IN THE COURT OF APPEALS
STATE OF GEORGIA

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**CASE # A21A1129**

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SIERRA CLUB, INC.
Appellant

v.

GEORGIA PUBLIC SERVICE COMMISSION
Appellee

&

GEORGIA POWER COMPANY
Intervenor - Appellee

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# REPLY BRIEF OF APPELLANT

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*Counsel for Appellant Sierra Club, Inc.*

Robert B. Jackson, IV, Esq.
Georgia Bar #387750
Robert B. Jackson, IV, LLC
260 Peachtree St - Ste 2200
Atlanta, GA 30303
(404) 313-2039 Voice
rbj4law@gmail.com

Dorothy E. Jaffe, Esq.
*Pro hac vice*
Sierra Club, Inc.
50 F Street NW 8th Floor
Washington, D.C. 20001
(202) 675-7917 Voice
dori.jaffe@sierraclub.org

# I. INTRODUCTION

The single most important issue in this case is *who* should pay the costs to clean-up the coal combustion residuals ("coal ash" or "CCR") at the Georgia Power Company ("GPC") toxic coal ash ponds - GPC or its customers. Under Georgia law, GPC has the burden of proof to show that costs it seeks from customers are not only just and reasonable, (O.C.G.A. § 46-2-25(b)), but also "prudently incurred, reasonable and not unlawful." *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 572, 576-77, 396 S.E.2d 562 (1990). Here, the Georgia Public Service Commission ("Commission") allowed the cost recovery from GPC's customers (aka ratepayers). But the Commission entirely failed to consider whether GPC should pay some or all of GPC's CCR remediation costs given GPC's history of improper coal ash disposal.

As the U.S. Supreme Court explained in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, an agency action is "arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem," including failure to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52, 103 S. Ct. 2856 (1983). Georgia's Administrative Procedure Act ("APA") requires no less: to ensure an agency addresses all material issues and

renders a reasoned decision based on the evidence, an agency's "final decision shall include findings of fact and conclusions of law . . . accompanied by a concise and explicit statement of the underlying facts supporting the findings." O.C.G.A. § 50-13-17.[1] Here, the Commission failed to address whether GPC should pay the CCR costs instead of GPC's customers, and that failure is reflected in the lack of a Commission decision on the issue and a concise statement of facts supporting that decision.

GPC's responsibility for CCR costs given its decades of improper CCR disposal practices was directly before the Commission. The unrebutted analysis of geologist Mark Quarles shows that GPC has, for decades, disposed of its CCR waste in streams, wetlands and groundwater; that its practices contaminated groundwater; and that GPC's draft, unapproved closure plans would continue to contaminate groundwater. R2-D2.2 pp52-98. EPA itself has explained that the federal CCR regulation was adopted specifically to "address [] . . . *groundwater contamination from the improper management of CCR in landfills and surface impoundments* . . .." (emphasis added) *Hazardous and Solid Waste Management Systems; Disposal of Coal Combustion Residuals From Electric Utilities*, 80 Fed. Reg. 21301, 21303

[1] Georgia courts refer to federal precedent when resolving Georgia APA matters that are analogous to the federal APA. *See, e.g., Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc*., 381 S.E.2d 56, 58 (Ga. Ct. App. 1989) (citing Supreme Court "[c]onstruing analogous federal statutory law.")

(April 17, 2015). Before the Commission could conclude it was just and reasonable for GPC's customers to pay GPC's CCR remediation costs, it had to at least address GPC's responsibility for causing the CCR contamination.

The Commission contends that it need not "identify every argument and all evidence that it is not adopting," and asserts that the "Commission did not fail to consider the violations; instead, the Commission did not find the allegations persuasive." Commission Br. at 23. However, Appellees can point to nothing in the administrative record showing that the Commission considered whether GPC should pay those costs instead of the customers, nor to any facts supporting any reasoning that ratepayers should pay. *Id*.

