C.A. No. 18-02345

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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.

APPEAL OF DISTRICT COURT DECISION &
SUPPORT OF DENIAL OF REHEARING

BRIEF FOR THE
APPELLANT / INTERVENOR

Team No. 9

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JURISDICTIONAL STATEMENT

This action is an appeal of two orders from two separate proceedings. The first order under appeal concerns the jurisdictional reach of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The district court had federal question jurisdiction under 28 U.S.C. § 1331. This appeal is from a final order granting an injunction filed on June 15, 2018; jurisdiction is based on 28 U.S.C. § 1291. Commonwealth Generating Company filed this appeal on July 16, 2018; this appeal is timely under Fed. R. App.Proc.4(a)(1)(A).

The second order under appeal is FERC's denial of a rehearing on their approval of ComGen's rate schedule revisions. FERC has jurisdiction over the actions of public utilities under the Federal Power Act. 16 U.S.C. §824(e). ComGen is a D.C. corporation engaged in "the sale of electric energy at wholesale in interstate commerce" by way of its power service agreements with Vandalia Power Company and Franklin Power Company. Corporations of Vandalia and Franklin, respectively. Thus, ComGen is a public utility subject to FERC jurisdiction under the Federal Power Act. *id.* This appeal is from a final FERC order denying Petitioner's request for a rehearing of FERC's approval of ComGen's rate revisions. On December 3, 2018, SCCRAP filed a petition for review with this Court pursuant to 16 U.S.C. § 825l. FERC's denial represents a final agency action and jurisdiction is proper.

This Court granted a joint motion for consolidation on December 21, 2018.

STATEMENT OF THE ISSUES

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

2) Whether seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters constitutes the discharge of a pollutant from a point source in violation of §311(a) of the Clean Water Act.

3) Whether FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious.

4) Whether SCCRAP's position in the FERC proceeding – to disallow the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment – is an unconstitutional taking under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

This case involves the jurisdictional reach of the Clean Water Act and FERC's decision to allocate the cost of environmental cleanups in a manner that most successfully promotes environmental protection.

Procedural History:

In December 2017 SSCRAP filed suit against ComGen under the Clean Water Act's civilian suit provision alleging a violation of § 1311(a) and seeking injunctive relief. On June 15, 2018 the D.C. District Court issued a final order granting SCCRAP's request. This order requires Commonwealth Generating Company to fully excavate and relocate over 38 million cubic yards of solids from the Little Green Run coal ash impoundment at an estimated cost of 246 million dollars. ComGen filed its appeal on July 16, 2018. This is the first order under review.

The second order under review is FERC's approval of ComGen's proposed rate revisions to cover the cost for compliance with the District Court order. SCCRAP intervened in this proceeding and, after FERC approved ComGen's rate revision and denied SCCRAP's request for a rehearing, filed a petition for review with this Court on November 30, 2018.

Factual Background:

Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP) is a national environmental and public interest organization based in D.C. In 2015 SCCRAP began a nationwide initiative against coal ash impoundments and their owner/operators. This litigation is part of that initiative.

Several members of SCCRAP's Mammoth, Vandalia Chapter claim to have been directly impacted from the leaking of arsenic from the Little Green Run Impoundment to Fish Creek and Vandalia river.

Commonwealth Generating Company (ComGen), a D.C. corporation, is a wholly owned subsidiary of Commonwealth Energy (CE). CE is a multistate utility holding company that provides electric service at retail and wholesale rates. In 2014 ComGen was established by CE to purchase the Vandalia Generating Station (VGS) from Commonwealth Energy Solutions (CES), another wholly owned subsidiary of CE, with the purpose of bringing the station into regulated retail rates. This acquisition received regulatory approval.

Shortly after the acquisition of VGS, ComGen entered into unit power service agreements with Vandalia Power Company (VPC) and Franklin Power Company (EPC) where each would receive 50% of the electrical output of VGS. Both companies are public utilities under Section 201 of the Federal Power Act (FPA). Both agreements are subject to FERC jurisdiction. These agreements are known as ComGen's FERC rate schedule No. 1 (Vandalia Agreement) and ComGen's FERC rate schedule No. 2 (Franklin Agreement).

The source of controversy is the Vandalia Generating Station (VGS) and the Little Green Run Impoundment. VGS is a coal powered electric generating plant. It was developed by CES along the Vandalia River, near Mammoth, Vandalia. The plant began operating in 2000. Through ComGen's power service agreements with VPC and FPC, the electricity produced at the Vandalia Generating Station currently provides electricity to Northern and Eastern Vandalia, as well as, Eastern Franklin and a portion of South West Franklin.

The Little Green Run Impoundment is a coal ash impoundment pond used by VGS to dispose of its coal combustion residuals (CCRs). CCRs are a byproduct of the combustion of coal.

CCRs are known to contain arsenic and other contaminants associated with serious health defects. The Little Green Run Impoundment was created by damming Green Run. It is one of sixty-three coal ash impoundments in the United States listed with a "high" hazard rating by the EPA. The dam has a height of 395 feet, from toe to crest, making the impoundment the tallest dam structure on the list. The resulting impoundment has 71 surface acres and currently contains 38.7 million cubic yards of solids, most of which are CCRs.

The Clean Water Act established the National Pollution Discharge Elimination System (NPDES) which in turn established a permit system for the discharge of pollutants. 33 U.S.C. § 1342(a). Under the act states can establish its own permit system so long as it receives EPA approval. Id. § §1342(b)-(c). Both Vandalia and Franklin elected to establish their own systems.

