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

C.A. No. 18-02345

Commonwealth Generating Company,
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,
Intervenor.

BRIEF OF APPELLANT/INTERVENOR
Commonwealth Generating Company

Team No. 11

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this court, Appellant/Intervenor Commonwealth Generating Company (ComGen) states that it is a wholly owned regulated subsidiary of Commonwealth Energy (CE), a multistate electric utility holding company system providing electric service at retail and wholesale rates in nine states, including Vandalia and Franklin. ComGen was incorporated in the District of Columbia in 2014.

ComGen sells 50% of the energy it produces to Vandalia Power Company (VPC) and 50% to Franklin Power Company (FPC) under unit power service agreements executed in 2014. Both VPC, with its principle place of business in Mammoth, Vandalia, and FPC, with its principle place of business in Capital City, Franklin, are wholly owned subsidiaries of CE that engage in generating, transmitting, and distributing electric energy to the public throughout Vandalia and Franklin.

Respectfully submitted,

/s/ Team No. 11

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 33 U.S.C. § 1365, the citizen-suit provision of the Clean Water Act, and entered final judgment on June 15, 2018. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Contemporaneously with its appeal, ComGen commenced rate proceedings with the Federal Energy and Regulatory Commission (FERC) under § 205 of the Federal Power Act to recover the costs of complying with the district court's order. FERC entered its Order on October 10, 2018, and this Court has jurisdiction over the appeal under 16 U.S.C. § 824*l*(b).

STATEMENT OF ISSUES PRESENTED

I. In light of the text, history, and purpose of the Clean Water Act, did Congress deliberately exclude ground water from federal regulation, even where it is "hydrologically connected" to jurisdictional waters?

II. The Little Green Run Impoundment was constructed to keep pollutants in place and stands as a static recipient of the rainfall above and the ground waters below that flow diffusely and unpredictably in all directions. Did the district court err in concluding the release of pollutants from the Little Green Run Impoundment caused by rainfall and ground water migration nevertheless constituted a discharge from a "discernable, confined and discrete conveyance" under the Clean Water Act?

III. Did the Federal Energy Regulatory Commission properly approve of ComGen's proposed rate increases where it addressed SCCRAP's objections directly, its reasoning is readily discernable, and its conclusions are supported by the facts and applicable law?

IV. Does a utility rate-making that fails to account for the costs in providing service to consumers, fails to satisfy investor interest in obtaining a reasonable return on equity, and jeopardizes the financial integrity of a regulated public utility constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

This case arises from a consolidated appeal to the United States Court of Appeals for the District of Columbia Circuit concerning the United States District Court for the District of Columbia's order granting injunctive relief, and the Federal Energy Regulatory Commission's (FERC's) order denying rehearing of the Order Accepting Commonwealth Generating Company's (ComGen's) Revised Rate Schedules. (Record at 2.)

ComGen, a wholly owned subsidiary of Commonwealth Energy (CE), purchased the Vandalia Generating Station (VGS) from Commonwealth Energy Solutions (CES)[1] in 2014 as part of a broader investment decision to transition into the regulated utilities market. (*Id.* at 4.) The VGS is a coal-fired electric generating station, consisting of two 550 megawatt units located on the Vandalia River, near Mammoth, Vandalia. (*Id* at 3-4.) Vandalia Unit Nos. 1 and 2 commenced operations in 2000 and 2002, respectively. (*Id*.) Coal combustion residues (CCRs) produced by the VGS are stored in accordance with standard industry practice at the Little Green Run Impoundment (LGRI), a coal ash pond formed by damming Green Run, which flows east of the VGS. (*Id*.)

In November 2014, ComGen entered into unit power service agreements with the Vandalia and Franklin Power Companies, pursuant to which fifty percent of the electrical output of the VGS is sold to the Vandalia Power Company (Rate Schedule No. 1), with the remaining fifty percent sold to Franklin Power Company (Rate Schedule No. 2). (*Id*. at 4.) The Vandalia and Franklin Power Companies are wholly owned subsidiaries of CE providing retail electric service to consumers in various regions within Vandalia and Franklin. (*Id.*)

The Vandalia Department of Environmental Quality (VDEQ) granted permits to the VGS pursuant to the state permitting program under the Clean Water Act (CWA). (*Id*. at 5, 7.) In

[1] CES is an unregulated energy wholesaler that is also a wholly owned subsidiary of CE.

compliance with its VDEQ permit CES conducted ground water monitoring at the VGS. (*Id.* at 5.) In 2002, CES detected elevated arsenic levels at the site and diligently notified the VDEQ in order to formulate a corrective action plan to mitigate the problem. (*Id*.) In accordance with the plan, CES hired a subcontractor to install a new high density polyethene (HDPE) geomembrane liner on the west embankment of the LGRI in 2006. (*Id*.) Despite these efforts, additional testing in 2017 revealed that rain and ground water were leaching pollutants into the surrounding soil, and ultimately into the Vandalia River. (*Id*. at 6.) An investigation by the VDEQ found that the seam in the HDPE geomembrane liner had been inadequately welded, resulting in seepage from the impoundment. (*Id*.)

In December 2017, Stop Coal Combustion Residual Ash Ponds (SCCRAP) filed suit against ComGen in the district court, invoking the citizen-suit provision of the CWA. (*Id*.) SCRAAP argued that ComGen violated the CWA by discharging a pollutant into navigable waters. (*Id*.) On June 15, 2018, the district court held that rainwater and ground water were leaching arsenic from the coal ash stored in the LGRI, polluting the groundwater, and thus carrying arsenic into navigable waters via Fish Creek and then into the Vandalia River. (*Id*. at 7-8.) The court rejected ComGen's arguments that the discharges did not constitute a point source, as the impoundment itself is not a conveyance. (*Id*. at 8.) Additionally, the court held that the seepage from the LGRI was actionable under the CWA because the ground water through which it travelled had a direct hydrological connection to navigable waters. (*Id*.) The district court ordered ComGen to fully excavate the coal ash from the LGRI and relocate it to a completely lined facility in compliance with the EPA's Coal Combustion Residual (CCR) rule. (*Id*.) On July 16, 2018, ComGen filed an appeal with this court, challenging the district court's conclusion. (*Id*.)