Surely, if the Commission had addressed the issue, in its first, precedential decision determining *who* should pay the initial $525 million installment of an estimated $7.6 billion cleanup bill, it would reflect *some* discussion of whether GPC should pay; *some* articulation of the Commission's reasoning; and *some* recitation of the evidence supporting the reasoning. Yet the Commission failed to point the Court to any such reasoning, evidence, or decision; it simply never addressed it.

In December 2020, the N.C. Supreme Court reversed and remanded the North Carolina Utilities Commission's ("NCUC's") allocation of CCR remediation costs to that utility's customers on similar grounds. *State ex rel. Utilities Comm'n v. Stein,* 375 N.C. 870, 851 S.E.2d 237 (2020). As the *Stein* court explained, the NCUC was

> **required to consider *all* material facts of record…including…facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins**…and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any, in determining the appropriate ratemaking treatment for the challenged coal ash costs."

*Id.* at 276-77 (emphasis added).

In addition, allowing GPC to recover its CCR costs now to implement GPC's *proposed future* closure plans, is unreasonable and imprudent due to the great risk of harm to the ratepayers. Until Georgia Environmental Protection Division ("EPD") issues final closure permits, the draft closure plans and resulting costs could change substantially.

The Commission was charged with determining whether it was just and reasonable to allocate GPC's remediation costs to GPC's customers. Appellees cannot show where in the record the Commission ever grappled with GPC's culpability for its improper coal ash disposal.

Sierra Club asks this court to reverse and remand this matter so the Commission can conduct a proper inquiry into whether it is just and reasonable to

require GPC or GPC customers to bear the CCR cleanup costs, and whether the costs GPC wants to recover were prudently incurred.

## II. ARGUMENT AND CITATION TO AUTHORITIES

In a rate case, the Commission is charged with analyzing the just, reasonableness and prudence of the individual costs that a utility is seeking to recover from its ratepayers. *Georgia Power Co.*, 196 Ga. App. at 576-77. There often are a number of elements to such an analysis. For example, there is an "actuarial" analysis examining *what* the costs are and *how* they will be recovered: i.e., are specific costs relevant to a necessary project, accurately tabulated, and recovered using an appropriate methodology. There must also be a "prudency" analysis examining whether a project is necessary or warranted.

Completely separate is an analysis of *who* should pay those costs; specifically, whether it is just and reasonable to require the customers, rather than the utility to pay those costs. On this point, the N.C. Supreme Court's decision in *State v. Stein*, is instructive because on virtually identical facts it held that a utility's improper CCR disposal practices is a relevant and necessary consideration in allocating CCR costs between the utility and its customers. *State v. Stein,* 851 S.E.2d at 276-77. As in *Stein*, the Commission here had an obligation to determine not just *what* the CCR costs were and *how* they would be recovered in rates, but whether it was just and reasonable for GPC's customers and not GPC to pay them. *Georgia Power Co.*, 196

Ga. App. at 577-79. Because the Commission only addressed *what* the costs were and *how* to recover them from ratepayers, the record here is devoid of any evidence or reasoning that it is just and reasonable to require ratepayers to pay GPC's remediation costs. Commission Br. at 20-21; R2-V pp176, 181-82, 184, 190, 192, 197-98; R2-K2.1 pp72-73.

In this case, Appellees rely upon the deferential "any evidence" standard to defend the Commission's Final Decision by citing evidence that bears upon the "actuarial" analysis of *what* the cost estimates are and *how* GPC will recover them from ratepayers. However, such evidence is not relevant to *who* should pay GPC's CCR costs.