CES received a permit from the Vandalia Department of Environmental Quality (VDEQ) to dispose of pollutants into the Little Green Run Impoundment. A condition of that permit required CES to monitor the groundwater surrounding the Little Green Impoundment and to notify the VDEQ if arsenic levels in the groundwater exceeded Vandalia's groundwater quality standards. In 2002 CES detected arsenic levels that exceeded the standard and notified VDEQ. CES and VDEQ then began to develop and implement a corrective action plan. The plan was approved by VDEQ in 2005. The following year, pursuant to the corrective action plan, CES installed a high-density polyethylene (HDPE) geomembrane liner along the west embankment of the Little Green Impoundment. The other embankments are composed of compacted clay.

In 2017, three years after ComGen acquired VGS from CES, Vandalia Waterkeeper, a local chapter of the environmental NGO Waterkeeper Alliance, detected elevated levels of arsenic in the Vandalia River during their routine monitoring. Upon further analysis the group believed the increased levels of arsenic were due to rainwater and groundwater leaching arsenic from the coal

ash in the Little Green Run Impoundment eventually making its way into Fish Creek and Vandalia River. The group filed a complaint with VDEQ. VDEQ then launched an investigation.

The VDEQ investigation showed there was seepage that pooled at the downstream toe of the west embankment of the impoundment. This seepage was traced to a defective weld in a seam on the HDPE geomembrane liner that was installed by CES in 2006 as part of the VDEQ's corrective action plan.

> The seep occurs at a low point in the foundation topography and appears to have been active for many years without significant change. The seep runs clear at a slow rate and there is no evidence of internal erosion of dam materials. ComGen stated that the seepage occurs only when there is significant rainfall, and that it dries up within a few weeks of the precipitation event. Although the downstream slope was observed to be in generally good condition, the seepage had caused some erosion and indentations or grooves in the soil as it made its way down the embankment towards Fish Creek.

VDEQ Coal Ash Impoundment: Specific Site Assessment Report, Little Green Run Impoundment, p. 14.

Following this report, SCCRAP filed suit against ComGen alleging a violation of section 1311(a) of the Clean Water Act. The District Court found as fact that rainwater and groundwater were leeching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater. The court further found that the polluted groundwater then carried the arsenic into the navigable waters of Fish Creek and Vandalia river.

The district court also determined that since ComGen concentrated the piles of coal ash in one location and that one location channels and conveys arsenic into the groundwater that then reaches The District Court concluded this constituted a violation of section 1311(a) because the groundwater had a "direct hydrological connection" to the navigable waters of Fish Creek and Vandalia River.

The District Court granted SCCRAP's requested injunctive relief. The order requires ComGen to fully excavate and relocate the 38.7 million tons of solids in the Little Green Run Impoundment to a different, competently lined, impoundment. The projected cost of this massive undertaking is 246 million dollars.

In response to the District Court order, ComGen filed a rate revision with FERC under section 205 of the FPA. Through the revised rates ComGen will recover 50% of the cost of compliance from VPC and the other 50% from FPC over a 10-year amortization period. This cost will be recovered from these utilities retail customers. The customers' bills will increase by $3.30 dollars a month over this period.

SCCRAP intervened in this proceeding and argued that ComGen violated the prudence principle and the "matching principle" of utility ratemaking. However, FERC ultimately approved of ComGen's proposed rates on October 10, 2018. SCCRAP immediately sought a rehearing which was denied. SCCRAP now seeks judicial review in this Court.

SUMMARY OF THE ARGUMENT

Hydrologically connected groundwater is not actionable under the Clean Water Act. This is evidenced by the language of the act as well as the legislative history both indicating that Congress did not intend to extend the CWA's jurisdiction to groundwater. Further, there is no continuous surface connection between the impoundment, groundwater, and Fish Creek and Vandalia River, which is required for an actionable violation of the CWA.

There is no "point source" that could bring this action under the jurisdiction of the CWA. Groundwater is not a "discernable, confined and discrete conveyance" in such that it could constitute a "point source." The impoundment itself cannot be classified as a point source. The

Little Green Run Impoundment does not discharge directly into the waters of Fish Creek and the Vandalia River.

The rates approved of by FERC should be upheld in light of the substantial evidence the decision was based on. The rates do not violate the prudence principle or the matching principle. The investment in consideration under the prudence principle is the cost of compliance with the District Court order which was not reasonably foreseeable by ComGen. While FERC is under no affirmative obligation to follow the matching principle, the decision still does not violate that principle. The public consumers directly benefit from the use of the impoundment and should share in the cost of compliance with the District Court order.

The rates proposed by SCCRAP would constitute a regulatory taking without due process in violation of the Fifth and Fourteenth Amendments. Such a rate would eliminate ComGen's profits from the past ten years and would frustrate the purpose of the 2014 purchase of the Vandalia Generating Station. Most importantly, public policy dictates that public utilities be able to recover the cost of compliance in order to fulfill the goals of such regulatory regimes.

ARGUMENT

I. Surface water pollution via hydrologically connected groundwater is not actionable under the Clean Water Act because the language and legislative history of the Clean Water Act indicates that it did not intend to cover groundwater and a hydrological connection does not constitute a continuous surface connection.

Congress passed the Clean Water Act ("CWA") in 1972 with the stated objective, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). To that end, the CWA requires a permit to "discharge . . . any pollutant." *Id.* §§ 1311(a), 1342(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to

navigable waters from any point source." Id. §1362(12). The CWA generously defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.*§ 1362(7).

A. Surface water pollution via hydrologically connected groundwater is not actionable under the Clean Water Act because the language and legislative history of the clean water act indicates that it did not intend to cover groundwater.

