C.A. No. 18-02345

In the

United States Court of Appeals for the District of Columbia Circuit

COMMONWEALTH GENERATING COMPANY
Appellant,

v.

STOP COAL COMBUSTION RESIDUAL ASH PONDS
Appellee.

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

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STOP COAL COMBUSTION RESIDUAL ASH PONDS
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

COMMONWEALTH GENERATING COMPANY
Intervenor.

On Petition for Review from the Federal Energy Regulatory Commission

BRIEF FOR APPELLANT/INTERVENOR

Team No. 21
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JURISDICTIONAL STATEMENT

The District Court for the District of Columbia had jurisdiction according to the citizen suit provisions of the Clean Water Act and under federal question jurisdiction. 28 U.S.C. § 1331; 33 U.S.C. § 1365(a). The district court entered a final judgment on June 15, 2018, and Commonwealth Generating Company timely filed its appeal on July 16, 2018. R. at 7–8. This Court has jurisdiction to hear the appeal from the United States District Court for the District of Columbia under 28 U.S.C. § 1291.

The Federal Energy Regulatory Commission issued its decision on October 10, 2018, and Stop Coal Combustion Residual Ash Ponds timely sought rehearing of this decision on November 9, 2018. R. at 11. The Federal Energy Regulatory Commission issued an order denying the rehearing on November 30, 2018, and Stop Coal Combustion Residual Ash Ponds timely petitioned this Court on December 3, 2018. R. at 12. This Court has jurisdiction to hear this case because of the constitutional issue involved according to federal question jurisdiction under 28 U.S.C. § 1331, as well as under 16 U.S.C. § 2633.

STATEMENT OF THE ISSUES PRESENTED

I. Under the Clean Water Act (CWA), is the seepage of arsenic into navigable waters actionable when it reaches the navigable waters through hydrologically connected groundwater?

II. Under the CWA, does pollution from coal ash ponds constitute the discharge of a pollutant from a point source when the pollution is conveyed through hydrologically connected groundwater?

III. Under the Administrative Procedure Act, is the Federal Energy Regulatory Commission's (FERC) decision to approve revised rate schedules arbitrary and capricious when the utility filed the rate change primarily to recover the cost of achieving environmental compliance?

IV. Under the Fifth and Fourteenth Amendments, is a FERC denial of a revised rate schedule an unconstitutional taking when the denial of the rate schedule results in an unprofitable venture for the utility?

STATEMENT OF THE CASE

Commonwealth Generating Company (ComGen) is an electric utility holding company incorporated in the District of Columbia. R. at 3. In 2014, after ComGen acquired the Vandalia Generating Station, ComGen contracted with Vandalia Power Company and Franklin Power Company to provide power to portions of Vandalia and Franklin. R. at 4.

Clean Water Act Action

In 2002, ComGen discovered groundwater was being contaminated by the coal ash ponds at the Little Green Run Impoundment where the coal combustion residuals from the Vandalia Generating Station are stored. R. at 5. Once this was discovered, ComGen informed the Vandalia Department of Environmental Quality and began implementing a corrective plan, which was

approved in 2005. R. at 5. In 2006, ComGen installed a high-density polyethylene (HDPE) geomembrane liner to prevent further percolation from the coal ash ponds at Little Green Run Impoundment. R. at 5. In 2017, the Vandalia River was found to contain elevated levels of arsenic, which was later attributed to the Little Green Run Impoundment after it was discovered that a subcontractor had inadequately welded the HDPE liner. R. at 5–6.

Stop Coal Combustion Residual Ash Ponds (SCCRAP) filed suit in December 2017 and alleged that ComGen was violating the Clean Water Act's prohibition on the discharge of pollutants into navigable waters. R. at 6. SCCRAP alleged that the Little Green Run Impoundment was a point source which polluted the groundwater that was hydrologically connected to the Vandalia River. R. at 7. The District Court of the United States for the District of Columbia agreed and issued an order that arsenic was leaching from the Little Green Run Impoundment, travelling through hydrologically connected groundwater to eventually pollute the navigable waters of the Vandalia River. R. at 7. The court held that the Clean Water Act (CWA or the Act) supported a hydrologically connected theory, and that the coal ash ponds constituted a point source under the Act. R. at 8. The court then ordered ComGen to "fully excavate" the coal ash ponds and to relocate the ash to a facility that was properly lined. R. at 8. ComGen then appealed this decision on July 16, 2018. R. at 8.