"Evidence is relevant if it logically tends to prove or disprove a material fact at issue in a case." *Jackson Elec. Membership Corp. v. Georgia Pub. Serv. Comm'n.*, 294 Ga. App. 253, 260, 668 S.E.2d 867 (2008) (internal citations omitted). Nowhere do Appellees identify or explain how the total CCR costs or their recovery methodology "tends to prove or disprove" that GPC's customers should pay those costs and not GPC. *Id.* Nor can they. Appellees' testimonial evidence consisted of two witness panels that discuss at a generic level *what* the CCR costs are and *how* they will recover those costs, not *why* customers should pay**.** GPC Br. at 9-12; Commission Br. at 16-19. Likewise, the documentary evidence they cite provide only estimates of *what it may* cost in the future to remediate GPC's CCR ponds. GPC

Br. at 12-16; 25-26. Because the any evidence cited by the Appellees does not support the Commission's Final Decision to approve recovery from GPC's customers, that decision must be reversed.

## A. Appellees identify nothing in the record indicating the Commission ever reviewed evidence, weighed GPC's responsibility, nor explained its reasoning in allocating all of GPC's CCR remediation costs to GPC's customers.

### 1. The record below establishes that GPC's improper coal ash disposal necessitated the CCR remediation costs.

EPA promulgated the CCR Rule expressly to "address . . . groundwater contamination from the *improper management of CCR in landfills and surface impoundments* . . .." (emphasis added) 80 Fed. Reg. at 21303. The "rule requires any existing unlined CCR surface impoundment that is contaminating groundwater . . . to stop receiving CCR and either retrofit or close." *Id*. at 21302. The unrebutted analysis of geologist Quarles demonstrates GPC constructed and is still using CCR ponds without liners, adjacent to rivers, over streams, and in areas with shallow groundwater table aquifers, thereby placing CCR wastes in direct contact with groundwater. R2-D2.2 pp58, 68-69. *See also* R2-D2.2 p89 ("[g]roundwater contamination is present due to the leakage of unlined surface impoundments that Georgia Power constructed […]"). GPC customers did not cause or contribute to that groundwater contamination.

Appellees have not disputed these facts. Nor can they. They do not dispute that it has been illegal to discharge pollutants to groundwater in Georgia without a permit since the 1964 Georgia Water Quality Control Act ("GWQCA") (O.C.G.A. § 12-5-30), or that GPC never had such a permit, or that GPC's CCR ponds have nevertheless been discharging pollution to groundwater for decades. R2-D2.2 p80. Nor do they dispute that it is unlawful to "store, treat, or dispose of hazardous waste in Georgia without a hazardous waste facility permit" (O.C.G.A. §§ 12-8-66; 12-8-62(4); 12-8-62(11)), and that GPC has been doing so at its CCR ponds for decades.

2. Appellees never identify where the Commission considered GPC's responsibility for incurring the CCR costs; what its reasoning was in allocating those costs exclusively to GPC's customers, nor what evidence supported that reasoning.

It is telling that Appellees cannot identify for the Court where the Commission undertook analysis of *who* should pay for GPC's CCR costs. To the contrary, the Commission's position on appeal is that under the APA they are under no obligation to "identify every argument and all evidence that it is not adopting," instead it asserts the "Commission did not fail to consider the violations; instead, the Commission did not find the allegations persuasive." Commission Br. at 23.

But the Commission's position is inconsistent with *State Farm* and Georgia law requiring a decision with a concise statement of supporting facts. It was the Commission's duty to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found

and the choice made." *State Farm,* 463 U.S. at 52; O.C.G.A. § 50-13-17. This duty is all the more critical where there is unrebutted evidence in the administrative record that GPC's conduct was solely responsible for necessitating the costs. As this Court stated in *Georgia Power Co.*: when the stakes are high and the public is at risk, you need a heightened standard of care to assess whether the costs are excessive or unreasonable, a cost which should then be borne by the utility, not the ratepayer. *Georgia Power Co.*, 196 Ga. App. at 578-79.

