Ninth Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18-02345
ORDER

Commonwealth Generating Company,

Appellant,

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

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Appellee,

Stop Coal Combustion Residual Ash Ponds (SCCRAP),

Petitioner,

-v.-

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

Respondent,

Commonwealth Generating Company

Intervenor.

This case involves an appeal to the United States Court of Appeals for the District of Columbia Circuit from orders in two separate proceedings:

1. An order by the United States District Court for the District of Columbia granting the request of petitioner Stop Coal Combustion Residual Ash Ponds (SCCRAP) for injunctive relief against Commonwealth Generating Company (ComGen).
2. An order by the Federal Energy Regulatory Commission (FERC) denying rehearing in Docket ER-18-263-000. Petitioner SCCRAP takes issue with the decision of FERC denying rehearing of the Order Accepting Commonwealth Generating Company's Revised Rate Schedules.

ComGen appealed the decision of the District Court to this Court and contemporaneously commenced a rate proceeding at FERC to recover under its FERC-

approved unit power service agreements the costs it would incur to comply with the injunctive relief imposed by the District Court. SCCRAP intervened in the FERC proceeding in opposition to ComGen's rate filing. Upon FERC's issuance of an order accepting ComGen's proposed rates, SCCRAP appealed FERC's decision to this Court. Because both actions involve common parties (ComGen and SCCRAP) and common issues (liability under the Clean Water Act for pollution from the Little Green Run Impoundment owned and operated by ComGen), SCCRAP, ComGen, and FERC jointly filed a motion in this Court to have the actions consolidated for decision. On December 21, 2018, this Court granted the motion.

It is hereby ordered that SCCRAP and ComGen[1] brief the following 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 §402 of the Clean Water Act (33 U.S.C. §1342).
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.

SO ORDERED

Entered this 28th Day of December, 2018

Judge Samuel L. Wotus

[1] FERC will not be represented in this case for the purposes of the briefs and oral argument. Participants will represent SCCRAP and ComGen.

Factual Background

A. Coal Ash Impoundment Ponds

Coal combustion residuals (CCRs), commonly known as coal ash, are byproducts of the combustion of coal at electric generating plants. There are several different types of materials produced including, (1) fly ash, a very fine, powdery material composed mostly of silica made from the burning of finely ground coal in a boiler, (2) bottom ash, a coarse, angular ash particle that is too large to be carried up into the smoke stacks so it forms in the bottom of the coal furnace, (3) boiler slag, molten bottom ash from slag tap and cyclone type furnaces that turns into pellets that have a smooth glassy appearance after it is cooled with water, and (4) flue gas desulfurization material (FGD), a material leftover from the process of reducing sulfur dioxide emissions from a coal-fired boiler that can be a wet sludge consisting of calcium sulfite or calcium sulfate or a dry powered material that is a mixture of sulfites and sulfates.[2]

Coal ash contains contaminants like mercury, cadmium and arsenic associated with cancer and various other serious health effects. Coal ash is disposed of in wet form in large surface impoundments and in dry form in landfills. According to the Environmental Protection Agency (EPA), without proper protections, these contaminants can leach into groundwater and can potentially migrate to drinking water sources, posing significant public health concerns.[3]

CCRs are one of the largest industrial waste streams generated in the United States. In 2012, more than 470 coal-fired electric utilities burned over 800 million tons of coal, generating approximately 110 million tons of CCRs in 47 states and Puerto Rico.[4] CCRs can be disposed in off-site landfills, or disposed in on-site landfills or surface impoundments. In 2012, approximately 60 percent of the CCRs generated were disposed in surface impoundments and landfills, with the vast majority disposed in on-site disposal units, including more than 735 active on-site surface impoundments, averaging more than 50 acres in size with an average depth of 20 feet. The Little Green Run Impoundment, owned and operated by ComGen, is one such on-site surface impoundment; it is located adjacent to the Vandalia Generating Station.