Federal Energy Regulatory Commission Action

In addition to filing an appeal of the district court's decision, ComGen filed with the Federal Energy Regulatory Commission (FERC) to recover the costs of excavating the Little Green Run Impoundment through rate changes to Vandalia Power Company and Franklin Power Company. R. at 8. The proposed rate changes would allocate half of the estimated cost of $246 million to Franklin Power Company and half to Vandalia Power Company over a ten-year period. R. at 8. The rate changes would result in an increase of only $3.30 per customer, per month, in the

ComGen covered regions of Franklin and Vandalia. R. at 9. SCCRAP intervened in this proceeding and filed a protest opposing the rate change, claiming ComGen was precluded from recovering because ComGen had improperly implemented the HDPE liner. R. at 9. Additionally, SCCRAP claims that if FERC approved recovery, ComGen could not fully recover from the Vandalia and Franklin power companies, and only the costs allocable to those companies could be passed to their customers. R. at 9.

In response, ComGen asserted that the company properly implemented the corrective plan and the company cannot be held liable for the improperly sealed liner because it exercised due care in retaining a subcontractor to install the liner. R. at 10. ComGen asserted that the company "is entitled to a presumption of managerial competence in performing its routine utility operations" and that this is not overcome by the failure of the liner. R. at 10. ComGen also argued that the costs to comply with the district court's order will be incurred during the time of the agreements with the Franklin and Vandalia power companies, and the cost is properly allocable to those companies through the contracts. R. at 10. Additionally, ComGen asserts that, if prevented from recovering the costs associated with complying with the district court's order, SCCRAP's request would constitute a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution. R. at 10. This is because a denial of recovery would result in a failure in ComGen's ability to maintain the financial integrity of the company. R. at 11.

On October 10, 2018, FERC issued its decision and approved the revised rate schedules with the stipulation that ComGen file a confirmation that the company would actually be required to undertake the cleanup. R. at 11. FERC ultimately agreed with ComGen's argument and accompanying testimony that disallowing recovery would compromise the financial integrity of the company and implicate constitutional issues. R. at 12. SCCRAP then filed for a rehearing and, after the hearing was denied, filed for judicial review on December 3, 2018. R. at 12.

SUMMARY OF THE ARGUMENT

The Clean Water Act was established in order to maintain the navigable waters of the United States. To accomplish this, the Act prohibits discharges of pollutants into navigable waters from point sources. The pollution of the Vandalia River was not a violation of the Act. This is because the pollution reached the river through groundwater, and because coal ash ponds themselves do not constitute point sources. Neither the text, context, nor legislative history of the Act can support a hydrologically connected groundwater theory because, by its very nature, groundwater cannot itself be considered a point source. It is neither defined nor discrete. Because groundwater cannot be considered a point source, the pollution was not discharged *from* a point source into navigable waters and is therefore, not actionable under the Act. Additionally, the coal ash ponds fail to satisfy the definition of point sources under the CWA because the ponds are neither defined nor discrete. Because liability under the Clean Water Act would require *both* support of a hydrologically connected theory *and* coal ash ponds constituting a point source, ComGen cannot be held liable under the Act.

FERC's decision cannot be considered arbitrary and capricious under the standards set forth in legal precedent. FERC reasonably based the decision on the evidence presented before it and considered the relevant factors. In addition to this, FERC articulated the reasoning behind the decision to approve the revised rate schedules with no clear error of judgment. FERC based the decision on the evidence that disallowing recovery would impact the financial integrity of ComGen. Because of this reasoning, the decision was just and reasonable under the circumstances. Additionally, disallowing the rate recovery would constitute a taking in violation of the United States Constitution. To disallow the revised rates would impact the financial integrity of ComGen, disrupting the company's ability to serve as a public utility, and would thus harm the public interest.