Given the CWA's purpose to regulate as fully as possible all sources of water pollution, the Supreme Court recognized that "the term navigable is of little import." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). "The Clean Water Act is a broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters." *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 964 (7th Cir. 1994) (citing *Riverside Bayview Homes, Inc.*, 474 U.S. at 121). To the extent permitted under the Constitution, Congress intended "navigable waters" to embrace virtually "every creek, stream, river or body of water that in any way may affect interstate commerce." *Quivira Mining. Co. v. U.S. E.P.A.*, 765 F.2d 126, 129 (10th Cir. 1985). Nonetheless, "the CWA's language and structure make it clear that Congress did not intend to include . . . groundwater as part of the 'navigable waters.'" *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989 (E.D. Wash. 1994).

First, throughout the CWA, Congress makes distinct references to both groundwater and navigable water. "[T]he CWA consistently refers to 'navigable waters **and** ground waters' in those portions of the Act dealing with EPA program development as well as the study of water pollution." *Id.* (*See*, *e.g.*, 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1)). "In the provisions for water quality standards and discharge permitting, on the other hand, only the phrase "navigable waters" is used." *Id.* (*See*, *e.g.*, 33 U.S.C. §§ 1312(a), 1342(a)(4)). Clearly then, the terms "navigable waters" and "groundwater," are not synonymous.

Second, the legislative history of the CWA demonstrates that Congress did not intend for discharges to groundwater to be covered under the Act. The Report of the Senate Committee on Public Works that accompanied the bill stated, "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation [to approve groundwater standards]. The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction." *Heckla Mining Co.*, 870 F.Supp. at 989 (citing S.Rep.No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739, *reprinted in* 2 Congressional Research Service of the Library of Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., at 1491 (Comm. Print 1973) (hereinafter "Leg.Hist.")). Furthermore, "Congress rejected an amendment offered by Senator Aspin to 'bring groundwater into the subject of the bill.'" *Id.* at 990 (citing 118 Cong. Rec. 10,669 (1972), 1 Leg. Hist. 597. (See Remarks of Sen. Aspin)). "Congress's main concern was expressed by Representative Harsha: 'We do not have the knowledge or the technology to devise water-quality standards for groundwater; we do not as yet know how to do that.'" *Id.* (citing 1 Leg.Hist. 594 (remarks of Rep. Harsha)).

Acknowledging the legislative history of the CWA, courts agree that the term "navigable waters" does not include groundwater. *See, e.g.*, *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tx. 1975). It therefore follows that, the CWA does not assert authority over groundwater, just because it may be hydrologically connected with surface waters. Members of Congress have proposed adding ground waters to the scope of the CWA, but, as previously noted, these proposals have been defeated. While decisions not to enact proposed legislation may not be conclusive on the meaning of the text actually enacted,

the legislative history of the CWA indicates a "clear intent to leave the regulation of groundwater pollution to the states." *Kelley v. United States,* 618 F. Supp. 1103, 1105 (W.D. Mich. 1985).

In *Village of Oconomowoc Lake*, the plaintiffs complained that pollutants from a warehouse's retention pond seeped into the groundwaters and spread throughout the village to other bodies of water. 24 F.3d at 964. The court stated that because all proposals to add groundwater to the scope of the CWA have been defeated, the legislature did not intend for the CWA to assert authority over groundwater hydrologically connected to surface water. *Id.* at 966. Specifically, the court held that the CWA does not assert authority over artificial ponds that drain into ground waters. *Id.*

In the case at hand, Stop Coal Combustion Residual Ash Ponds ("SCCRAP"), senselessly argues, and the District Court incorrectly held, that the CWA covers discharges into groundwater that has a hydrological connection to navigable waters. Similar to *Village of Oconomowoc Lake*, where the court held that the CWA does not have jurisdiction over pollutants from artificial ponds that drain into groundwater, the CWA does not have jurisdiction over pollutants from the Little Green Run Impoundment that drain into groundwater. SCCRAP and the District Court failed to adequately consider the language and legislative history of the CWA, as previously explained. After analyzing the legislative history of the CWA, courts agree that the term "navigable waters" does not include groundwater, and therefore conclude that the CWA does not assert authority over such. *See, e.g.*, *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tx. 1975).

Currently, there is no language *in the CWA* that creates a difference between groundwater, and groundwater that is hydrologically connected to surface water. It follows that the CWA does not assert authority over ground water just because it may be hydrologically connected with

surface waters. ComGen is not claiming that the possibility of a hydrological connection should be denied. However, as the CWA stands, it does not assert a claim of authority over such a possibility. Rather, the federal government has decided to leave the regulation of such up to the states. See, e.g., *Kelley,* 618 F. Supp. at 1105. Because both the language and the legislative history of the CWA indicate that Congress did not intend for the CWA to cover groundwater, surface water pollution via hydrologically connected groundwater is not actionable under the CWA.

B. Surface water pollution via hydrologically connected groundwater is not actionable under the Clean Water Act because such a hydrological connection does not constitute a continuous surface connection.

Further support for the notion that the CWA lacks jurisdiction over surface water pollution via hydrologically connected groundwater can be seen in *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion). According to *Rapanos*, establishing the CWA's jurisdiction over wetlands [i.e. groundwater] requires two findings: (1) that the adjacent channel contains a water of the United States; and (2) that the wetland has a *continuous surface connection* with that water, making it difficult to determine where the "water" ends, and the "wetland" begins. *Id.* at 742 (emphasis added). The *Rapanos* plurality states that, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem . . . and thus lack the necessary connection to covered waters . . . ." *Id.* In other words, the plurality's test in *Rapanos* would not support finding jurisdiction over groundwater because groundwater lacks the necessary *surface* connection. *Id.*

In *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, the court held that groundwater, hydrologically connected to surface water, does not fall within the scope of regulation under the CWA. 25 F. Supp. 3d 798 (E.D.N.C. 2014). In *Cape Fear River Watch, Inc.*, the defendant allowed coal ash materials to escape from its coal ash lagoons into the groundwater.