B. Commonwealth Generating Company

Commonwealth Generating Company (ComGen) is a wholly owned subsidiary of Commonwealth Energy (CE), a multistate electric utility holding company system providing electric service at retail and wholesale rates in nine states (including Vandalia and its neighboring state of Franklin). ComGen was incorporated by CE in the District of Columbia in 2014 to purchase the Vandalia Generating Station from Commonwealth Energy Solutions (CES), a wholly owned, unregulated subsidiary of CE that formerly owned thirteen merchant electric generating

[2] EPA, Frequent Questions about the 2015 Coal Ash Disposal Rule, available at https://www.epa.gov/coalash/frequent-questions-about-2015-coal-ash-disposal-rule
[3] *Id.*
[4] *Id.*

plants.[5] In 2014, CE announced its intention to reduce its exposure to competitive wholesale markets by either selling off its merchant plants to independent power producers, or moving them into the regulated rate base of CE's retail electric companies operating in nine states. The sale of the Vandalia Generating Station in 2014 to ComGen was part of the latter strategy.

In November 2014, following the regulatory approval of ComGen's acquisition of the Vandalia Generating Station, ComGen entered into unit power service agreements with Vandalia Power Company and Franklin Power Company under which the electrical output of the Vandalia Generating Station would be sold 50% to Vandalia Power and 50% to Franklin Power. Vandalia Power, a wholly owned subsidiary of CE with its principal place of business in Mammoth, Vandalia, is a corporation organized and existing under the laws of Vandalia; it is engaged in generating, transmitting, and distributing electric energy to the public in northern and eastern Vandalia and a portion of southwestern Franklin, and is a public utility under Section 201 of the Federal Power Act (FPA). Franklin Power, a wholly owned subsidiary of CE with its principal office in Capital City, Franklin, is a corporation organized and existing under the laws of Franklin; it is engaged in the generation, transmission, and distribution of electric power to the public in eastern Franklin and is a public utility under Section 201 of the FPA.

Because the unit power service agreements are wholesale transactions in interstate commerce (i.e., transactions between utilities), the agreements are subject to FERC jurisdiction under the FPA. The unit power service agreement between ComGen and Vandalia Power is designated as ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement), while the unit power service agreement between ComGen and Franklin Power is designated as ComGen's FERC Rate Schedule No. 2 (Franklin Agreement).

C. The Vandalia Generating Station and the Little Green Run Impoundment

In the late 1990s, CE formed CES as part of its commitment to becoming a major energy supplier in the emerging competitive wholesale power markets. Shortly thereafter, CES commenced development of the Vandalia Generating Station, which consists of two 550 megawatt (MW) coal-fired units (for a total capacity of 1100 MW) located near Mammoth, Vandalia on the Vandalia River. Vandalia Unit Nos. 1 and 2 commenced commercial operation in 2000 and 2002, respectively.

CCRs produced by the Vandalia Generating Station are disposed in the Little Green Run Impoundment, which was formed by the construction of a dam across Green Run, immediately east of the Vandalia Generating Station. The dam has a current height of 395 feet from toe to crest, with a top elevation of 1,050 feet above sea level. The impoundment formed by the dam covers approximately 71 surface acres and currently contains approximately 38.7 million cubic yards of solids, mainly CCRs and coal fines and waste

[5] The electrical output from merchant power plants is typically sold into the wholesale markets, and the owners of such plants bear the risk of whether the price received in the wholesale market covers the cost of their operation. In contrast, regulated power plants are typically owned by retail electric utilities that recover the operating costs of their operation (including a return on investment) from captive retail electric customers through the ratemaking process at state public utility commissions (PUCs).

material removed during the coal cleaning process. The effluent from the Little Green Run Impoundment flows south and enters Fish Creek before entering the Vandalia River.

The Little Green Run Impoundment was included in EPA's listing of coal ash impoundments; based on EPA's listing as of March 2014, the Little Green Run Impoundment is one of 63 electric industry coal waste impoundments in the United States with a "high" hazard rating. With a current height of 395 feet from toe to crest, the Little Green Run Impoundment has the highest existing dam structure among the coal waste dams listed by EPA.