STANDARDS OF REVIEW

Appellate courts are to review the legal conclusions of a district court de novo. *PBM Prods., L.L.C. v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011); *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492 (6th Cir. 2005); *Carey Can., Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1554 (D.C. Cir. 1991). In reviewing decisions from the Federal Energy Regulatory Commission, the court will utilize the arbitrary and capricious standard, and will "affirm the Commission's orders so long as [it] examined the relevant data and articulated a . . . rational connection between the facts found and the choice made." 5 U.S.C. § 706(2)(A); *S. Cal. Edison Co. v. Fed. Energy Reg. Comm'n*, 717 F.3d 177, 181 (D.C. Cir. 2013) (quoting *Sacramento Mun. Util. Dist. v. Fed. Energy Comm'n*, 616 F.3d 520, 528 (D.C. Cir. 2010)). Review of rates are "highly deferential, as issues of rate design are fairly technical and . . . involve policy judgments that lie at the core of the regulatory mission." *S. Cal. Edison Co.*, 717 F.3d at 181. Additionally, the court's "scrutiny is limited to ensuring that the Commission has made a principled and reasoned decision supported by the evidentiary record." *Id.* (quoting *Complex Consol. Edison Co. v. Fed. Energy Reg. Comm'n*, 165 F.3d 992, 1000–01 (D.C. Cir. 1999)).

ARGUMENT

I. The contamination from the Little Green Run Impoundment did not violate the Clean Water Act because the Act does not support a hydrologically connected theory, and the coal ash ponds do not constitute a point source.

The Clean Water Act was passed in 1972 in order to restore and maintain the "integrity of [the] Nation's waters." 33 U.S.C. § 1251(a). To accomplish this, the Act prohibits any unpermitted discharge of pollutants into navigable water. *Id.* § 1311(a). The discharge of a pollutant is further defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). Additionally, the CWA only regulates pollution to navigable waters of the United States from point sources, which are defined as "any discernable, confined, and discrete conveyance." *Id.* §§ 1362(12)(A), 1362(14). There are five elements that must be satisfied for a claim under the Act: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

A. Neither the text nor context of the Clean Water Act supports a hydrologically connected theory.

The Sixth Circuit recently determined that pollution of surface water through groundwater is not actionable under the CWA. *Ky. Waterways All. v. Ky. Utils. Co*., 905 F.3d 925, 940 (6th Cir. 2018). In *Kentucky Waterways*, selenium pollution was leaching into a nearby lake through groundwater that was contaminated by coal ash residual ponds. *Id.* at 930–31. The court relied on the text and context of the CWA in their conclusion that pollution through groundwater was not covered by the Act. *Id.* at 933. The CWA specifically defines a discharge of a pollutant as an "addition . . . to navigable waters" through a point source, and these point sources must be a "discernable, confined and discrete conveyance." 33 U.S.C. §§ 1362(12)(A), 1362(14). Groundwater does not meet the definitions of, nor the common understanding of, discernable, confined, or discrete. *Ky. Waterways All.*, 905 F.3d at 933.

Additionally, the CWA does not support the idea of a hydrologically connected theory whereby pollutants could travel from a point source, through a non-point source—such as groundwater—to a navigable water source. *Id.* at 934. In coming to this conclusion, the Sixth Circuit focused on the following: "discharged from point sources *into* navigable waters." *Id.* (quoting 33 U.S.C. § 1362(11)) (alteration in original). The court determined that the use of "into" meant that the Act requires dumping "*directly* into those navigable waters" and specifies that the language used "leaves no room for intermediary mediums to carry the pollutants." *Id*. (alteration in original).