A far more credible explanation is that the Commission simply failed or refused to consider the issue of whether GPC should pay. GPC argued the issue was decided in an earlier Integrated Resources Plan ("IRP") docket, as evidenced by the testimony of GPC's Chief Financial Officer ("CFO"), Mr. Poroch:

> Q: Whether you should be able to recover that money?
>
> A: (Witness Poroch) Well, I think that the "whether" has already been addressed in the IRP. How is to be addressed here.
>
> Q: So it's your belief its already been determined that the customers should pay for the coal ash cleanup instead of the company?
>
> A: (Witness Poroch) Yes, sir, Yep.
>
> Q: That's your belief?
>
> A: (Witness Poroch) That is my belief.

R2-K2.1 pp72-73.

Appellees' argument fails because whether it is just reasonable and prudent to allow cost recovery from GPC's customers is the core question that gets resolved in a rate case, not an IRP. *See* O.C.G.A. §§ 46-3A-2(b); 46-2-25. And even if that were not the case, Appellees never identify where in the IRP docket (because it is not there) the Commission supposedly undertook the analysis that is lacking here: a decision that GPC's customers should pay rather than GPC. Since the Commission's decision "failed to consider an important aspect of the problem," the Final Decision is arbitrary and capricious and should be reversed. *State Farm*, 463 U.S. at 43

3. The evidence the Commission cites does not bear on whether GPC instead of its Customers should bear GPC's CCR costs.

The Commission cites testimony of Staff witness Smith and GPC witness Poroch to argue that GPC's CCR costs were prudently incurred since it would be spent to come into compliance with recent CCR regulations. Commission Br. at 17, 22-23. But the evidence the Commission cites, only bears on the issue of *what* costs GPC expects it may incur in the future and whether GPC is acting prudently to come into compliance with newly adopted regulations, not GPC's responsibility for historical improper CCR disposal in violation of long-standing State of Georgia environmental laws, and *who* should pay. *See* R2-B2.1 pp40-41; R2-B2.2 pp28-29, 203, 205; R2-B.2.4 pp164-74, 351-55; R2-V pp197-98.

To the extent that the Commission cites the opinion of accountant Ralph Smith that GPC was "pretty" safe in handling coal ash, it is clear that as an accountant, he is not purporting to, nor qualified to, offer an expert opinion on CCR handling practices. *Georgia Power Co.*, 196 Ga. App. at 580 (only "opinions of competent witnesses may constitute…a rational basis" under O.C.G.A. § 50-13-19(h)(6)).

4. Appellee-GPC fails to identify anywhere in the record where the Commission considered the issue of whether GPC or its customers should pay the CCR costs, provided its reasoning, or identified evidence supporting its conclusion.

GPC makes three distinct arguments regarding its culpability and unlawful handling of coal ash: (1) that the Sierra Club waived the culpability argument; (2) that Staff and GPC witnesses testified that GPC was in compliance with the CCR regulations; and (3) Sierra Club cited no U.S. EPA or EPD. GPC Br. at 9-23. These arguments, notably not advanced by the Commission, are meritless and should be ignored.

First, the Sierra Club did not waive the culpability argument. The issue of whether it is just, reasonable and prudent for GPC's customers and not GPC to pay the CCR costs has been front and center throughout the administrative hearing and this appeal. *See e.g.*, R2-N2 pp7-13; R1-Vol.2 pp.146-153, 220, 224-227. For example, in Sierra Club's briefing before the Commission, the Club submitted Quarles' analysis regarding GPC's responsibility for its unlawful CCR disposal and expressly argued "[s]uch expenditures, which are solely within the control of

Georgia Power, should be paid by Georgia Power, not the ratepayers." R2-N2 pp11-12. In its Fulton County Superior Court Notice of Appeal, the Club specifically noted as an error of law that "[t]he commission erred because its Final Decision makes GPC customers pay costs necessitated by GPC's unlawful coal ash storage and disposal in groundwater" (R2-03 p7), and argued in its brief that "[w]hile [Commission] approval [of CCR closure plans] may be appropriate and sufficient for GPC to spend its own money, that approval does not [render it] appropriate to pass along to ratepayers in a rate case." R1-Vol.2 p153.

