presumption that [the utility was] operating in a prudent manner." *Id.* at 66179. In that case, the matching principle was a relevant but non-critical factor for the presiding judge. Similarly, although ComGen's case implicates the matching principle, FERC's policy judgment finds other factors decisive. Prudent operations trump other considerations such as the matching principle.

Commission decisions also demonstrate a willingness to part from strict adherence to the matching principle when other policy concerns dominate. In its decision in *Columbia Gas Transmission Corp. UGI Utilities, Inc.*, 75 FERC ¶ 61017 (April 2, 1996), FERC found that it was "not inequitable" for an oil transmission company to pass on environmental remediation costs to past customers. ("While there [were] equity issues, the end result is not unreasonable from a policy standpoint[.]") *Id.* at 61061. FERC reasoned that encouraging the utility to quickly clean up the environmental hazard was the most important policy outcome. Similar reasoning applied here suggests that other policy concerns should dominate equity considerations raised by the matching principle. Failing to apply the *Columbia Gas* precedent would put at risk other key policy considerations—most notably ComGen's continued viability. The Commission's policy judgment aligns with previous policy judgments and therefore deserves deference.

ii. The Power Service Agreement Expressly Guarantees Full Recovery of Costs.

Utilities can fully recover costs from ratepayers when expressly guaranteed by the power service agreement, like the one between ComGen and Vandalia Power and Franklin Power here. In *Town of Norwood Mass. I*, the Court upheld the Commission's rejection of the administrative law judge's proposal to reduce the utility's recovery to 80%, on the basis of a finding that the original power contract expressly guaranteed full recovery of operating and maintenance expenses. 80 F.3d at 532. Here, remediation costs are properly allocable to Vandalia Power and Franklin Power under the express terms of the power service agreements. *Order* at 10 ¶ 4. This fact is not in dispute. Thus, the Commission's approval of the rate should be upheld.

III. THE COMMISSION'S DETERMINATION THAT PETITIONER'S ALTERNATIVE PROPOSAL RAISES CONSTITUTIONAL ISSUES IS DUE DEFERENCE.

A. SCCRAP's Alternative Proposal Fails the "End Results" Test.

Utility rates must be "sufficient to yield a reasonable return" in order to avoid being characterized as "confiscatory" in violation of the Fifth and Fourteenth Amendment Takings Clauses. *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923). A reasonably sufficient return "assure[s] confidence in the financial soundness of the utility" and "enable[s] it to raise the money necessary for the proper discharge of its public duty." *Id*. at 693. *FPC v. Hope Natural Gas Co.* explained further that "[i]t is not theory but the *impact* of the rate order which counts." 320 U.S. 591, 602-03 (1944) (emphasis added). *Permian Basin Area Rate Cases* elaborated this "end-result" test by requiring the Commission to consider "pertinent factors" such as whether the rate will 1) "maintain the financial integrity of the utility," 2) "attract necessary capital," and 3) "fairly compensate investors for assumed risks." *Permian Basin Area Rate Cases*, 390 U.S. at 792. Such a determination is a result of "expert judgment" and carries "the presumption of validity." *FPC*, 320 U.S at 602.

Indeed, a noncompetitive return on equity fundamentally threatens all three conditions the Commission must consider under the end result test. As the New Mexico Public Utility Commission explains, "the cost of a public utility's common equity capital is simply another cost of furnishing service" equivalent to "wages to those who work for the company[.]" *Re Pub. Serv. Co. of New Mexico,* 8 P.U.R. 4th 113 (1975). *See also* Joel B. Eisen et al., ENERGY, ECONOMICS AND THE ENVIRONMENT 471, 475 (4th ed. 2015). Like workers who contribute labor and undertake other risks for work, shareholders contribute their money for the utility to use on often uncertain investments like environmental compliance. *Town of Norwood Mass. I*, 80 F.3d 526. Shareholders are therefore "entitled to a return . . . for the [utility's] use of their money" *Id*. Underpaid shareholders will find alternative investments with more competitive returns. Charles F. Phillips, Jr., THE REGULATION OF PUBLIC UTILITIES 394 (3d ed. 1993). Indeed, a mass exodus of shareholders would threaten the utility's "financial integrity" and prevent it from making "necessary capital investments." *Permian Basin Area Rate Cases*, 390 U.S. at 792.