Simultaneous with its appeal to this court, ComGen filed proposed rate schedules with FERC in order to recover the costs of complying with the district court's order—an estimated $246

million over a 10-year period. (*Id.* at 9.) SCCRAP intervened, challenging the validity of ComGen's ability to recover its costs from utility ratepayers. (*Id*.) SCCRAP asserted, on the basis of the "prudence principle," that ComGen's shareholders, rather than utility ratepayers, must bear the burden of the district court's order. (*Id*.) In the alternative, SCCRAP argued that if FERC permits ComGen to recover its costs, it must do so in line with the "matching principle" of utility ratemaking. (*Id*.) This principle would require ComGen shareholders to proportionally bear the burden of the costs associated with the corrective action. (*Id*.) ComGen argued, inter alia, that it fulfilled its duty of care in hiring a competent subcontractor to install the HDPE liner, and if FERC were to find merit in SCCRAP's arguments, it would result in an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution. (*Id*. at 10.) While agreeing in principle with some of SCCRAP's arguments, FERC agreed that ComGen could not be held strictly liable for the failure of its subcontractor to adequately weld the HDPE liner, and the financial impact of requiring ComGen to bear the costs of the district court order alone would "jeopardize the financial integrity of ComGen and therefore raise constitutional issues under the Fifth and Fourteenth Amendments." (*Id*. at 12.) Following FERC's decision, SCCRAP sought a rehearing, which was denied by FERC on November 20, 2018. (*Id*.)

As a result, SCCRAP sought judicial review in this court on December 3, 2018, arguing that FERC's decision to approve ComGen's revised Rate Schedules No. 1 and No. 2 was arbitrary and capricious. (*Id*.) Because ComGen's appeal of the district court order and SCCRAP's appeal of the FERC order involve common parties and common issues, SCCRAP, ComGen, and FERC jointly moved to consolidate the actions, which this Court granted on December 21, 2018. (*Id.*)

SUMMARY OF THE ARGUMENT

Because the district court't injunction requiring ComGen to fully excavate and relocate the Little Green Run Impoundment (LGRI), at a cost to ComGen of $246 million, rests solely upon the district court's erroneous interpretation of the requirements of the Clean Water Act (CWA), its judgment should be reversed and its injunction vacated.

The district court improperly construed the jurisdictional scope of the CWA to cover the discharge of pollutants into ground water that is "hydrologically connected" to jurisdictional waters. However, as is clearly evident from the text, history, and purposes of the permitting and enforcement provisions of the CWA, Congress deliberately excluded ground water from federal regulatory control in an effort to preserve a system of cooperation between the federal government and the States. The "hydrological connection" theory adopted by the district court and urged upon this court by Appellees, would work a substantial intrusion of federal power into what has traditionally been reserved to the States, viz. the regulation of land and water use. Congress sought to preserve and promote State regulatory authority over ground water (whether hydrologically connected to surface waters or not). This court should join the well-reasoned decisions of its sister circuits and affirm Congress's intent.

The district court also misconstrued the effluent limitations provisions of the CWA in concluding that the release of pollutants from the LGRI as a consequence of rainfall and ground water migration constituted a "point source" discharge under the Act. However, only a "discernable, confined and discrete conveyance" qualifies as a "point source" subject to effluent limitations. Neither the LGRI, nor the ground water percolating underneath it, can be fairly characterized as such. The LGRI stands as a static recipient of rainfall and ground water flow and is constructed for the purpose of *keeping pollutants in place*. Moreoever, the ground water through which pollutants may travel and from which they may flow into surface waters is a diffuse medium

that "travels" unpredictably in all directions. No circuit has held, as the district court did, that a mere causal chain, traceable from the surface water discharge to a coal ash pond, renders source of the pollutants a "point source" for purposes of the prophylactic pollution controls set forth in the CWA.

Alternatively, because the order of the Federal Energy Regulatory Commission (FERC or Commission) granting ComGen's proposed rate increases was well-reasoned and supported by the facts and applicable law—and, therefore, neither arbitrary nor capricious—this court should affirm its decision.

Stop Coal Combustion Residual Ash Ponds (SCCRAP) raised two substantive challenges to ComGen's proposed rate schedules, both of which were addressed and rejected by the Commission's well-reasoned and factually and legally sound decision. Because ComGen owed no duty with respect to the manner in which its subcontractor installed the HDPE liner at the LGRI, it could not be adjudged negligent simply in virtue of the liner's eventual failure. As the "prudence principle" is the regulatory analogue to common law negligence, neither could ComGen be found to have imprudently incurred the costs associate with the subcontractor's inadequate workmanship. Therefore, the only plausible argument available to SCCRAP would be predicated on a theory of strict liability. However, as the FERC knew quite well, SCCRAP had the burden of producing reliable, probative, and substantial evidence *of imprudence*. Failing to carry this burden, SCCRAP's objections were properly rejected.

SCCRAP also claimed, on the basis of the general utility rate-making principle of "matching," that ComGen should be entitled only to recover a relatively insignificant portion of the cost of complying with the district court's order. However, like previous courts and Commissions, FERC was loathe to dismiss the very real likelihood that to deny ComGen a full recovery would raise significant constitutional concerns under the takings clause of the Fifth

Amendment. The Commission further explained that as a matter of agency policy, utilities must recover the costs of environmental cleanup in order to promote environmental protection generally. Courts exercise substantial deference to the Commission's policy judgments in this area, and this court should as well.