Rapanos v. United States is commonly utilized to support the theory that hydrologically connected groundwater constitutes a point source and is therefore actionable under the CWA. 547 U.S. 715 (2006); *see, e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018); *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 748 (9th Cir. 2018). In his plurality opinion, the late Justice Scalia states that the CWA "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Rapanos*, 547 U.S. at 743 (quoting 33 U.S.C. § 1362(12)(A)) (alteration in original). Justice Scalia concludes that even if a point source does not directly emit into navigable waters, the pollution from the point source is still actionable if it reaches navigable waters through hydrologically connected water sources. *Id.* However, using *Rapanos* to support the idea that pollution through hydrologically connected groundwater is an actionable pollution under the Act is an improper use of the opinion. *Rapanos* is a plurality opinion discussing the issue of whether certain wetlands constituted navigable waters, not the discharge of a pollutant itself. *Id.* at 739. The "addition of any pollutant *to* navigable waters" still requires a pollutant to be excreted through a point source to be considered a discharge—and thus actionable under the Clean Water Act. *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A)); 33 U.S.C. § 1362(12) (alteration in original).

The context of the Clean Water Act is also important in determining whether pollution from hydrologically connected groundwater is actionable. Some courts have utilized the Act's purpose of "[r]estoration and maintenance . . . of [the] Nation's waters" to support the idea that the contamination of hydrologically connected groundwater is actionable under the Act. *See, e.g.*, *Upstate Forever*, 887 F.3d at 652 (To reject the hydrologically connected theory would "greatly undermine the purpose of the Act."). However, this interpretation does not take into account the full context of the CWA. Section 1251(b) specifies that another purpose of the Act is 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). It is clear from this section, and from the authorization of states to administer the National Pollutant Discharge Elimination System permits themselves, that Congress envisioned cooperative federalism and that states would be involved in the regulation of water pollution within their borders. *See id.* §§ 1251(b), 1342(b). It is also important to consider that Congress limited the definition of what is actionable under the CWA by specifying that the only discharges that are prohibited are those that are discharged in "navigable waters from any *point source*." *Id.* § 1362(12) (emphasis added). Had Congress intended to regulate *any* discharge from *any* source, it is unlikely the definition would have been so limited. *See* S. Rep. No. 92-414, (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 (the Senate first declined to cover groundwater pollution because "the jurisdiction regarding groundwaters is so complex and varied from State to State.").[1] Therefore, neither the text nor the context of the Clean Water Act support the theory that pollution through hydrologically connected groundwater is actionable under the Act.

[1] Shortly after, the House also declined to exercise authority over groundwater pollution, despite opposition from the EPA administrator and several representatives. *Water Pollution Control Legislation-1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. on Pub. Works*, 92nd Cong. 230 (1971). One representative went so far as to propose an amendment due to his fear that the bill would "virtually exempt the subject of ground water

B. Coal ash ponds are not point sources under the Clean Water Act because the ponds do not satisfy the statutory definition of a discernable, confined, and discrete conveyance.

Similarly to groundwater, coal ash ponds themselves are not point sources under the CWA. *See Ky. Waterways All.*, 905 F.3d at 934 n.8; *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018). The Fourth Circuit Court of Appeals recently decided a case in which, in the same way as the case at hand, arsenic was discovered leaching into groundwater from coal ash ponds in a nearby coal-fired power plant. *Sierra Club*, 903 F.3d at 406; *see* R. at 5. The plaintiff in the case alleged that the defendant violated the CWA by discharging a pollutant into navigable waters. 33 U.S.C. § 1311(a); *Sierra Club*, 903 F.3d at 406. However, the CWA requires the pollution to be discharged from a point source to be actionable. 33 U.S.C. § 1362(12) ("discharge" is defined as the "addition of any pollutant to navigable waters from any *point source*" (emphasis added)). The plaintiffs alleged that the coal ash ponds constituted point sources, but the Fourth Circuit disagreed, and concluded that the ponds did not fall under the CWA's definition of point sources. *Sierra Club*, 903 F.3d at 406.