Id. at 802. The contaminated groundwater then migrated toward drinking water supply wells. *Id*. The court found support for their holding in both the language and legislative history of the CWA and in the application of the Supreme Court's plurality ruling in *Rapanos*, as previously noted, which set forth tests excluding certain wetlands from the scope of the CWA. *Id*. at 810.

Application of the plurality's test in *Rapanos*, would render the surface water pollution via hydrologically connected groundwater in the case at hand, not actionable under the CWA. 547 U.S. at 742. The *Rapanos* test requires that the wetland (i.e. the groundwater) has a *continuous surface connection* with the water (i.e. Fish Creek and the Vandalia River), making it difficult to determine where the "water" ends, and the "wetland" begins. *Id*. The groundwater in the case at hand does not have a surface connection with Fish Creek or the Vandalia River, and therefore the CWA lacks jurisdiction over such.

Furthermore, similar to *Cape Fear River Watch, Inc.*, where coal ash pollutants seeped in to the groundwater which was hydrologically connected to drinking supply wells, the seepage of arsenic from coal ash into the groundwater that was hydrologically connected to Fish Creek and the Vandalia River in the case at hand, does not fall within the scope of regulation under the CWA. 25 F. Supp. 3d at 802. Because groundwater hydrologically connected to surface water does not constitute a continuous surface connection, surface water pollution via hydrologically connected groundwater is not actionable under the CWA.

II. Seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act because groundwater cannot be classified as a point source and the coal ash impoundment did not directly convey the arsenic to navigable waters nor can it be classified as a point source.

In order for the CWA to maintain jurisdiction over sources of water pollution, the source of pollution must fall within the scope of the "point source definition." 33 U.S.C.S §1362(12). The

CWA defines a point source as a, "*discernible, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*§ 1362(14) (emphasis added). The CWA's effluent limitations, the guides by which a CWA-regulated party must abide, are defined as, "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources *into* navigable waters . . . ." *Id*. at 1362(11) (emphasis added).

"The term 'into' indicates directness. It refers to a point of *entry*." *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 444 (6th Cir. 2018) (citing Webster's Third New International Dictionary, Unabridged. 2018.Web. 22 Aug. 2018.). "Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase 'into' leaves no room for intermediary mediums to carry the pollutants." *Id*. Moreover, the CWA addresses only pollutants that are added "*to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, "the CWA requires two things in order for pollution to qualify as a 'discharge of a pollutant': (1) the pollutant must make its way [directly] to a navigable water (2) by virtue of a point-source conveyance." *TVA*, 905 F.3d at 444.

A. Seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act because groundwater is not a point source.

In *TVA*, the defendant discharged coal ash into man made coal ash ponds which was allegedly seeping through the groundwater into a nearby river. *Id*. The court held that when the pollutants were discharged to the river, they were not coming *from* a point source because they

were coming from groundwater, which they deemed to be a nonpoint-source conveyance. *TVA*, 905 F.3d at 444

In *Tri-Realty Co. v. Ursinus College*, plaintiffs alleged that defendants' heating oil leaked from underground tanks and migrated through the subsurface soil, contaminating the land and waters of the neighboring property. 2013 U.S. Dist. LEXIS 165471 (E.D.P.A. 2013). The court stated that, given its natural physical attributes, groundwater could not fairly be described as a "discernible, confined and discrete conveyance." *Id.* at 24. Accordingly, the court concluded that the diffuse downgradient migration of pollutants on top of or through soil and groundwater is "nonpoint source pollution outside the purview of the CWA." *Id.*

The seepage of arsenic from the coal ash impoundment in the case at hand, does not constitute a discharge of a pollutant from a point source in violation of § 402 of the CWA, because the arsenic did not make its way [directly] to the navigable waters by virtue of a point-source conveyance. *See TVA*, 905 F.3d at 444. The arsenic directly made its way to Fish Creek and the Vandalia River by groundwater. Under 33 U.S.C.S §1362(14), groundwater does not constitute as a point source because it is not a *discernible, confined, nor discrete conveyance*. Similar to *TVA*, when the arsenic in the case at hand was discharged into Fish Creek and the Vandalia River, it was not coming from a point source because it was coming from groundwater. Similar to *Tri-Realty Co.*, where groundwater cannot fairly be described as a "discernible, confined and discrete conveyance," it cannot be a point source within the purview of the CWA. *See* 33 U.S.C.S §1362(14). Because groundwater does not constitute a point source, seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of § 402 of the CWA.

B. Seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act because the coal ash impoundment is not a point source and did not directly convey the arsenic to the navigable waters.

In *Sierra Club v. Va. Elec. & Power Co*., arsenic from coal ash stored on the defendants' ponds was found to have reached navigable waters — having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters. The court found that such a "simple causal link does not fulfill the Clean Water Act's requirement that the discharge be *from a point source*."903 F.3d 403, 410 (4th Cir. 2018). The court stated, that "[a]t its core, the [CWA]'s definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance." *Id*. " 'Conveyance' is a well-understood term; it requires a channel or medium — *i.e.*, a facility — for the movement of something from one place to another." *Id*. (citing *Webster's Third New International Dictionary* 499 (1961)). In this context, the court said that the ponds were not created to *convey* anything because the actual means of conveyance was a generalized condition – groundwater that distributed the leached arsenic into navigable waters. Thus, the settling ponds were not point sources because they could not be characterized as discrete "points," nor did they function as conveyances.