Finally, reversing the Commission's order in this case, and leaving ComGen without the ability to recover all or a substantial portion of its losses, would constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Contrary to SCCRAP's unjustified speculations, ComGen as well as its parent company, CE, prudently invested in the Vandalia Generating Station and, having subjected itself to federal price regulations, is entitled to a reasonable return on that investment. SCCRAP's position at the FERC hearing would deprive ComGen of compensation for its costs in providing services to consumers, cripple its ability to obtain a reasonable return on its investment and to attract new capital, and cast substantial doubt on its future financial integrity—all to save consumers three percent on their electric bill. No fair balancing of the relative interests of consumers and investors would sanction such an unjust and unreasonable result.

For these reasons, and for the reasons set forth below, we ask this court to reverse the judgment of the district court. Alternatively, the district court's injunction should be vacated and the case remanded for the district court to reconsider whether an injunction should issue. Should the decision of the district court be affirmed, the Commission's Order should likewise be affirmed in full.

ARGUMENT

I. FEDERAL AUTHORITY UNDER THE CLEAN WATER ACT DOES NOT EXTEND TO GROUND WATER EVEN WHERE IT IS HYDROLOGICALLY CONNECTED TO SURFACE WATERS.

Whether surface pollution via hydrologically connected groundwater is actionable under the Clean Water Act (CWA or Act) is a question of statutory interpretation, which this court reviews *de novo*. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008); *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388, 396 (D.C. Cir. 2017). "The judiciary is the final authority on issues of statutory construction," and where an administrative interpretation is inconsistent with the clear intent of the legislature, it must be rejected. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

A. The "hydrological connection" theory is inconsistent with the text, history, and purpose of the Clean Water Act.

The first step courts take in construing a statutory provision is to look to the plain meaning of its text, *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *Cal. Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004), "as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). As discussed below, the "hydrological connection" theory urged by appellees and adopted by the district court is inconsistent with Congress's clear intent, as evidenced by the text, structure, and history of the CWA, to limit the reach of the Act to surface water discharges.

1. The text of the CWA reveals the intent of Congress to exclude the migration of pollutants through groundwater from regulation under the Act, even where it is hydrologically connected to surface waters.

The CWA prohibits, in relevant part, "the discharge of any pollutant by any person" except where such discharge is in compliance with a National Pollution Discharge Elimination System (NPDES) permit (or state equivalent). 33 U.S.C. § 1311(a). The definitional provision of the Act

provides that the "discharge of a pollutant" is "the addition of any pollutant to navigable waters from any point source." § 1362(12). Thus, to make out a cause of action under the CWA "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*." Nat'l *Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Though somewhat cryptic, the statutory definition of "navigable waters" serves as Congress's statement of the outer limits of its jurisdiction under the Act and brings the regulatory scope of the CWA within the confines of Congress's power under the commerce clause. Were this the only expression of federal authority under the Act, the question whether the CWA governs pollution of surface waters via hydrologically connected groundwater would be a close one indeed, and would require that this court engage in a difficult analysis of the constitutional limitations of Congress's power over matters traditionally left to regulation by the States. *See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

When it enacted the CWA, however, Congress deliberately cabined its authority under the Act, providing that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).[2] Further, Congress was careful to distinguish "navigable waters" from "ground waters." *See, e.g.*, § 1252(a) ("navigable waters and ground waters"). And despite Congress's repeated references to ground water throughout the various provisions of the CWA, and despite

[2] *See also Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994) (holding that had Congress, in passing the CWA, attempted "to assert national power to the fullest," then perhaps (on analogy to the Supreme Court's seminal interstate commerce case, *Wickard v. Filburn*, 317 U.S. 111 (1942)), all hydrologically connected ground water "*could* be thought within the power of the national government," but concluding that it did not and, therefore, that the CWA does not grant federal jurisdiction over ground waters "just because these may be hydrologically connected with surface waters.").

the fact that it understood the potential effects that ground water pollution could have on the surface waters of the United States,[3] no mention of ground water can be found in the permitting provision under which the district court found ComGen liable nor in Congress's definition of "discharge of a pollutant."[4] *See* 33 U.S.C. §§ 1342, 1362(12).

An interpretation of the statute that extends the scope of the Act to cover hydrologically connected groundwaters would constitute a substantial expansion of federal authority into the "States' traditional and primary power over land and water use." *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). As this court has held, Congress "would have said so more clearly" if it intended statutory language to take on such a disputed meaning. *Bluewater Network v. EPA*, 370 F.3d 1, 18 (D.C. Cir. 2004). Indeed, such "an unprecedented intrusion into traditional state authority" would ordinarily require "[a] clear and manifest statement from Congress." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion). Yet no such statement of congressional intent can be found in the language of the CWA.

2. The legislative history of the CWA likewise reveals Congress's intent to exclude the migration of pollutants through groundwater from regulation under the Act.

In 1971 and 1972, as Congress was poised to enact the CWA, several bills and amendments were proposed that would have authorized the federal government to establish ground water pollution standards. *See* S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668,

[3] *See* S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 (discussed *infra*).

[4] However, as discussed below, Congress did encourage states to develop their own groundwater regulations under state permitting programs. *See, e.g.*, 33 U.S.C. § 1329(b)(2)(A) (encouraging state management programs that consider "the impact of the practice on ground water quality"). Both Vandalia and Franklin established such programs under the Act. (Record at 7.) The Vandalia Department of Environmental Quality established groundwater quality standards as part of the Vandalia state permit program, and it was the groundwater monitoring requirement contained in therein that initially alerted CES to the need to take corrective action at the Little Green Run Impoundment. (*Id*. at 5.)

3739. However, the Senate Committee on Public Works recognized that expansion of federal authority over groundwaters would embroil the federal government in the complexities and idiosyncrasies of state ground water jurisdiction. *Id.* Therefore, notwithstanding recognition of "the essential link between ground and surface waters," these proposals were rejected. *Id.*

In particular, an amendment was offered by Congressman Aspen of Wisconsin that would have inserted "and ground waters" after nearly every instance of the words "navigable waters" found in the permitting and enforcement provisions of the Act, including those at issue in this case. 118 Cong. Rec. 10609, 10666 (1972). Mr. Aspen argued, "If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not ground water makes no sense at all." *Id.* After thorough debate, the House rejected the amendment by a vote of 86 to 34. *Id.* at 10669. That Mr. Aspen's amendment was soundly rejected "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Int'l Bhd. Of Elec. Workers v. NLRB*, 814 F.2d 697, 711 (D.C. Cir. 1987) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). Yet Appellees would have this court read Mr. Aspen's amendment into the very statute from which it was deliberately excluded.