The Fourth Circuit focused on the text of the CWA, specifically § 1311(a), that limits regulation "to discharges from 'any *discernible, confined and discrete conveyance*'" to reach its conclusion. *Id.* at 410 (alteration in original). The Fourth Circuit also cites to another case where the court concluded that pollution from a point source does not include "unchanneled and uncollected surface waters." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). While the court agreed that the coal ash ponds do constitute a conveyance, the CWA requires a "discrete conveyance" and the court did not agree that the ponds fell under this

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pollution from the purview of Federal study and regulation." *Hearings on H.R. 11896 before the H. Comm. on Pub. Works*, 92nd Cong., 1st Sess. 727 (1971). The amendment was soundly defeated, with only 34 votes in favor, against a whopping 84 opposed. 118 Cong. Rec. 10669 (1972).

requirement. *Sierra Club*, 903 F.3d at 410–11 ("[T]he actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil." (alteration in original)).

The Fourth Circuit also focused on the context of the CWA as a whole in reaching the conclusion that coal ash ponds do not constitute point sources. *Id.* at 411. According to the court, the inclusion of the National Pollutant Discharge Elimination System Program, which is based on effluent limitations that can be quantified and measured, evidences Congress's intent that a mere conveyance is not enough to be actionable under the CWA. *Id.* The court explains that when the concentration and rate of a pollutant discharged from a conveyance can be measured, the conveyance is likely discrete, and when a discharge is diffuse, it is "virtually impossible" to measure the concentration and rate of a pollutant. *Id.* In *Sierra Club*, the district court was unable to determine how much groundwater reached the navigable waters or the level of arsenic that traveled from the plant site. *Id.* This was telling for the Fourth Circuit, which determined that such an "indeterminate and dispersed percolation indicates the absence of any facility constituting a discernible, confined, and discrete conveyance[,]" and further concluded that this "indicates circumstances that are incompatible with the effluent limitation scheme that lies at the heart of the Clean Water Act."[2] *Id*. Because coal ash ponds do not constitute a "discernable, confined and discrete conveyance," the ponds are not a point source as defined under the Clean Water Act, and therefore, are not actionable under the same. 33 U.S.C. § 1362(14).

II. The approval of revised Rate Schedules No. 1 and No. 2 was not arbitrary and capricious because the Commission reviewed the relevant factors, reasonably based its decision on the evidence and arguments before it, and had no clear error of judgment.

The Administrative Procedure Act provides that agency decisions found to be arbitrary and capricious are unlawful. 5 U.S.C. § 706(2). This is the least demanding form of judicial review, and the party challenging an agency action bears the burden of proof to show that there was no

[2] It is unclear from the record if such findings were made in the case at hand. R. at 5–6.

rational basis in the decision. *Trombetta v. Cragin Fed. Bank for Sav. Emp. Stock Ownership Plan*, 102 F.3d 1435, 1438 (7th Cir. 1996); *see, e.g.*, *Transmission Agency of N. Cal. v. Fed. Energy Reg. Comm'n*, 628 F.3d 538 (D.C. Cir. 2010); *The Kroger Co. v. Reg'l Airport Auth. of Louisville & Jefferson Cty.*, 286 F.3d 382, 389 (6th Cir. 2002). Circuit courts have agreed that reviewing courts should examine the record in existence, not create a new record for review. *The Kroger Co.*, 286 F.3d at 387; *Sandoval v. Aetna Life and Cas. Ins.*, 967 F.2d 377, 380 (10th Cir. 1992). Even if an agency decision is lacking, the court should remand for further investigation instead of making its own conclusions or substituting its own judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); *The Kroger Co.*, 286 F.3d at 387; *Trombetta*, 102 F.3d at 1438 ("[A]ny questions of judgment are left to the administrator of the plan.").

The Supreme Court established a test for deciding whether an agency action was arbitrary and capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). According to the Court, a reviewing court must consider the relevant factors for the decision and "whether there has been a clear error of judgment." *Id.* This rule was later expanded upon and the Court explained that an agency, after reviewing the relevant facts, must satisfactorily explain the action taken, ". . . including a 'rational connection between the facts found and the choice made.'" *State Farm Mut. Auto. Ins.*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Court further explained that an agency decision need not be the *best* solution, so long as the agency justified the reasoning behind the decision. *Id.*

Circuit courts have further interpreted what constitutes an arbitrary and capricious decision in various ways. The Second Circuit has concluded that "willful and unreasoning action without consideration or regard for the facts and circumstances" constitutes arbitrary and capricious behavior. *Boothe v. Roofing Supply, Inc. of Monroe*, 893 So.2d 123, 126 (2nd Cir. 2005).