Here, the Commission determined that the overall impact of a 3.2% or 3.6% return on equity suggested by SCCRAP would jeopardize ComGen's financial integrity and raise constitutional issues under the Takings Clause. *Order* at 12 ¶1. Indeed, 3.2% and 3.6% both fall far below the 10.0% return that the Commission authorized during ComGen's 2016 rate proceedings. *Order* at 10 ¶5. Given the technical expertise involved in the Commission's determinations, "the court's review of whether a particular rate design is just and reasonable is highly deferential." *Maine Pub. Utilities Com'n*, 454 F.3d at 288 (citing *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) and *Town of Norwood Mass. v. FERC* 962 F.2d 20, 22 (finding that the Commission's determinations on return on equity incentives for transmission restructuring were entitled to highly deferential review). Neither the reasonableness

of the Commission's authorization in 2016 nor the Commission's determination in its October 2018 decision are disputed here. Thus, the bar for reversing the Commission's decision is extremely high and SCCRAP has failed to reach it.

B. ComGen's Compliance Efforts Are Constitutionally Protected Prudent Investments.

A rate order is also confiscatory if it denies shareholders recovery of their prudent investment made pursuant to the utility's statutory duty to serve. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 292 (1923). *First*, SCCRAPs argument that ComGen is not constitutionally entitled to earn a reasonable rate of return due to mismanagement has already been addressed. *Order* at 11 ¶3. ComGen's implementation of the 2005 corrective plan was conclusively prudent. *See infra* Part II.b.

Second, denying full recovery of environmental remediation costs is inconsistent with the purpose of the prudent investment rule. The prudent investment rule in combination with the "just and reasonable" requirement on rates is designed to preserve a "relationship of reciprocity" between ratepayers and utility investors. William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721, 768 (2018). Investors give up the opportunity to reap higher returns in exchange for just and reasonable returns. Investors also have constitutionally protected interests in investments devoted to "public service." *Southwestern Bell Telephone Co.*, 262 U.S. at 292. Thus:

> *Expenses* . . . in its broad sense . . . are facts. They are to be ascertained, not created, by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce.

Mississippi River Fuel Corp. v. FPC, 163 F.2d 433, 437 (D.C. Cir. 1947) (emphasis added).

Here, ComGen is under a legal obligation to comply with environmental standards and provide continuous electric service to its customers regardless of risk, while the return it is entitled

to receive is statutorily restricted. Thus, when ComGen invests in regulatory compliance pursuant to its public obligations, shareholders are at least entitled to get a fair return on the investment. Denying remediation costs solely because ComGen's compliance efforts were imperfect when viewed with the benefit of perfect hindsight would be unfair and confiscatory.

C. Collateral Attacks On the Reasonableness of Prior FERC Decisions Are Unreviewable.

SCCRAP's contention that any threats to ComGen's financial integrity can only be attributed to the company's prior business decisions rather than the ratemaking question at issue here is a "collateral attack" on the Commission's prior decisions, and therefore disallowed. *Order* at 11 ¶2. The Commission had already approved Intervenor's restructuring decisions and power agreements prior to SCRRAP's lawsuit, pursuant to the Commission's authority under 16 U.S.C. §§ 824(b) and 824(d). *Order* at 4 ¶ 2-3. "[T]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 (1988). In *Mississippi Power & Light Co.*, consumers challenged the prudency of rate increases utilities proposed to recover their federally mandated allocation of construction costs. *Id*. at 362-63. The Court held that the Commission "has exclusive authority to determine the reasonableness of wholesale rates" and decisions that "affect wholesale rates." *Id*. at 371. Therefore, the "only appropriate forum" for challenges is "before the Commission or a court reviewing the Commission's order." *Id*. at 375. Thus, Petitioner's collateral challenge to the Commission's prior decisions is inappropriate here.

CONCLUSION

For the foregoing reasons, ComGen respectfully requests the District Court's decision be reversed and that FERC's order be upheld in all respects.

Appendix B

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Team 27 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. 27