3. Subsequent agency interpretations are entitled to no deference.

The EPA has proposed and promulgated several different—often contradictory—interpretations of its jurisdictional reach under the Act. In 1973, General Counsel for the EPA stated that under the CWA, "the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters (or the contiguous zone of the ocean). *Discharges into ground waters are not included*." *Exxon Corp. v. Train*, 554 F.2d 1310, 1320 n.21 (5th Cir. 1977) (emphasis added). However, in 1990, the Agency began to quietly expand its supposed authority. In promulgating a rule for National Pollutant Discharge Elimination System (NPDES) permit

applications regulating storm water discharges, the EPA stated, "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)." 55 Fed. Reg. 47990-01, 48036 (Nov. 16, 1990). Again, in 2001, the EPA proposed a rule that asserted the Agency's reach into hydrologically connected ground waters, "[n]otwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of ground waters." 66 Fed. Reg. 2960-01, 3016-17 (Jan. 12, 2001). The EPA reasoned that although ground waters are not "waters of the United States," discharges to ground waters can be regulated "because such discharges are effectively discharges to the directly connected surface waters." *Id.* at 3017. Subsequent rules promulgated in 1997 and 2001 likewise reasserted the Agency's view that it had authority to regulate discharges into hydrologically connected ground waters. *See* 62 Fed. Reg. 20177-01, 20178 (April 25, 1997); 66 Fed. Reg. 2960-01, 3017 (Jan. 12, 2001).

However, the EPA revisited its position on the hydrological connection theory in 2014, proposing that "other waters" could be "waters of the United States" where they are shown to have a "significant nexus" to a traditional navigable water, such as an ocean, river, or lake. 79 Fed. Reg. 22,188-01, 22,188-89 (proposed April 21, 2014). Presumably, therefore, ground waters with a "significant nexus" to oceans, rivers, or lakes would constitute "waters of the United States" under the CWA—a result that directly contradicts the Agency's own position in 2001 (never mind the text of the CWA itself). *See* 66 Fed. Reg. at 3017. The EPA's final rule, promulgated in 2015, officially established as a matter of agency interpretation, the "significant nexus" standard, which it adopted in large measure from Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006). *See* 80 Fed. Reg. 37,054-01, 37,056, 37,065-73 (June 29, 2015).

Even if this were the EPA's final attempt at defining the reach of its authority under the CWA, the history of inconsistent agency interpretations would be enough to call into question

what deference, if any, ought to be afforded the 2015 rule (or any prior rule). However, the EPA continues to vacillate. Pursuant to an executive order issued in 2017 by President Trump,[5] the EPA sought public comment on the question "whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation." 83 Fed. Reg. 7126-01, 7126 (Feb. 20, 2018) (to be codified at 40 C.F.R. pt. 122). The Agency downplayed the significance of its previous statements regarding the hydrological connection theory, noting that those statements were merely "collateral to the central focus of a rulemaking or adjudication." *Id.* at 7127. Indeed, it acknowledged that in the past, it had declined to establish federal limitations on discharges to "groundwater with a direct hydrological connection to jurisdictional water." *Id.* However, far from claiming to have communicated a consistent and coherent agency view, the EPA proceeded to highlight the substantial confusion in the federal courts that has resulted from the coy manner in which it had gone about "defining" its own authority relative to hydrologically connected ground waters. *See id.* at 7127-28. Thus, it would constitute a peculiar application of judicial deference to turn to the EPA for guidance in construing the CWA at the very moment it is inclined to reverse course and has turned to the public for guidance on the very same question that is before this court. *See id.* at 7128 (requesting public comment on the question whether including discharges to hydrologically connected ground waters within the ambit of EPA authority "is consistent with the text, structure, and purpose of the CWA"); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (holding that no

[5] *See* Exec. Order No. 13778, 82 Fed. Reg. 12497 (2017). The President ordered the EPA Administrator to review the 2015 rule and "consider interpreting the term ["navigable waters"] . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)," which the President presumably decided was more in keeping with "the roles of the Congress and the States under the Constitution" than Justice Kennedy's "significant nexus" test. *See id.* at 12497.

deference is owed to an agency interpretation "when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter") (internal quotations and citation omitted). As the Supreme Court has held, "subsequent history is less illuminating than the contemporaneous evidence," *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) (citation omitted), and given the EPA's seesawing interpretations of the CWA over the years, it is even less illuminating here.

B. The "hydrological connection" theory is inconsistent with Supreme Court precedent as well as the well-reasoned decisions of sister circuits.

Although the Supreme Court has yet to weigh in on the precise question at issue in this case, it has had occasion to consider the jurisdictional reach of the CWA in illustrative contexts. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court held that federal authority under the Act extends to waters and wetlands beyond those that fall within the traditional concept of "navigable waters" (i.e. navigable-in-fact), and that including waters and wetlands that are adjacent to, and "inseparably bound up with," the waters of the United States is not an impermissible interpretation of the reach of that authority. *Id.* at 133-34. However, in *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court qualified its holding in *Riverside Bayview*, emphasizing that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.

Finally, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court held that the term "navigable waters" in the CWA "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739 (plurality opinion) (alteration in original) (citation omitted). The Court, in its plurality opinion, did note (as dicta) that the discharge of pollutants to navigable waters need not be "direct"; however, this statement must be

read in the context of the Court's narrow interpretation of "navigable waters," as well as its true concern, viz. making clear that "even if pollutants discharged *from a point source* do not emit 'directly into' covered waters, but pass 'through *conveyances*' in between" they may be subject to regulation under the Act. *See id.* at 743 (emphasis added). Nothing in the Court's brief discussion of "direct" versus indirect pollution of navigable waters suggests that the it was expanding the scope of the Act, or that pollutants travelling through ground water—a nonpoint source—fall under its jurisdiction.