D. Stop Coal Combustion Residual Coal Ash Ponds

Stop Coal Combustion Residual Coal Ash Ponds (SCCRAP) is a national environmental and public interest organization based in Washington, D.C. SCCRAP has members located throughout the states of Franklin and Vandalia. Its chapter in the town of Mammoth includes several citizens who allege they are directly affected by the environmental impacts associated with the Little Green Run Impoundment.

Beginning in 2015, SCCRAP commenced a two-pronged initiative targeted at coal ash impoundments across the United States. First, SCCRAP filed lawsuits under the Clean Water Act and/or Resource Conservation and Recovery Act (RCRA) against the owners and operators of coal ash impoundments found to be responsible for pollutants leaking into groundwater. Second, SCCRAP intervened in utility ratemaking proceedings before state public utility commissions (PUCs) and FERC to challenge rate recovery of expenses associated with polluting coal ash impoundments.

E. The Release of Pollutants from the Little Green Run Impoundment

Through groundwater monitoring that was required by permits issued by the Vandalia Department of Environmental Quality (VDEQ), CES began in 2002 to detect arsenic in the groundwater at levels that exceeded Vandalia's groundwater quality standards. (Arsenic leaches from coal ash when water passes through it.) As required by its permits, CES notified VDEQ and began developing and implementing a corrective action plan with VDEQ to mitigate the pollution. VDEQ approved the corrective plan in 2005. Under the corrective plan, CES installed a high density polyethylene (HDPE) geomembrane liner on the west embankment of the Little Green Run Impoundment in 2006. (The embankments on the north, east, and south sides of Little Green Run are homogeneous embankments constructed of compacted clay, while the west embankment is constructed of a 15-foot-wide compacted clay lining on the upstream slope with the remainder of the embankment constructed of bottom ash.)

During routine monitoring of the water quality, Vandalia Waterkeeper[6] in March 2017 detected elevated levels of arsenic in the Vandalia River. Subsequent analysis by

[6] Vandalia Waterkeeper is a local chapter of the Waterkeeper Alliance, which is an environmental NGO focused on clean water. The Waterkeeper Alliance claims to have "more activists on the water than any other

Vandalia Waterkeeper suggested that the source of the arsenic was the Little Green Run Impoundment; rainwater and groundwater were leaching arsenic from the coal ash in the impoundment, polluting the groundwater, which carried the arsenic into the navigable waters of the nearby Fish Creek and Vandalia River. Vandalia Waterkeeper filed a complaint with the VDEQ, which commenced an investigation. That investigation showed that a seam in the HDPE geomembrane liner installed in 2006 was inadequately welded, resulting in seepage that pooled at the downstream toe of the west embankment. According to the VDEQ report:

> "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.

Legal Background

A. <u>The Clean Water Act</u>

The Clean Water Act was enacted 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 those ends, the Act prohibits the "discharge of any pollutant by any person" into navigable waters unless otherwise authorized by the Act. *Id.* §1311(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 term "point source," in turn, means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." *Id.* §1362(14).

As recognized in §1311(a), the Act provides for the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specified effluent standards. In 50 U.S.C. §1342(a), the Act established the National Pollutant Discharge Elimination System (NPDES), under which EPA may "issue a permit for the discharge of any pollutant" provided that the authorized discharge complies with the effluent standards specified in the permit or otherwise imposed by the Act. Through that system, the EPA also shares regulatory authority with the States, and a State can elect to establish its own permit

organization in the world, patrolling and protecting 2.69 million square miles of rivers, lakes, and coastal waterways." https://waterkeeper.org/

program, subject to EPA approval. *Id*. §1342(b)-(c). When a State elects to establish its own program, the EPA suspends its federal permit program and defers to the State's, allowing the state discharge (SPDES) permit to authorize effluent discharges under both state and federal law. (The states of Vandalia and Franklin have elected to implement permitting programs under the Clean Water Act.)