The seepage of arsenic from the coal ash impoundment in the case at hand, does not qualify as a "discharge of a pollutant" actionable under § 402 of the CWA, because the arsenic did not make its way [directly] to the navigable waters by virtue of a point-source conveyance. *See TVA*, 905 F.3d at 444. The Little Green Run Impoundment does not qualify as a "discharge of a pollutant" under the CWA, because it does not discharge arsenic *directly* into Fish Creek and the Vandalia River. *Id*. Rather, the actual means of conveyance was the groundwater that distributed the arsenic into Fish Creek and Vandalia River.

Furthermore, Green Run's Impoundment also does not qualify as a point source because it is not a *discernible, confined, nor discrete conveyance*, as required under 33 U.S.C.S §1362(14). Much like *Sierra Club*, the case at hand involves arsenic which was found to have seeped from coal ash at Green Run's Impoundment, thereby polluting the groundwater and ultimately Fish Creek and Vandalia River. Similar to *Sierra Club* court's reasoning, the Little Green Run Impoundment is not a point source because it was not created to convey anything and thus could not be characterized as a discrete "point," nor did it function as a conveyance. Because the coal ash impoundment is not a point source and did not directly convey the arsenic to the navigable waters, seepage of arsenic from a coal ash impoundment that passes through groundwater to navigable waters does not constitute the discharge of a pollutant from a point source in violation of § 402 of the Clean Water Act.

III. The rates approved by FERC were well within its broad discretion and were not arbitrary or capricious because FERC appropriately considered relevant evidence and policy considerations before rendering a decision.

The rates approved by FERC were not arbitrary and capricious and are supported by substantial evidence. Section 706(2)(A) of the Administrative Procedure Act (APA) provides that reviewing courts shall set aside and hold unlawful agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706. The Supreme Court has posited that courts reviewing under this standard have three primary responsibilities in examining ratemaking: to determine whether the Commission exceeded its authority, whether the reasons supporting the rate order are founded on substantial evidence, and whether there is a balance of consumer and utility investor interests. *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-792 (1968).

A. The rates set fall within FERC's reasonable judgment because FERC is granted a wide range of discretion in setting rates.

The Federal Power Act (FPA) requires that "[a]all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rate or charges shall be just and reasonable". 16 U.S.C. § 824d(a). Further, any rate that does not comply with that section, which is not just and reasonable, is *per se* unlawful. *Id.* This singular clause in the FPA grants FERC broad discretion in setting rates. Courts consistently hold that issues of rates are entitled to great deference. *Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) ("[W]e afford great deference to the Commission in its rate decisions."); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000) ("Not only is FERC's judgment about utilities' reasonable expectations precisely the type of policy assessment to which we owe great deference…"); *Verso Corp. v. FERC*, 898 F.3d 1,7 (D.C. Cir. 2018) ("[C]ourts afford 'great deference' to FERC's rate decision, and we 'may not substitute our own judgment for that of the Commission.'"); *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir 2009) ("In matters of ratemaking, our review is highly deferential as '[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.'")

Whether or not rates are reasonable is based on result of the ratemaking process and not the process used to reach that result. *See Fed.Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). However, FERC has more than one acceptable rate is any given situation; so long as the rate is within a zone of reasonableness, courts should not disturb them. *Maine,* 854 F.3d at 23 ("As long as the rate selected by the Commission is within the zone of reasonableness, FERC is not required to adopt as just and reasonable any particular rate level.") (international quotations

omitted); *Permian Basin*, 390 U.S. at 797 ("[C]ourts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness'").

The rates set, and more specifically the return granted to ComGen's shareholders, fall within the zone of reasonableness. While it is true that each determination of a rate or return is fact specific, the rate set by FERC in this case is well within past precedent. In *Maine v. FERC*, the zone of reasonableness was said to be from "7.03 percent to 11.74 percent." 854 F.3d at 27. In *Duquesne Light*, Penn Power was permitted a 12.02% overall return rate. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989). The rate set in this case, 10.0%, is well within historical zones of reasonableness for FERC.

1. The FERC rates, as currently formulated, represent a balancing of consumer and investor interests.

FERC, given its wide range of discretion, has the ability and indeed the duty to balance the interests of both consumers and investors in the public utility. Indeed it has been stated that "in reviewing a rate order courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Com*m'n, 810 F.2d 1168, 1177-178 (D.C. Cir. 1987). Instead of making its own determination as to the proper balance, courts instead should only look to determine whether "the Commission has given reasoned consideration to each of the pertinent factors." *Id.* at 1177.

The evidence shows that FERC gave reasoned consideration to each sides interest's when issuing their October 10, 2018 decision. FERC agreed with SCCRAP, however wrongly,[1] that granting the adjusted rates would violate the matching principle and grant the ComGen's

[1] Discussed in more detail below

shareholders a windfall. FERC continued to consider, and subsequently rely upon, the interest ComGen has in maintaining their financial integrity and access to investment capital on reasonable terms. By explicitly stating these considerations in their reasoning, FERC has satisfied its burden of giving reasoned consideration to each side.

Further, FERC has appropriately balanced the competing interests by approving the rates proposed by ComGen. Consumers interests are protected in that they are the only being charged for property that they are actually going to use. The life of the new coal ash impoundment will be used for the current customers of Vandalia Power and Franklin Power. They have a firm interest in keeping the power on but not being charged exorbitant rates for such service. ComGen has an interest in recouping its investments made towards providing electricity. By amortizing the new coal ash impoundment over 10 years and increasing customer's rates by only $3.30 per month over the entirety of the 10-year period, FERC has reached an ideal balance between the two competing interests.