In the time since the *Rapanos* decision, a notable circuit split has emerged. Some courts have held that the enforcement provisions of the CWA contemplate surface pollution through hydrologically connected ground water. *See, e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) (holding that pollutants from a ruptured pipeline travelling to navigable waters through hydrologically connected groundwater is actionable under the CWA); *Hawai'I Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (going further and requiring that pollution of navigable waters need only be "fairly traceable" to a point source to constitute a violation of the CWA). Other courts, however, hold that the "hydrological connection" theory is unsupported by the text of the CWA. *See, e.g.*, *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018) (holding that pollution from coal ash ponds that makes its way to navigable waters by way of hydrologically connected ground water is not regulated under the CWA); *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018) (holding that the effluent limitations imposed by the CWA prohibit discharges from a point source "into" navigable waters and, therefore, the Act "leaves no room for intermediary [nonpoint source] mediums to carry the pollutants" from a coal ash pond to navigable waters).

Because the district court's atextual extension of federal authority under the CWA to include groundwater with a hydrological connection to surface waters finds no support in the language of the Act, flies in the face of contrary textual and historical evidence, and fails to square with Supreme Court precedent and the well-reasoned decisions of other circuits, it's decision cannot stand.

II. THE RELEASE OF POLLUTANTS FROM THE LGRI CAUSED BY RAINFALL AND GROUND WATER MIGRATION DOES NOT CONSTITUTE A "POINT SOURCE" DISCHARGE UNDER THE CWA.

As explained, the CWA prohibits the "the discharge of any pollutant by any person," except as in compliance with, inter alia, the Act's permitting requirements. 33 U.S.C. §§ 1311(a), 1342. The "discharge of a pollutant" is "any addition of any pollutants to navigable waters from any point source." § 1362(12). Congress further defined "point source" as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." § 1362(14).

The distinction between point source and nonpoint source pollution is important because it further delineates the boundary of federal jurisdiction under the Act and makes clear that, consistent with its effort to address water pollution through a system of cooperative federalism, Congress intended the regulation of nonpoint source pollution to be carried out by the States. *See, e.g.*, § 1329 (providing the framework for State nonpoint source management programs).

Circuit courts that have considered the question are unanimous in holding that pollution from a coal ash impoundment or landfill that percolates through ground water and eventually finds its way into jurisdictional surface waters does not constitute a "point source" discharge. *See Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018) (holding that coal ash impoundments are not created to convey pollutants and do not function as such); *Kentucky Waterways*, 905 F.3d 925, 933 (holding that while ground water may serve to "convey" coal ash pollutants to surface waters, it is not "confined" and "discrete" as required by the CWA);

Tennessee Clean Water Network, 905 F.3d 436, 444-45 (6th Cir. 2018) (holding that groundwater, which is adding coal ash pollutants to surface waters, is not a point source and, therefore, pollutants are not being discharged into surface waters "*from* a point source").

Notwithstanding this wall of precedent, the district court concluded that the migration of pollutants from the Little Green Run Impoundment (LGRI) through the underlying ground waters was a "point source" discharge for purposes of the effluent limitations provision of the CWA. (Record at 7-8.) It held that the LGRI was a "point source" because

> ComGen built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River.

(Opinion at 10). However, this finding conflicts with the express intentions of Congress as well as the holdings of a majority of the federal circuit courts—even among those that have adopted the "hydrological connection" theory. *See, e.g.*, *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018) (holding that a mere causal link does not satisfy the requirement that a discharge be "*from a point source*"). No circuit court has held that the mere existence of a causal chain, tracible to a source of pollution, renders that source (or the diffuse media through which the pollutants may travel) a "point source," subject to regulation under the CWA. And for good reason: neither the LGRI nor the ground water below constitutes a "discernable, confined and discrete conveyance" as Congress intended, and as courts have construed, those terms. Because the district court's erroneous interpretation of the CWA's effluent limitations provision presents a question of statutory interpretation, its decision is reviewed *de novo*. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008); *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388, 396 (D.C. Cir. 2017).

A. Coal ash impoundments like the LGRI are not "point sources" because they do not function as "conveyances," moving pollutants from one place to another.

The district court held that the LGRI is a "point source" because it is "[e]ssentially . . . a discrete mechanism that conveys pollutants from the Vandalia Generating Station to the Vandalia River." (Opinion at 10.) However, in light of the fact that the LGRI exists in order to keep pollutants in place and stands as a mere "static recipient[] of the precipitation and groundwater that flow[s] through [it]," this characterization strains credulity and makes a hash of the "well-understood term," "conveyance." *See Sierra Club*, 903 F.3d at 410.

In *Sierra Club*, the Fourth Circuit held that a coal ash impoundment from which pollutants were percolating through the underlying ground water into surface waters did not constitute a "point source" within the meaning of the CWA. 903 F.3d at 410. The defendant had operated a coal-fired power plant for over 60 years, during which time it stored the coal ash produced as a byproduct of its operation in settling ponds identical in all relevant respects to the LGRI. *See id.* at 405-406. The Sierra Club brought a cause of action under the CWA, arguing that ground water seepage from the settling ponds that was reaching surface waters constituted the discharge of a pollutant from a point source in violation of 33 U.S.C. § 1311(a), the CWA's effluent limitations provision. *Id.* at 406. As here, the district court ruled that the settling ponds were "point sources" under the Act because defendants "built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the old power plant to the river." *Id.* at 410. However, the circuit court disagreed, concluding that the mere fact that pollutants reached navigable waters from the settling ponds was not sufficient to show that the settling ponds were "point sources" within the meaning of the CWA. *Id.*

The *Sierra Club* court made clear that coal ash impoundments are not created to convey anything and do not function as such—indeed, they are created to do the very opposite: keep pollutants in place. *See id.* at 411. The court reasoned that, as here,

> the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil. This diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula. Thus, the landfill and settling ponds could not be characterized as discrete "points," nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them.