B. The Federal Power Act

Enacted in 1935, Title II of the Federal Power Act (FPA) provides FERC with jurisdiction over the actions of a "public utility," which is defined by the FPA as "any person who owns or operates facilities subject to the jurisdiction of the Commission," i.e., "any person who owns or operates" facilities for "the transmission of electric energy in interstate commerce," and "to the sale of electric energy at wholesale in interstate commerce." 16 US.C. §824(b). FERC's primary responsibilities under Title II of the FPA are to ensure that the rates, terms and conditions of wholesale electric sales by public utilities are just and reasonable and not unduly discriminatory (*Id*. §824d) and to remedy rates that it finds are unjust, unreasonable, or unduly discriminatory (*Id*. §824e). FERC's rate authority provides it with jurisdiction over tariffs filed by electric utilities operating in interstate commerce.

Because ComGen engages in the sale of electric energy at wholesale in interstate commerce – by virtue of its unit power service agreements with Vandalia Power Company and Franklin Power Company, respectively, through which it provides electricity for resale by these utilities to their retail customers – it is a "public utility" under the FPA, and thus must file its tariffs with FERC for approval under §205 of the FPA (16 US.C. §824e).

Procedural Background

A. ComGen's Appeal from the District Court Ruling

1. SCCRAP's District Court Action

In December 2017, SCCRAP filed suit against ComGen in U.S. District Court for the District of Columbia under the citizen-suit provision of the Clean Water Act, alleging that ComGen was violating U.S.C. §1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters. Under the Clean Water Act, the discharge of a pollutant is defined to mean the "addition of any pollutant to navigable waters from any point source." Id. § 1362(12). According to SCCRAP's complaint, the Little Green Run Impoundment qualified as a point source from which arsenic seeped, polluting the groundwater around ComGen's Vandalia Generating Station which was "hydrologically connected" to Fish Creek and the Vandalia River, carrying arsenic to navigable waters.

2. The District Court's Decision

Following a bench trial, the District Court on June 15, 2018 issued its order finding that rainwater and groundwater were indeed leaching arsenic from the coal ash in the Little Green Run Impoundment, polluting the groundwater, which carried the arsenic into navigable waters. Because the court determined that the Impoundment constituted a "point source" as defined by the Clean Water Act, it found ComGen liable for ongoing violations of

§1311(a). The District Court rejected ComGen's argument that §1311(a) of the Clean Water Act did not cover the seepage of arsenic from coal ash into the groundwater, concluding that the Act did indeed cover discharges into groundwater that had a "direct hydrological connection" to navigable waters such that the pollutant would reach navigable waters through groundwater. And it found as fact that arsenic was reaching Fish Creek and the Vandalia River in that manner. According to the court's opinion, "the CWA applies to discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is direct, immediate, and can generally be traced."[7]

The court also rejected ComGen's argument that the Little Green Run Impoundment was not a point source because it was not a "conveyance." According to the court's opinion:

> "ComGen built the coal ash piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the Vandalia Generating Station to the Vandalia River."[8]

As a remedy, the court ordered ComGen to "fully excavate" the coal ash in the Little Green Run Impoundment (38.7 million cubic yards in total) and relocate it to a "competently lined" facility that complies with the EPA's Coal Combustions Residual (CCR) rule. Although acknowledging that the burden of closure by removal "may be great," the court stated that it was "the only adequate resolution to an untenable situation that has gone on for far too long." Because of the costs associated with the injunctive remedy, the court did not assess civil penalties against ComGen.

3. ComGen's Appeal

From the District Court's orders, ComGen filed this appeal on July 16, 2018 challenging the court's conclusions that (1) the Clean Water Act regulates discharges into navigable waters through hydrologically connected groundwater, and (2) the Little Green Run Impoundment constitutes a "point source" under the Clean Water Act.