2. The rates do not violate the prudence principle because the investment would be prudent at the time it is made.

While alleged by SCCRAP, the rates in fact do not violate the prudence principle. "Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight." *Duquesne Light*, 488 U.S. at 309. Courts have noted that this principle is similar to common law negligence, and that while the principle does not have hard boundaries for courts to employ, "it at least requires the exclusion from rate base of costs that should have been foreseen as wasteful." *Appeal of Conservation Law Found.*, 127 N.H. 606, 647 (1986). What matters in this analysis is "what due care required *at the time an investment or expenditure was planned and made*." *Id.* at 638 (emphasis added).

At the time ComGen makes the investment, it will be prudent. They key to this analysis is the timing of the investment and whether at that moment it is prudent. *Id.* ComGen is not seeking to have its installment of the high-density polyethylene geomembrane from 2006 recouped in their rates. Rather, ComGen is seeking to recoup their investment for the 2018 judicially imposed remedy.[2] This investment, into fully excavating the Green Run Impoundment and relocating it, would be prudent at the time it is made, as it is being done to strictly comply with the EPA's Coal Combustion Residue rule. The prudence principle does not analyze the events leading up to such an investment, but rather reviews each individual investment at the time they are made to determine if they are foreseeably wasteful. *See Id.* It is clear that complying with a judicial order and further complying with EPA rules is a prudent and not-wasteful use of resources. Thus, the rates approved by FERC do not violate the prudence principle, contrary to what SCCRAP urge.

3. The rates do not violate the matching principle because at the time the investment is completed, the property will actually be providing service to the customers being charged.

Appellants further incorrectly allege that the rates approved by FERC violate the matching principle. As explained by this court, "underlying the matching principle is the concept of "used and useful" property. Property or equipment can usually be included in the rate base only if the property is providing service to *current* ratepayers." *Mid-Tex Elec. Coop, Inc. v. Fed. Energy Regulatory Com*m'n, 773 F.2d 327, 350 (D.C. Cir. 1985). The focus is on whether the property or equipment, and thus the investment made, is providing services to customers at the time it is put into operation. In the case at hand, FERC approved the rate increase on customers who will directly use the new coal ash impoundment pond. As they receive the benefit of the property, being able to use it for continuing coal power waste, the burden is on them to help pay for it.

[2] Pending judicial confirmation that such a remedy is required.

This formulation of the principle makes sense. If our focus was on who caused damage to property, thus necessitating its replacement, any new generator or plant would implicitly be the fault of all the customers who have used it over the years of its service. Thus, public utilities would be unable to ever recoup investments completely without enacting retroactive rate increases on previous customers, something that has only been allowed to this point in a single case where the prior rate methodology has been found to be unjust or unreasonable, a point not at issue in this case. *See Verso Corp*, 898 F.3d. This could should hesitate to allow retroactive rate increases to be levied upon customers for property replacements simply because they, at one point during its life, utilized a now unusable piece of property.

Further, to the extent that FERC did actually violate the matching principle, this is neither a rule FERC is obliged to follow nor one the court should consider. It was posited by the appellant's in *ACS of Anchorage* that the matching principle may in fact require costs be attributed only to those that cause them, as is alleged by Appellant's in this case. *ACS of Anchorage, Inc. v. FCC*, 390 F.3d 403 (D.C. Cir. 2002). This court, in *ACS*, without commenting on the specific formulation of the matching principle, instead noted that FERC is under no obligation to actually rely upon the matching principle when determining rates. *Id. at* 410. This result is consistent with the axiomatic principle that judicial review focuses on the result of the rates and not the process by which they were determined. *See Hope, 320 U.S. 591*. Thus, even if the matching principle were violated, FERC is under no affirmative obligation to follow it and this court would be limited in its ability to review it.

B. FERC's decision was not arbitrary or capricious because it engaged in a reasoned decision-making process considering both the factual record and policy concerns.

Reviewing courts undertake a narrow scope of review under an arbitrary and capricious standard. *Maine*, 854 F.3d at 21. This standard is deferential to the agency. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) ("[administrative] decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . ."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) ("Review under the arbitrary and capricious standard is deferential; a court does not vacate an agency's decision unless the agency relies on factors which Congress did not intend it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") (internal quotations omitted). An agency, to pass this test, "must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

Much of the record's evidence shows that FERC engaged in a reasoned decision-making process, which is evidence that its decision was not arbitrary and capricious. FERC held thee full days of evidentiary hearings on ComGen's proposed rate revisions. Upon FERC's approval of the rates, they subjected the approval to a condition: *actual* implementation of remedial action. FERC's decision ensured that any cost bore by consumers was actually necessary and not the product of a since overturned judicial decision. Further, FERC partially based its determination on the testimony of a witness, which would be entitled to deference. *See generally Kimm v. Dep't of the Treasury*, 61 F.3d 888 (Fed. Cir. 1995).

Similar to *Center for Auto Safety*, in this case there was little data upon which to base a decision, but FERC still examined all to which it had access and, in its decision, explicitly stated

an acceptable explanation for its determination. 956 F.2d 309 (D.C. Cir. 2002). Further, "in selecting an appropriate standard, [the agency had] to rely primarily on policy considerations rather than factual ones." *Id.* at 316. Reliance on policy considerations is not an impermissible basis for decisions. *Id; Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 417 (1983) (Where the Commission determined that "providing maximum incentive for the development of cogeneration and small power production, in light of the Commission's judgment that the entire country will ultimately benefit from the increased development of these technologies" was not an unreasonable basis to approve the maximum allowable rate.); *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 31 (D.C. Cir 2002) (FERC decisions "can be justified by a showing that . . . the goals and purposes of the statute will be accomplished through the proposed changes.") (internal quotations omitted). This kind of explanation, basing a decision on broad policy goals, however meager it may seem, provides contrast with the court's decision in *Maine*, where the rates were disapproved due to inadequate explanation. *854 F.3d 9. See also Motor Vehicles*, 463 U.S. at 56 (Where the agency did not perform its due diligence and analyze pertinent information).