Id. Thus, if any "conveyance" was involved in the migration of pollutants from the Vandalia Generating Station to the Vandalia River, it was the rain or ground water itself. However, as set forth below, courts have universally rejected the alternative theory of liability that asserts ground water is a "point source" from which pollutants may be added to jurisdictional waters.

B. Ground water is not a "point source" because it is not "discernible, confined, and discrete."

Given the universal rejection of the impoundment-as-point-source argument, litigants have attempted to bring the migration of pollutants through hydrologically connected ground water within the ambit of CWA regulations by asserting that ground water is itself a point source capable of discharging pollutants into navigable waters. However, this argument is unavailing as it controverts the very definition of "point source" provided in the Act, and attempts to surreptitiously sweep ground water regulation back into a regulatory regime from which it was deliberately excluded.

To constitute a "point source" discharge, pollutants must be added to jurisdictional waters from a "discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). As courts have recognized, whether or not ground water is a "conveyance," insofar as carries pollutants from one place to another, it is not "discernible," "confined," or "discrete" as those terms are reasonably defined. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018). Ground water

is a diffuse medium that, by its very nature percolates through soil in all directions. Such a "conveyance" is hardly what Congress had in mind when it sought to regulate point source discharges. In defining "point sources" under the Act, Congress listed examples, including pipes, ditches, channels, tunnels, conduits, wells, and discrete fissures, § 1362(14), evidencing a clear intent to include only those conveyances with discrete and discernable contours—a characteristic entirely inapplicable to ground water. *See Ky. Waterways*, 905 F.3d at 933.

The distinction between conveyances with discrete and discernable contours and those without is not mere hairsplitting, nor is it merely academic. The reason Congress created the CWA's permitting program (and associated effluent limitations) in the first place was to transition from the prior regulatory scheme, which focused only on remediation once navigable waters had been polluted, to a prophylactic scheme, designed to regulate pollutant discharges before they occur. *See* S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675. This purpose can only be realized where pollutants are channeled through a "discernable, confined and discrete conveyance" because only these can be identified, measured, and subjected to prophylactic regulations. The flow of ground water is simply too diffuse and unpredictable to be made the object of a permitting program, which (it stands to reason) is why Congress left all mention of it out of the permitting and enforcement provisions of the Act.

The district court's contrary conclusion would permit litigants to sneak ground water regulation in through the back door. But ground water is no more a "point source" than it is a "navigable water." To hold otherwise would effectively swallow the distinction between ground and surface waters that the Act sought to preserve. Therefore, because the district court's finding that the LGRI constitutes a "point source" is contrary to the text and purposes of the CWA as well as the holdings of virtually every court that has considered the question, it must be reversed.

III. FERC'S APPROVAL OF COMGEN'S REVISED RATE SCHEDULES WAS WELL-REASONED AND SUPPORTED BY THE FACTS AND APPLICABLE LAW.

SCCRAP challenged the proposed revisions to ComGen's FERC Rate Schedules 1 & 2, filed pursuant to section 205 of the Federal Power Act (FPA)[6], which would permit ComGen to recover the substantial costs associated with complying with the district court's order to "fully excavate" and relocate the LGRI. (Record at 8-9.) It argued that the proposed rate revisions should be denied on the basis of what it claimed was ComGen's "incompetent implementation of the corrective action plan" that Commonwealth Energy Solutions (CES) (ComGen's parent company) had developed in 2006 after it discovered elevated arsenic levels in the ground water at the LGRI. (*Id.* at 5, 9.)

SCCRAP claimed that had ComGen implemented the corrective action plan according to what SCCRAP considers "prudent utility practice," there never would have been any seepage of arsenic and, therefore, no district court order requiring ComGen to excavate the LGRI. (*Id.* at 9.) Thus, asserted SCCRAP, the costs incurred by ComGen in having to excavate and relocate the LGRI should be borne by ComGen's shareholders rather than allowed to flow through to the Vandalia and Franklin Companies. (*Id.*) SCCRAP argued, in the alternative, that ComGen's recovery should be limited by the "matching principle" of utility rate-making. (*Id.*) It claimed that because the Vandalia Generating Station commenced operations prior to the execution of power service agreements with the Vandalia and Franklin Power Companies in 2014, only the costs associated with coal ash disposal since 2014 should be allocated to those utilities and their retail consumers. (*Id.*)

However, the Federal Energy Regulatory Commission (FERC or Commission) disagreed. (*Id.* at 11.) Although the Commission "accepted in principle" some of the arguments advanced by

[6] 16 U.S.C. § 824d (2015).

SCCRAP, it decided that, with respect to its imprudence argument, ComGen could not be held strictly liable for the subcontractor's failure to adequately weld the HDPE liner. (*Id.*) With respect to SCCRAP's alternative argument, viz. that ComGen is entitled to recover only a small portion of its costs through increased rates, the FERC ruled that the financial impact that would befall ComGen if the Commission denied recovery of such a substantial portion of its costs would jeopardize its financial integrity, raising serious constitutional issues under the Fifth and Fourteenth Amendments. (*Id.* at 12.) The Commission further emphasized "the importance of ensuring that utilities are able to recover in rates the costs of environmental cleanups as a means of promoting environmental protection." (*Id.*) Candidly, the Commission's precise analytical path is not stated with perfect clarity on the face of the record, however its reasoning, as elaborated below, is readily discernable.

This court reviews FERC orders under the familiar arbitrary and capricious standard. 5 U.S.C. § 706; *Lichoulas v. FERC*, 606 F.3d 769, 775 (D.C. Cir. 2010). The scope of review under this standard is narrow, the Commission's rate decisions are afforded great deference, *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016), and the validity of its rulings is presumed, *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 658 (D.C. Cir. 2004). Indeed, courts must uphold such decisions even where they are "of less than ideal clarity" if the Commission's analytical path "may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974). "[N]owhere is that more true than in a technical area like electricity rate design." *Elec. Power Supply*, 136 S.Ct. at 782. Moreover, this court defers to the Commission's "reasonable application of its own precedents." *Vernal Enters.*, 355 F.3d at 658.