B. SCCRAP's Appeal of FERC's Decision

1. ComGen's FERC Filing

Contemporaneously with its appeal of the District Court's decision, ComGen on July 16, 2018 submitted a filing to FERC under §205 of the Federal Power Act to recover from Vandalia Power and Franklin Power the costs of complying with the District Court order (i.e., to "fully excavate" the 38.7 million cubic yards of coal ash in the Little Green Run Impoundment and relocate it to a new facility that complies with EPA's CCR rule). The filing consisted of proposed revisions to ComGen's FERC Rate Schedule No. 1 (Vandalia Agreement) and FERC Rate Schedule No. 2 (Franklin Agreement) to recover over a 10-year period the cost of achieving compliance with the district court order, which ComGen estimated to be $246 million in its FERC rate filing. Under the unit power service agreements, this cost is allocated 50% to Vandalia Power and 50% to Franklin Power. Upon approval by

[7] Opinion at 10.
[8] *Id*. at 12.

FERC, the costs allocated to each affiliate under the unit power service agreements would be recovered from each utility's retail customers. (The costs become FERC-approved rates that are flowed through to retail customers, and state PUCs have no authority to disapprove such recovery once approved by FERC.) ComGen's proposal would increase customer bills in each jurisdiction by about $2.15 per month in November 2019, and average households across in each jurisdiction would see bills rise by about $3.30 per month for the 10-year amortization period.

2. SCCRAP's Challenge to ComGen's FERC Filing

SCCRAP intervened in the FERC proceeding, and filed a protest in opposition to ComGen's filing. SCCRAP had two primary bases for its opposition to rate recovery. First, SCCRAP argued that under the prudence principle of utility ratemaking, ComGen should be precluded from recovering from utility ratepayers any of the costs of remedying its incompetent implementation of the corrective plan prescribed by VDEQ in 2006. According to SCCRAP's written testimony in the FERC proceeding, had ComGen exercised a standard of care consistent with prudent utility practice in implementing the corrective plan prescribed by VDEQ in 2006, there would have been no seepage of the arsenic into the groundwaters surrounding the Little Green Run Impoundment, and thus no basis for imposing the corrective action – at an estimated cost of $246 million – required by the District Court's injunction. Rather than passing these costs through to Vandalia Power and Franklin Power ratepayers under the applicable FERC rate schedules, SCCRAP urges that ComGen's shareholders be required to bear the consequences of ComGen's imprudence.

Second, in the event FERC agrees in principle with ComGen's filing to flow through the cleanup costs to Vandalia Power and Franklin Power (and, in turn, to their retail customers in Vandalia and Franklin), SCCRAP takes issue with forcing Vandalia Power and Franklin Power to bear the full cost of the "closure-by-removal" corrective action. SCCRAP points out that the 38.7 million cubic feet of coal ash currently contained in the Little Green Run Impoundment was accumulated over a period of 18 years – since the first of the Vandalia units achieved commercial operation in 2000 – and for the vast majority of that period, the Vandalia Generating Station was a merchant plant, the output from which was sold into the wholesale market to customers other than Vandalia Power and Franklin Power. Only the coal ash produced by the Vandalia Generating Station's operation since November 2014 – when ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company, respectively – are properly allocable to these utilities (and, in turn, their retail customers). According to the written testimony submitted by SCCRAP during the FERC proceeding, only about 19.5% of the $246 million in the costs of the corrective "closure-by-removal" remedy, or about $48 million, is fairly allocable to Vandalia Power and Franklin Power collectively, with the remaining $198 million being borne by ComGen's shareholders (given that the Vandalia Generating Station was a merchant plant for about 80.5% of the time the plant has been in operation). SCCRAP submits that requiring Vandalia Power and Franklin Power to bear 100% of the costs of the corrective action would violate the "matching principle" of utility ratemaking, which preserves the relationship between benefits and burdens (i.e., the customers who benefited from electricity production from the Vandalia Generating Station should bear the burdens of the costs associated with producing

that electricity). As stated by SCCRAP, 80.5% of the coal ash in the Little Green Run Impoundment is attributable to electricity produced when the Vandalia Generating Station was a merchant plant, and therefore the same percentage of remediation costs should be borne by the ComGen shareholders, who benefited from the revenue from electricity sales during the period from 2000 through November 2014.