C. The approved rates are supported by substantial evidence because each of the order's essential elements finds support on the record.

Alternatively, FERC's decision was supported by substantial evidence and is thus permissible. The arbitrary and capricious standard and the substantial evidence standard are the same test when applying them to the question of factual support. *See Ass'n of Data Processing Service Orgs., Inc. v. Board of Governors of the Fed. Reserve*, 745 F.2d 677 (D.C. Cir. 1984). "[T]here is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense". *Id* at 683-684. This holding has been explicitly held to apply in ratemaking cases. *See Mid-Tex Elec., 773 F.2d 327.* Courts

likewise have determined their own role in invalidating rates by using the terms synonymously. *See Maine*, 854 F.3d at 22 (When discussing their role under the arbitrary and capricious standard as "to [ensure] that the Commission's judgment is supported by substantial evidence") (Internal quotations omitted).

Section 706(2)(E) of the APA states that "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence" when the agency is required to use formal proceedings; This is the standard Agencies will be held to upon judicial review. 5 U.S.C. § 706(2)(E). This standard has been read to require that the evidence presented be enough that a reasonable person would find the conclusion drawn to be supported. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id.* at 477. Further, the court must consider the "whole record" presented and not limit its review to only the portions that support the Agency determination. *Id.* at 481.

The standard is slightly more particular when dealing with rates like the ones in question: "[A] court reviewing rate orders must assure itself both that each of the order's essential elements is supported by substantial evidence and that the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." *Jersey,* 812 F.2d at 1211 (Internal quotations omitted). Thus, the court must engage in a balancing between the interests of the investors and those of the consumers, the result of which must be supported by substantial evidence. *Id.* at 1182. This court is also obligated to consider the

policy interests proffered in FERC's decision when considering the substantiality of the evidence before it. *Mid-Tex Elec.,* 773 F.2d 327.

FERC relied upon substantial evidence in approving the proposed rates. While it is true that "[t]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight", this case does not present a problem of sufficiently detracting evidence. *Universal Camera*, 340 U.S. at 488. FERC relied upon two key permissible points in making their decision: the financial situation of ComGen and policy concerns. FERC concluded that forcing ComGen to bear the entirety of the judicially imposed remedy would likely jeopardize the financial integrity of ComGen, and instead imposed a smaller, yet still substantial penalty upon them.[3] Further, FERC determined that an important public policy implication was at stake and that it was a prudent course of action to encourage environmental protection was to allow utilities to recover in rates the costs of environmental cleanups. Both of these are factors to weigh in any balancing test and are explicitly a part of an arbitrary and capricious analysis.[4] *See Permian Basin,* 390 U.S. at 791-792. Further, policy decisions are permitted to make up the core of an administrative

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[3] SCCRAP fail to grasp that even with the approval of the rates, ComGen is still being incurring a potential financial penalty from the March 2017 discovery. While it is true that the rates authorized by FERC allow recovery of the $246 million ComGen estimated it would cost to comply with the district court order, this investment is being recouped over a 10-year period. The order does not make it clear whether that recovery would be in the base rate or the operating expenses section of the formula, with the former receiving a rate of return and the latter not. Assuming the money would be recovered through operating expenses, there is no interest accrued on the initial investment as an attempt by FERC to compensate ComGen for the time value of money or as a reasonable return on investment. *See Motion Picture Ass'n of Am. V. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992); *See also Jersey Central,* 810 F.2d at 1184-185 *("*The rationale is that while companies should be able to recover the amount of their investment in failed projects, they should not be allowed to profit from their failures. Correlatively, loss of the time [value of their equity in failed projects represents a reasonable sharing with ratepayers of the losses of a failed project."). Similarly, ComGen loses either money in its bank, thus losing potential interest generated, or has to pay interest on any loans it takes out. This should be viewed as a double-penalty imposed by FERC upon ComGen for their failure to properly monitor the effectiveness of the 2006 corrective action. It is eminently reasonable for FERC to conclude that this is an appropriate penalty for ComGen's failure to properly monitor and that sharing the cost of remedial action with those benefitting from continuing access to electricity is the proper way to ensure ComGen's continuing financial security, lest their customers be left without power.

[4] As they are essentially the same standard, as discussed above in this section, we see no reason those factors cannot be given the same weight in a substantial evidence analysis.

decision in the absence of limited other data, *See Center for Auto Safety,* and are entitled, in the instances of ratemaking, to great deference as "[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *Alcoa*, 564 F.3d at 1347. Substantial evidence on the record supports the reasons explicitly relied upon by FERC and thus the approved rates should be upheld.

IV. Rates lower than those prescribed by FERC, and advocated for by SCCRAP, would be confiscatory and unconstitutional under the Fifth and Fourteenth Amendment.

Were FERC to adopt SCCRAP's proposed rates, ComGen would have been subject to rates so low that they would be confiscatory and unconstitutional, barring just compensation. The Fifth Amendment states that no "private property be taken for public use, without just compensation." U.S. Const. amend. V. The definition of public use is quite broad and clearly encompasses property used in the generating of power for public consumption. *See, e.g., FCC v. Fla. Power Corp*., 480 U.S. 245 (1987)*; See also Kelo v. City of New London*, 545 U.S. 469 (2005*)*. ComGen is not arguing against regulation of the rates they charge customers for electricity, as it is "settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible." *FCC,* 480 U.S. at 253. However, the constitution places limits on how low the rates can be before they deny the public utility just compensation for the use of their property. We posit that the rates advocated for by SCCRAP would be below this constitutional threshold and would constitute a taking as such.