A. The Commission's ruling addressed SCCRAP's "imprudence" objection directly, was supported by both the facts and the law, and was therefore not arbitrary or capricious.

As a threshold matter, it should be noted that while the CWA is a strict liability statutory regime, *see* 33 U.S.C. § 1311(a), the FERC applies a "prudent investment" standard when deciding whether to approve proposed rate increases meant to reflect a utility's increased costs, *see, e.g.*, *Re New England Power Co.*, 31 F.E.R.C ¶ 61047, 61084 (1985). The purpose of the prudent investment standard is to "exclud[e] what might be found to be dishonest or obviously wasteful or imprudent expenditures" from the calculation of a utility's rate-base. *Mo. ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 289 n.1 (1923). Therefore, the test essentially operates as the regulatory analogue to common law negligence. *See id.*; Richard J. Pierce, *The Regulatory Treatment of Mistakes in Retrospect*, 132 U. Pa. L. Rev. 497, 511 (1984). As such, a finding of liability under the CWA does not simultaneously prove that a utility was "imprudent" for purposes of a rate-making determination. Quite the opposite: it is "[b]y now . . . axiomatic that a regulated utility enjoys a rebuttable presumption that it has conducted its operations prudently, in good faith, and consistent with principles of efficiency and economy." *Wis. Elec. Power Co.*, 73 F.E.R.C. ¶ 63019, 65225 (1995). Therefore, a utility is not required to demonstrate that its expenditures were prudently incurred in its case-in-chief, and unless an intervening party raising the issue of prudent investment can "establish its position with 'reliable, probative and substantial evidence,' the utility will be permitted to recover those costs." *Id.* at 65225-26 (citations omitted); *See* 16 U.S.C. 824e(b).

Thus, it is against this "axiomatic" backdrop that the Commission considered SCCRAP's claims in opposition to ComGen's rate proposals. The Commission's ruling, viz. that ComGen should not be held strictly liable for its subcontractor's failure to adequately weld the HDPE liner, follows directly from the nature of SCCRAP's objections and flows inevitably from the law and standards of proof applicable to a rate-making decision.

Specifically, SCCRAP argued that but for ComGen's "incompetent implementation of the corrective action plan[,]" "there would have been *no seepage of the arsenic into the groundwaters* surrounding the [LGRI]." (Record at 9) (emphasis added). Although the Commission later expressed the view that, in hindsight, ComGen might have discovered the problem earlier had it "properly monitored the effectiveness of the corrective action[,]" (*id.* at 11), SCCRAP's objection is clearly targeted at what it considered to be the negligent installation of the HDPE liner.

However, under the principles of common law negligence, ComGen "owe[d] no duty as to the manner in which the work [was] performed" by its subcontractor. Restatement (Third) of Torts: Phys. & Emot. Harm § 56 (Am. Law. Inst. 2012). The only duty owed by ComGen with respect to the installation of the HDPE liner was to exercise reasonable care in hiring a competent subcontractor and in deciding whether to proceed with the installation of an HDPE liner in the first place. *Id.* at § 55 cmt. c, e. But SCCRAP never disputed that ComGen exercised reasonable care with respect to these affirmative duties. (*See* Record at 9.) And for good reason: there is simply no evidence in the record, now or at the time of the FERC proceedings, that would suggest ComGen failed to hire a competent subcontractor. Moreover, ComGen's decision to install the HDPE liner was—far from negligent—an affirmation and fulfillment of its duty of care. *See, e.g.*, Restatement (Third) of Torts: Phys. & Emot. Harm §§ 38-39. Thus, the evidence proffered by SCCRAP at the FERC hearing—viz. the mere fact that the HDPE liner failed—was entirely lacking in probative value with respect to the question of ComGen's "imprudent" implementation of the corrective action plan.

With no theory of negligence upon which to rest SCCRAP's assertion that ComGen's 246-million-dollar liability was imprudently incurred, the Commission declined to deny ComGen's rate proposals on the basis of the only remaining theory that SCCRAP could plausibly sustain: strict liability. (Record at 11.) Although a strict liability argument may very well be available to

SCCRAP in an action sounding in tort (or perhaps nuisance), the standard for successfully challenging a utility's proposed rate increase is "reliable, probative and substantial evidence" of *imprudence*. *Wis. Elec. Power Co.*, 73 F.E.R.C. at 65225. SCCRAP failed to meet this evidentiary burden and, accordingly, its challenge was denied.

Therefore, the reasons given by the Commission for rejecting SCCRAP's arguments, based as they were on inapposite theories of imprudence, were not only relevant and discernable but eminently reasonable and proper. As such, its decision should be affirmed.

B. The Commission's ruling addressed SCCRAP's "matching principle" objection directly, was supported by both the facts and the law, and was therefore not arbitrary or capricious.

As explained, SCCRAP argued to the Commission that ComGen should be prevented from incorporating into its rate base a substantial portion of the costs it incurred as a result of the district court's order to fully excavate and relocate the LGRI because the power service agreements executed between ComGen and the Vandalia and Franklin Power Companies were not entered into until 2014, several years after the Vandalia Generating Station came online. (Record at 9.) It now claims that the Commission's refusal to adopt SCCRAP's alternative proposal on the basis of constitutional concerns was arbitrary and capricious. (*Id.* at 12.) However, the Commission was clear in its reasons for denying SCCRAP's proposal: whatever merits there may be to the argument that under the general rate-making principle of "matching," Vandalia and Franklin Power Company retail consumers ought not to bear the burden of the district court's injunction, the constitutional concerns such an outcome would implicate were too weighty to ignore. (*Id.*) Because the Commission's reasoning and conclusions are well-supported by both the facts and the law, its decision was not arbitrary or capricious and should be affirmed.