Meanwhile, the Tenth Circuit has stated that "both lack of substantial evidence and a mistake of law" would be indicative of an arbitrary and capricious decision. *Sandoval*, 967 F.2d at 380 n.4. The court further defined substantial evidence as that which a "reasonable mind might accept as adequate to support the conclusion" of the agency, and that "[s]ubstantial evidence requires 'more than a scintilla but less than a preponderance.'" *Id.* at 382 (quoting *Flint v. Sullivan*, 951 F.2d 264, 266 (10th Cir. 1991)). Additionally, the Sixth Circuit has ruled that if there is any evidence to support an agency decision, the decision is not arbitrary and capricious. *The Kroger Co.*, 286 F.3d at 389. While these courts have varying specific definitions for what constitutes arbitrary and capricious, the circuits follow the Supreme Court's rule that an agency must consider the relevant factors.

Several circuit courts, including this Court, have held that it is up to the party challenging an agency action to show that there was no rational basis for the decision. *See, e.g.*, *Transmission Agency of N. Cal.*, 628 F.3d at 550; *The Kroger Co.*, 286 F.3d at 389. This Court has previously held that if FERC determines the rate is not unduly discriminatory so as to violate the Federal Power Act, the petitioner would bear the burden of demonstrating that FERC's judgments are arbitrary and capricious. *Transmission Agency of N. Cal.*, 628 F.3d at 549. This Court went on to note that this is a *heavy* burden to meet. *Id.*

SCCRAP fails to meet this burden. FERC based the decision to approve the revised rate schedules on the evidence presented that denying the revised rates would jeopardize the financial integrity of ComGen. R. at 12. The decision 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" as a matter of policy. R. at 12. This was FERC's ultimate decision, though the Commission considered, and partially agreed with, arguments from SCCRAP. R. at 12.

In *Gulf Power Co.,* this Court held a FERC decision to be arbitrary and capricious. *Gulf Power Co. v. Fed. Energy Reg. Comm'n*, 983 F.2d 1095, 1102 (D.C. Cir. 1993). This was because FERC did not consider important factors, such as the extent the customers would have benefitted from the ruling. *Id.* at 1100. Additionally, FERC failed to adequately explain why the decision differed from similar decisions in the past. *Id.* However, in the case at hand, FERC reasonably based the decision on the evidence presented before it and aptly explained the reasoning for the decision. R. at 11–12. Furthermore, FERC's consideration of constitutional concerns represents a relevant factor for the agency to consider in making its ultimate decision. R. at 12. Therefore, SCCRAP cannot show that FERC's decision was arbitrary and capricious.

The Supreme Court has established that FERC has "undoubted power . . . to prescribe a change in contract rates whenever it determines such rates to be unlawful." *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). In what has been dubbed the *Mobile-Sierra* doctrine, the Court determined that rates set forth in freely negotiated contracts must be presumed just and reasonable unless FERC determines the contract seriously harms the public interest. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008). In the *Sierra* case, the Court explicitly states that a situation where a rate so low as to "impair the financial ability of the public utility to continue its service" would constitute a rate adverse to the public interest. *Sierra Pac. Power Co.*, 350 U.S. at 355. These facts and circumstances, the Court stipulated, are up to FERC to determine if an adverse effect on the public interest exists. *Id.*

In the case at hand, FERC determined that not allowing ComGen to recover the expenses paid would compromise the financial integrity of the company. R. at 12. According to the Supreme Court, this falls directly under the rule established in the *Sierra* case and allows FERC to approve ComGen's revised rate schedule outside of the contracts between ComGen and the Franklin and

Vandalia power companies. Because disallowing the rate change would constitute a rate adverse to the public interest by impairing the ability of ComGen to continue its service, the original rate schedule negotiated between ComGen and the power companies would be unlawful, and FERC retains the ability to adjust these rates to a lawful level, outside of an agreement between the parties.