Second, GPC asserts that the testimony of Mr. Poroch (GPC CFO, Comptroller and Treasurer)[2] and Staff witness Smith (an accountant)[3] supports its claim that GPC is complying with CCR regulations. GPC Br. at 20-21. However, Poroch and Smith were testifying regarding actuarial issues, and neither are competent, qualified witnesses who can testify regarding GPC's CCR disposal practices nor GPC's compliance with the CCR Rule, the GWQCA, or Georgia's environmental laws. *Georgia Power Co.*, 196 Ga. App. at 580 (only "opinions of competent witnesses may constitute…a rational basis" under O.C.G.A. § 50-13-19(h)(6)). Indeed, their testimony does not even attempt to rebut the Quarles report

[2] R2-V p70.
[3] R2-B2.4 pp.1-19.

facts detailing GPC's decades long improper ash disposal nor the fact that GPC currently has coal ash sitting in and polluting groundwater.

Third, GPC attempts to dismiss Sierra Club's arguments about GPC's responsibility for CCR costs arguing that neither EPA nor EPD took enforcement actions against GPC. GPC Br. at 19-20. However, as noted above, there is abundant record evidence regarding GPC's responsibility, and that it was and is the Commission's duty to consider and weigh that evidence, and that the Commission failed to do so, contending instead that it was not an "environmental decision-maker." R2-B.2.1 p191.

The N.C. Supreme Court flatly rejected that same argument from the NCUC in *Stein* when it held that

> **Although the Commission is not…statutorily charged with making definitive decisions concerning the extent, if any, to which the utilities committed environmental violations, we do believe that it was required, for ratemaking purposes, to evaluate the extent to which the utilities committed environmental violations in determining the appropriate ratemaking treatment for the challenged coal ash costs**...

*Stein*, 851 S.E.2d at 276 (emphasis supplied). The Court went on to hold that the NCUC was "required to consider all material facts …including…facts pertaining to alleged environmental violations such as…groundwater contamination from the coal

ash basins…and to incorporate its decision…in determining the appropriate ratemaking treatment for the challenged coal ash costs." *Id.* at 276-77.

Moreover, the Commission here had the unrebutted report of geologist Quarles[4] showing that the CCR remediation costs had to be spent because GPC had been illegally, unreasonably, and imprudently polluting groundwater for decades. R2-D2.2 pp61-98. While an enforcement action may be probative of GPC's responsibility, the lack of one is not dispositive, especially where, as here, EPA and EPD did act to rectify improper CCR disposal actions by adopting broadly applicable federal remedial regulations.

It remains the Commission's duty to undertake an analysis to determine if it is just and reasonable to impose GPC's CCR costs on ratepayers. *Georgia Power Co.*, 196 Ga. App. at 577-79. Because the Commission did not do so, this Court should rule as a matter of law that it was arbitrary and capricious for the Commission to fail to address the issue of GPC's responsibility for CCR remediation costs (*See Infinite Energy v. Georgia Public Service Commission*, 257 Ga. App. 757, 758, 572

[4] Appellee-GPC attempts to discredit Mr. Quarles analysis based on the title containing the word "Preliminary" but GPC also mentions that they moved to strike his analysis and then subsequently withdrew that motion to avoid delaying the hearing. What GPC left out is that both the Commission and Sierra Club offered to make Mr. Quarles available for cross-examination during the already scheduled hearing dates, but GPC declined the offer and withdrew its objection to the Quarles testimony. R2-G2.

S.E.2d 91 (2002) (legal determinations of the Commission are subject to *de novo* review)), and remand the matter to the Commission so that it can fulfill that duty.

**B. The Commission Should Not Allow Cost Recovery When the Amounts are Future Cost Estimates from Unapproved Draft Closure Plans.**

Both Appellees misconstrue the Sierra Club's argument regarding the draft closure plans. Sierra Club does not claim GPC should take no action to remediate its CCR ponds until EPD approves the plans. Commission Br. at 24; GPC Br. at 24-26. To the contrary, Sierra Club's position is only that GPC cannot recover costs from ratepayers until prudency can be assessed against final approved closure plans. This is particularly important given that GPC is proceeding with its preferred, unapproved plan to cap-in-place its waste at many sites, when EPD may ultimately require the waste to be excavated and landfilled.