In response to SCCRAP's protest, FERC suspended ComGen's rate filing[9], and set the matter for an evidentiary hearing to take testimony on the limited factual issues raised in SCCRAP's protest, with the remainder of the issues to be resolved based on the parties' written submissions.

In response to SCCRAP's arguments in the FERC proceeding, ComGen claimed that its implementation of VDEQ's corrective plan in 2006 was consistent with prudent utility practice, and that it cannot be held strictly liable for the failure of the weld in the seam of the HDPE liner. ComGen asserts that it exercised due care in retaining a competent subcontractor to implement the VDEQ-prescribed corrective plan at the Little Green Run Impoundment, and that it is entitled to a presumption of managerial competence in performing its routine utility operations. ComGen submits that this presumption is not overcome by the simple fact of a failure in the HDPE liner, which it does not dispute was the source of the seeping of arsenic into the groundwaters surrounding the Little Green Run Impoundment.

With respect to the application of the "matching principle," ComGen argues that the relevant fact is the time at which the violation of the Clean Water Act was alleged: SCCRAP's action was commenced in December 2017, well after ComGen executed the unit power service agreements with Vandalia Power Company and Franklin Power Company. And the remediation costs will be incurred during the term of the unit power service agreements with Vandalia Power and Franklin Power, making the costs properly allocable to these utilities under the express terms of the unit power service agreements, as implemented through ComGen's FERC Rate Schedule No. 1 and FERC Rate Schedule No. 2, respectively. ComGen submits that if the District Court's injunction is upheld, it will be required as a matter of law to comply with the prescribed "closure-by-removal" plan, and longstanding ratemaking principles provide for the utility's ability to recover costs associated with compliance with legal and regulatory requirements in rates.

Finally, ComGen asserts that the relief requested by SCCRAP, if granted, would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. According to the testimony submitted by ComGen in the FERC proceeding, disallowing recovery of all or a substantial portion of the $246 million in remediation costs would effectively erase the majority of its profits over the proposed 10-year recovery period for the remediation costs. Rather than earning the 10.0% return on equity authorized by FERC in ComGen's most recent rate proceeding at FERC (in 2016), its actual earned return over this period would fall to 3.2% if, as SCCRAP proposes, the entire amount is disallowed. (The actual earned return would be 3.6% under SCCRAP's alternative proposal to disallow

[9] The proposed rate schedules, by their terms, would have become effective 60 days after filing, or on September 15, 2018.

$198 million, or 80.5% of the remediation costs.)[10] This level of profits, according to ComGen, would fail to properly balance the interests of ratepayers and ComGen's shareholders, maintain its financial integrity, and assure confidence in the its financial soundness, thereby undercutting its ability to raise capital on reasonable terms. ComGen points out that these are the constitutional standards for setting "just and reasonable rates" enunciated by the U.S. Supreme Court in *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923) and *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944), as well as the "end results" test articulated in the *Hope* case.

In its briefing to FERC, SCCRAP responded by claiming that ComGen is not constitutionally entitled to earn a reasonable rate of return in the face of utility mismanagement. Rather, SCCRAP submits that the role of FERC is to insulate ratepayers from the consequences of management's imprudent decisions by requiring shareholders to bear a portion, if not all, of the costs of remediation. In response to ComGen's claims about the impact of such a decision on its financial integrity, SCCRAP points out that ComGen's sole shareholder is CE, which saddled ComGen at the outset with an unprofitable coal-fired power plant that CE "put on the backs of Vandalia's and Franklin's ratepayers" through a "creative" corporate restructuring and the unit power service agreements.