To be sure, the "matching principle," according to which the Commission seeks to set rates such that ratepayers are charged for costs arising out of the services they receive, is an established

methodology in utility rate-making. *Town of Norwood, Mass. v. F.E.R.C.*, 53 F.3d 377, 380-81 (D.C. Cir. 1995). Nevertheless, even well-established principles of utility rate-making must give way to conflicting constitutional dictates. As this court has held, it is the "end result" and the consequences of the Commission's action overall that serve as the constitutional standard when determining whether approved rates are just and reasonable—not whether the Commission was faithful to a particular rate-making methodology. *See Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1175-83 (D.C. Cir. 1987) (citing . The Commission credited ComGen's evidence of the impact that denial of its proposed rate schedules would have on its ability to maintain financial integrity, and concluded quite rightly that constitutional implications outweighed SCCRAP's demand for mathematical fidelity to the matching principle, and emphasized the importance of "ensuring that utilities are able to recover in rates the costs of environmental cleanups as a means of promoting environmental protection." (Record at 12.) As this court has recognized, such policy judgments lie "at the core of FERC's regulatory mission," and are therefore afforded "substantial deference." *Sacramento Mun. Utility Dist. v. F.E.R.C.*, 616 F.3d 520, 532 (D.C. Cir. 2010) (citation and internal quotation marks omitted).

IV. PROHIBITING RECOVERY OF ALL OR A SUBSTANTIAL PORTION OF COMGEN'S PRUDENTLY INCURRED COSTS WOULD AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

SCCRAP's proposal, which would bar recovery of the $246 million necessary to fully excavate and relocate the LGRI, as well as its alternative proposal, which would bar the recovery of 80.5% of those costs ($198 million), would amount to an unconstitutional taking, as the U.S. Constitution prohibits the government and its actors from taking private property for public use without just compensation. *See* U.S. Const. amends V, XIV. The Supreme Court has long recognized that unconstitutional takings can be effectuated through government regulation. Indeed, as the Court has made clear—and as has been reiterated time and again by this court and

others—"[the] power to regulate is not a power to destroy," nor does it grant to the government the power to "do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886). *See, e.g.*, *Dem. Central Comm. of Dist. Of Columbia v. Wash. Metro. Area Transit Comm'n*, 436 F.2d 233, 235, 235 n.7 (D.C. Cir. 1970) (citing *Stone* in support of its holding that a transit company must be permitted to recover past losses through future fares because it could not "treat lightly the serious constitutional question that denial of the increases would pose").

The Federal Power Act (FPA) grants the FERC authority over the transmission and sale of electricity by a public utility doing business in interstate commerce. 16 U.S.C. § 824. The Commission has both a constitutional and statutory duty to ensure that wholesale utility rates are just and reasonable. § 824d(a); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). A "just and reasonable rate . . . should be based on the costs of providing service to the utility's customers, plus a just and fair return on equity." *Northwestern Corp. v. F.E.R.C.*, 884 F.3d 1176, 1179 (D.C. Cir. 2018). Further, public utilities are entitled to rates and returns similar to those being made at a similar time and place by other "business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923). To offer a fair and reasonable return on investment, a rate must be "reasonably expected to [permit the utility to] maintain financial integrity, attract necessary capital [and credit], and fairly compensate investors for the risk they have assumed." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). Moreover, courts will aside a rate ordered by the Commission if it is outside of the "zone of reasonableness," *id.* at 797, existing between an investor's interests against confiscation and a consumer's interest against exorbitant rates, *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950). In providing a valued public service, GomGen is entitled to rates that allow it to recover costs associated with the

operation and maintenance of its facilities. *Alabama Power Co. v. F.E.R.C.*, 160 F.3d 7, 8 n.1 (D.C. Cir. 1998). An element of those costs is

In opposition to ComGen's constitutional arguments, SCCRAP maintains that ComGen is not entitled to a reasonable rate of return on its investment in light of what it considers to be "utility mismanagement." (*Id.* at 11.) In support of this assertion—but without any support in the record—SCCRAP claims that Commonwealth Energy (CE), of which ComGen is a wholly owned subsidiary, "saddled" its own utility company with an unprofitable power plant (Vandalia Generating Station), in order to exact its supposed losses on Vandalia and Franklin ratepayers. (*Id.*) As explained, CE incorporated ComGen as part of a broader business decision to invest in the regulated utility market. (*Id.* at 4.) ComGen's subsequent acquisition of the Vandalia Generating Station from Commonwealth Energy Solutions, CE's subsidiary in the unregulated energy market, was an element in that investment strategy. (*Id.*) This investment gained regulatory approval in 2014 and, as such, GomGen's is entitled to a reasonable rate of return.

ComGen's most recent FERC-approved rate was a 10% return on equity. (Record at 10.) Were ComGen precluded from recovering the cost of achieving compliance with the district court's order, its rate of return would fall to 3.2% (or 3.6% under SCCRAP's "matching" proposal)—a staggering 68% loss. (*See id.* at 10-11.) However, under the Commission's approved rate increase, the average Vandalia and Franklin ratepayer would see his monthly bill increased by a mere $3.30 for the 10-year amortization period. (*Id.* at 9.) A fair balancing of interests between investors and consumers would surely preclude a result that imposed upon a public utility a nearly seventy-percent loss in return on equity, putting it at risk of utter financial collapse, in order to save consumers from a three percent increase in their monthly electric bill.

For the foregoing reasons, adoption of SCCRAP's position in the FERC hearing would result in a rate that, in virtue of its failure to properly balance the interests of investors against

confiscation, violates the constitutional prohibition against the taking of private property for public use without just compensation. As such, SCCRAP's position should be rejected and the Commission's Order affirmed.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed, and judgment should be entered in favor of ComGen. Alternatively, the district court's injunction should be vacated and the case remanded for the district court to reconsider whether an injunction should issue. Should the decision of the district court be affirmed, the Commission's Order should likewise be affirmed in full.

Respectfully submitted,

/s/ Team No. 11

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 4, 2018.

Respectfully submitted,

/s/ Team No. 11