III. Disallowing the recovery of costs incurred by Commonwealth Generating Company is an unconstitutional taking under the Fifth and Fourteenth Amendments because doing so would compromise the financial integrity of the company.

The United States Constitution provides that private property will not be taken for public use, unless just compensation is provided. U.S. Const. amend. V. The Supreme Court considered whether public utility rate adjustments could be considered an unconstitutional taking in 1923. *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923). In that case, the Public Service Commission determined that the amount the public utility could recover was $460,000. *Id.* at 684. This, the utility company claimed, was an unconstitutional taking because the rate limitation denied the company the right to recover for past construction costs. *Id.* at 689. According to the Supreme Court, "[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory . . ." and therefore, would deprive a company of property in violation of the Constitution. *Id.* at 690.

The Court went on to detail that there is no bright-line rule to determine what rate level would constitute a taking, and that the Commission must consider all relevant facts in making a ruling—although the Court does not detail what these facts are. *Id.* However, the Court specifies that the return on rates "should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate . . . to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Id.* at 692.

The Supreme Court again examined rate increases in 1944. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944). Congress had established that any rates under FERC's jurisdiction must be just and reasonable and would otherwise be unlawful.[3] *Id.* at 600. However, Congress gave no rule or test for what constituted just and reasonable, and the Supreme Court went on to hold that FERC did not have to use a specific rule or test to determine just and reasonable rates. *Id.* at 600–01. Additionally, the Court determined that "it is the result reached not the method employed which is controlling." *Id.* at 601. In *Hope Natural Gas Co.,* the Court noted that in making a decision on rates, FERC "stressed the importance of maintaining the financial integrity of the company." *Id.* at 604. According to the Court, "[r]ates which enable to company to operate successfully, to maintain its financial integrity, . . . certainly cannot be condemned as invalid." *Id.* at 605. While *Hope Natural Gas Co.* dealt with the Natural Gas Act, the same considerations should be applied to the case at hand and the Federal Power Act because both statutes consider federal regulation over public service companies engaged in interstate commerce. 16 U.S.C. § 824(b); *Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942).

Not all rate disallowances are considered unconstitutional. *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 602 (3d Cir. 1988). It has been held that "imprudent managerial decision[s] affecting a company's rate of return cannot serve as the basis for an argument that . . . rate-making rises to the level of confiscatory activity." *Id.* at 617. However, this is not applicable to the case at hand. ComGen exercised due care in hiring a subcontractor to install the HDPE liner. R. at 10. Additionally, ComGen prudently acted to coordinate with the Vandalia Department of Environmental Quality to develop and implement a plan to mitigate the leakage from the Little Green Run Impoundment. R. at 5. Disallowing the rates in the revised rate schedules in the case at

[3] The case references the Federal Power Commission, which was later reorganized as FERC with the same responsibilities and powers. *History of* FERC, FEDERAL ENERGY REGULATORY COMMISSION, https://www.ferc.gov/students/ferc/history.asp (last visited Jan. 30, 2019).

hand would constitute a taking because it would compromise the financial integrity of ComGen. R. at 11. This has been specifically determined to constitute a taking by the Supreme Court. *Bluefield Waterworks & Imp. Co.*, 262 U.S. at 692. Additionally, FERC decisions should stand unless found to be arbitrary and capricious. 5 U.S.C. § 706(2). In this case, FERC determined that the revised rate schedules should be administered, based this decision on maintaining ComGen's financial integrity, and that, as a matter of policy, utilities should be able to recover costs of environmental compliance. R. at 11–12.

CONCLUSION

Because the Clean Water Act does not support a hydrologically connected groundwater theory, and coal ash ponds do not constitute point sources because they are neither discrete nor confined, Commonwealth Generating Company respectfully requests this Court reverse the district court's ruling. Additionally, because the Federal Energy Regulatory Commission's decision was not arbitrary or capricious, and disallowing recovery of environmental compliance would constitute a taking in violation of the United States Constitution, Commonwealth Generating Company respectfully asks this Court to affirm the Federal Energy Regulatory Commisson's decision to approve the revised rate schedules.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2019.

Respectfully submitted,

Team No. 21