A. The Takings Clause prevents unreasonably low rates from being forced upon ComGen.

The Takings Clause, in the context of public utility ratemaking, prevents unreasonably low rates from being forced upon public utilities, as such low rates would be considered a taking under the Fifth Amendment. As conceded above, the general regulation of rates is permissible and

constitutional. Further, strict regulation of maximum allowable rates can stringently limit how much return on investment can be seen by public utilities, *FCC,* 480 U.S. at 253, or even reduce the value of the property being regulated. *Fed. Power Comm'n v. Texaco Inc*., 417 U.S. 380, 392 (1974). "All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level. In the context of the Act's rate regulation, whether any rate is confiscatory, or for that matter just and reasonable, can only be judged by the result reached, not the method employed." *Id.* at 391-393 (internal quotations omitted). The constitution simply protects the public utility from having their rates limited so unjustly that they become confiscatory. *Duquesne Light*, 488 U.S. at 309. *See also FCC, 480 U.S. at 253* ("So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition.").

B. The rates advocated for by SCCRAP are unreasonably low and thus are unconstitutional.

SCCRAP advocates for rates so unreasonably low that they would be unconstitutional under current fifth amendment jurisprudence. Regulatory takings[5], distinguished from physical takings, consider three main factors, which have been found to have "particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action." *Connolly v. Pension Benefit Guar. Corp*., 475 U.S. 211, 225 (1986); *See also Los Angeles Gas & Elec. Corp. v. RR Comm'n of Cal.*, 289 U.S. 287, 305-306 (1933) ("We have said that the judicial ascertainment of value for the purpose of deciding whether rates are confiscatory "is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of

[5] This would qualify as a regulatory taking as there is no physical confiscation of property or denying of ComGen the ability to use their land. See FCC, 480 U.S. at 305; See also Los Angeles Gas, 289 U.S. at 305 (As the property remains in the ownership of the complainant, the question is whether the complainant has been deprived of a fair return for the service rendered to the public in the use of the property.).

all relevant facts."); *See generally Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Of clear importance to this factual inquiry is the economic impacts on the regulated party. Consideration in this calculus is also given to the cost of the property acquired for public use. *Los Angeles Gas,* 289 U.S. at 306 ("The actual cost of the property – the investment the owners have made – is a relevant fact.").

The facts of this case forcefully show that there would be a regulatory taking if the rates proposed by Appellants were approved. To the first factor, the facts make it clear that disallowing recovery would put severe financial strain on ComGen. Testimony stated that the majority of ComGen's profits over the entirety of the 10-year rate period would be effectively erased. FERC's approval of the rates gave ComGen a reasonable 10.0% return on equity. However, if return is disallowed, that would drop to a meager 3.2%. A difference of 6.8% return far exceeds what the Supreme Court classified as "reasonable" in *Duquesne Light* when it commented that denial of amortized recovery would only reduce the utility's revenue by 0.5% was constitutionally reasonable. 488 U.S. at 312. This major drop in income would imperil ComGen's financial integrity and render it impotent to raise capital on terms not unfavorable to ComGen.

To the second factor, ComGen purchased the Vandalia Generating Station in 2014 specifically to engage in regulated rate sales as a public utility, removing it from the constant price flux and risk present as a merchant power plant. ComGen invested in the Vandalia Generating Station with the reasonable expectation of earning consistent, reasonable returns on their investment, not have it taken for public use without just compensation. To deny them the ability to recover for prudent, necessary investments would be frustrating this reasonable investment expectation.

While the character of the government action in this case is entirely permissible, and thus it appears will weigh against ComGen, this is of little significance when considering the aforementioned facts. The cost of the coal ash impoundment further weighs in favor of finding a taking. The amount needed to secure the property for public use is exorbitant. ComGen has estimated that it will cost $246 million to fully comply with the judicial order. While in *Duquesne Light* the court denied recovery of less than $35 million and determined that it was not a taking, this case concerns a far larger amount. *See* 488 U.S. at 302. Forcing a single company to bear such a high financial burden, regardless of their means, for all its customers would be unjust and unreasonable.

The weight of the first two factors, and the supplemental interest in the cost of the investment, is more than enough to evidence that a taking will occur if ComGen cannot incorporate the coal ash impoundment into their rates. The sheer unreasonableness of this request by SCCRAP is shocking. Thus, this court should find that the rates proposed by SCCRAP would constitute a taking under the Fifth and Fourteenth Amendments.

C. Effective public policy demands that public utilities be able to recover prudently made investments.

There are strong policy reasons for this court to find that such low rates are unconstitutional. Allowing actual recovery of prudently made investments will encourage businesses, specifically public utilities, to invest in themselves for the betterment of the public. Were a public utility unable to actually or fully recover their investments, such as a private business would be able to do, they would have no impetus to invest in themselves; For example, a power company would be unmotivated to take measures to mitigate impacts on the environment from its operations, whether by remedying ongoing or past impacts or by proactively investing in cleaner technology.

It is in the public interest that utility companies are incentivized to actually use their earnings for the public good. This is especially so when we are dealing with natural monopolies, as public utilities are. Without incentives to do so, there is no capitalistic competition between providers to spur investments. This means that it is up to regulators to creates those incentives, and one of the best tools they have is in rate calculations and return on investments. This court would be doing a disservice to all utility consumers if it began disallowing reasonable recovery of prudent investments.

CONCLUSION

For the foregoing reasons, appellant/ intervenor respectfully request this Court should reverse the District Court Decision or, in the alternative, uphold the FERC decision to deny a rehearing.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Commonwealth Generating Company (ComGen) 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, 2019.

Respectfully submitted,

Team No. 9