3. FERC's Decision

On October 10, 2018, following three days of evidentiary hearings in September focused on the limited factual issues, FERC issued its decision approving the rate revisions proposed by ComGen. FERC allowed the proposed rates to become effective, subject only to a compliance filing by ComGen confirming that the injunctive relief imposed by the District Court withstood judicial review and that ComGen would be required to implement the required remedial action.[11] Notwithstanding that outcome, however, FERC accepted in principle many of the arguments advanced by SCCRAP. With respect to the imprudence of ComGen's implementation of VDEQ's corrective action in 2006, FERC agreed with ComGen that it should not be held strictly liable for the actions of its subcontractor in failing to competently weld the HDPE liner in 2006. But FERC reached a factual finding that ComGen failed to properly monitor the effectiveness of the corrective action during the 2006-2017 period, which likely would have revealed the problem with arsenic seeping through the imperfect weld in the liner. FERC also agreed in principle with SCCRAP's argument regarding the "matching principle" of utility ratemaking, and found that charging Vandalia Power and Franklin Power (and, in turn, their ratepayers) with the full remediation costs would represent a "windfall" of sorts to ComGen's shareholders, inasmuch as they received the benefits of the revenues produced by the output from the Vandalia Generating Station from 2000 through 2014, and thus should bear a proportionate share of the remediation costs

[10] In the ratemaking process, if FERC approves inclusion of the $246 million as part of ComGen's cost of service under the unit power service agreements, it would be recovered from Vandalia Power Company and Franklin Power Company, respectively, and in turn from their ratepayers following retail rate proceedings at state PUCs. On the other hand, if FERC excludes all or any portion of the $246 million from recovery under the unit power service agreements, the under-recovery is necessarily borne by ComGen's shareholders (which in this case is Commonwealth Energy (CE)). Expenses that are incurred but not recovered in rates would contribute to ComGen's inability to earn its allowed return.

[11] Under the ratemaking mechanism proposed by ComGen and approved by FERC, ComGen would recover the actual remediation costs at the completion of the remediation, amortized over the subsequent 10-year period.

corresponding to the coal ash accumulated in the Little Green Run Impoundment during the period the Station operated as a merchant plant. At the end of the day, however, FERC accepted ComGen's testimony that the financial impact of such an outcome would likely jeopardize the financial integrity of ComGen and therefore raise constitutional issues under the Fifth and Fourteenth Amendments. FERC's decision emphasized as a matter of policy the importance of ensuring that utilities are able to recover in rates the costs of environmental cleanups as a means of promoting environmental protection.

SCCRAP promptly sought rehearing of FERC's decision on November 9, 2018 and, upon FERC's denial of rehearing by order issued on November 30, 2018, pursued judicial review with its petition to the D.C. Circuit Court of Appeals on December 3, 2018. In its appeal, SCCRAP claims that FERC's decision to approve ComGen's revised FERC Rate Schedule No. 1 and revised FERC Rate Schedule No. 2 was arbitrary and capricious, and further challenges FERC's finding that it would be an unconstitutional taking if FERC had adopted SCCRAP's position and disallowed the recovery in rates of all or a portion of the costs incurred by ComGen in remediating the Little Green Run Impoundment. Because SCCRAP's appeal of the FERC decision and ComGen's appeal of the U.S. District Court's decision for the District of Columbia involve common parties (ComGen and SCCRAP) and common issues (liability under the Clean Water Act for pollution from the Little Green Run Impoundment owned and operated by ComGen), SCCRAP, ComGen, and FERC jointly filed a motion in the D.C. Circuit Court of Appeals to have the actions consolidated for decision. On December 21, 2018, the D.C. Circuit granted the motion, and issued a subsequent order on December 28, 2018 setting forth the issues to be briefed and argued on appeal.

[NOTE: No decisions or documents dated after December 28, 2018 may be cited either in briefs or in oral arguments.]