"Where the risk of harm to the public and ratepayer is greater, the standards of care expected from the reasonable person is higher." *Georgia Power Co.*, 196 Ga. App. at 578. Here, there is a significant likelihood that the actions GPC is currently taking, pursuant to its draft closure plans, could be incompatible with eventual EPD approved closure plans. This uncertainty and risk of incompatibility goes directly to whether it is just, reasonable and prudent to make the customers pay $525 million in CCR costs now, instead of GPC. *Georgia Power Co.*, 196 Ga. App. at 576-78. As recognized by this Court, "excessive or unreasonable costs could result from a decision that was prudent when made, but that 'the determinative issue is not

whether the decision to incur the costs was prudent but *who should bear such costs*.'" *Id.* at 578. In those instances, "excessive or unreasonable costs become the responsibility of the utility and not the ratepayer." *Id.* at 579.

Until the draft closure plans are approved by EPD, the costs are subject to change. That change could be a complete switch, for example, from a lower cost cap-in-place plan to a more expensive and incompatible full excavation of the CCR ponds. R2-D2.2 p89. Such changes can result in GPC expending funds unnecessarily and or unreasonably before its closure plans were approved. Such expenditures -- which are solely within the control of GPC -- should be paid by GPC, not the ratepayers. *Georgia Power Co.*, 196 Ga. App. at 578-79.

Cost over-runs and mismanagement were at issue in the 1987 GPC rate case dealing with Plant Vogtle, and just like here, the risk of getting the strategy and price tag wrong is high and it is unreasonable and imprudent to make the customers pay now for unapproved, unpermitted closure plans.

This Court should therefore reverse the Commission's Final Decision as arbitrary and capricious and unsupported by the record.

### C. The Putative "Any Evidence" Appellees Rely on Does Not Support the Conclusion That the CCR Costs Were Just, Reasonable and Prudently Incurred.

Appellees rely on the testimony of Staff witness Smith, GPC witness Poroch and five exhibits in an attempt to meet the "any evidence" standard for its

examination of *what* the CCR costs are. GPC Br. at 9-15, Commission Br. at 16-19.[5] None of this evidence supports the Commission's conclusion that the CCR costs were just, reasonable and prudently incurred.

Staff witness Smith's testimony addresses equity return on profit, carrying costs, and revenue deficiency. R2-B2.2 pp28-29; R2-B2 pp203, 205, 443-45. GPC witness Poroch's testimony is similar, addressing the total annual projected spend and the "*structure* for CCR ARO compliance cost recovery" (emphasis added). R2-V pp197-98. None of this testimony supports the Commission's conclusion that the specific CCR costs were or will be just, reasonable and prudently incurred. In fact, this testimony makes clear that the only thing GPC and Staff witnesses were concerned about was the *mechanism* to recover costs from ratepayers, not the specific costs themselves, not what remedial actions they funded and whether they might be incompatible with an excavation requirement, and not whether the ratepayers should have to pay or why.

Appellees next point to Staff Exhibits 18[6] and 32; and Sierra Club Wilson's Exhibits RW-2 and RW-3. But these documents contain only high-level estimates of what GPC believes future cleanup and ash pond closure could cost annually if

[5] GPC also identified data request STF-PIA-14-5 but counsel found no record cite containing that document in the administrative record.

[6] Staff Exhibit 18 was attached to the Direct Testimony of Smith and Trokey as RS/RT-11. GPC refers to this exhibit in its brief as Staff Exhibit 11.

their draft plans are approved by EPD and no detail about how that money would be spent or who should pay. R2-B2.1 pp40-41; R2-B.2.4 pp164-74, 351-55; (Sealed R1-1-35). They nowhere discuss GPC customers or otherwise address who should pay for the cleanup or why.

Lastly, Appellees cite to GPC Exhibit 40, supposedly for all eleven coal plants, as "any evidence" to support the conclusion that the CCR costs were prudently incurred.[7] However, those closure plans are nothing more than GPC's draft engineering plans (subject to change during EPD approval permitting process) with possible future cost estimates to clean-up and close the ash ponds. *See e.g.*, Sealed R1-36-427. The dollar amounts in the plans assume EPD approves the draft plans as written. Because the draft plans nowhere discuss GPC customers or otherwise address who should pay for the cleanup or why, it would not help Appellees' position even if all eleven plans were in the administrative record.

## III. CONCLUSION

GPC ratepayers should not be on the hook for speculative possible costs with a cumulative price tag of $7.6 billion. Everyone should be able to clearly identify

[7] GPC's eleven draft ash pond closure plans are not contained in the administrative record. Based on GPC testimony at the hearing, it may have been GPC's intent to include them all, but that did not happen. The only ash pond draft closure plans in the record here are for Plants Bowen and Branch, found at Sealed R1 pp36-427.

what GPC is paying for and ascertain whether the individual costs incurred were reasonable and prudent, or excessive and unreasonable. R2-D2.2 p24.

The Sierra Club has shown that the administrative record does not contain any evidence supporting the Commission decision to make GPC customers pay for the CCR cleanup and closure. Therefore, Sierra Club asks this Court to reverse the Commission's Final Decision and remand this case. This Court should instruct the Commission to examine the cost and GPC's coal ash handling practices and evaluate whether GPC and not its customers, should bear some or all of those costs consistent with this Court's ruling in *Georgia Power Co.*, 196 Ga. App. 572.

In addition, this Court should instruct the Commission to consider whether -- in the absence of EPD permits approving the closure plans -- it is premature for the Commission to determine a recoverable amount of just, reasonable, prudent and not excessive CCR costs incurred, where the dollar amounts are from draft closure plans that only provide mere future cost possibilities.

Respectfully submitted this 19th day of May 2021.

This submission does not exceed the word count limit imposed by Rule 24.

*/s/ Robert Jackson*
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Robert B. Jackson, IV, GA Bar #387750
Robert B. Jackson, IV, LLC
260 Peachtree St - Ste 2200
Atlanta, GA 30303
(404) 313-2039 Voice

*/s/ Dorothy Jaffe*
---
Dorothy E. Jaffe, *Pro Hac Vice*
Sierra Club, Inc.
50 F Street NW 8th Floor
Washington, D.C. 20001
(202) 675-7917 Voice

## CERTIFICATE OF SERVICE

Pursuant to Court of Appeals Rule 6, I hereby certify that based on a prior agreement with counsel for Appellee and for Intervenor\Appellee that service of a .pdf copy of this filing via email will be deemed sufficient service. I have served a true and correct copy of the foregoing *REPLY BRIEF OF APPELLANT* to Appellee and Intervenor-Appellee via their attorneys, in a .pdf format sent via email before filing. I certify that there is a prior agreement with Appellees to allow documents in a .pdf format sent via email to suffice for service.

Daniel S. Walsh, Esq. [dwalsh@law.ga.gov] (404) 657-2204
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334

Thomas E. Reilly, Esq. [tom.reilly@troutman.com] (404) 885-3256
TROUTMAN PEPPER HAMILTON SANDERS LLP
Bank of America Plaza
600 Peachtree Street, N.E., Suite 3000
Atlanta, Georgia 30308-2216

SO CERTIFIED this 19th day of May 2021.

*/s/ Robert Jackson*

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Robert Jackson, Esq. - Ga. Bar # 387750
ROBERT B. JACKSON, IV, LLC
260 Peachtree Street - Suite 2200
Atlanta, Georgia 30303
(404) 313-2039 Voice
rbj4law@gmail.com