November 10, 2014

Dear Smith Mountain Lake Residents, Business Owners, and Concerned Citizens

Help us help you!

On October 3, 2014, Appalachian Power Company (APCo), a subsidiary of American Electric Power Company (AEP), filed a legal action against a Smith Mountain Lake resident and his family in the U.S. District Court to stop them from constructing a dock on their property.

APCo's misleading claim – APCo claims it owns or controls the subject property, since it holds a standard Flowage Rights and Easement Deed. However, the property owner's easement deed reserved him the right, in perpetuity, to cross over APCo's easement to reach project waters for recreational purposes.

APCo's suit requires the property owner to apply to APCo for a Dock Permit and insists the property owner agree to the Permit's terms and conditions. This is in direct conflict to the property owner's right of access. If the property owner signs APCo's Permit, he would be forced to agree to the following terms and conditions of the Permit:

- That APCo has the authority to grant permission and regulate his dock and associated work, and
- He will abide by all terms of APCo's Shoreline Management Plan, and
- He will abide by all current and future terms of APCo's Federal license, and
- APCo can remove his dock if it determines his dock is no longer in the public interest, or
- APCo can remove his dock, if he violates any condition of the Permit, and
- He will assert no interest contrary to that held by APCo with respect to the site, and that his status shall be that of a licensee.

If the property owner signs the Permit, he would relinquish his State property rights.

By filing its suit in Federal court, APCo intentionally seeks to bypass the foundational State's property rights issue rather than prove it has the necessary property rights in a State court of proper jurisdiction.

Consequence to residents and businesses – If AEP is successful with this action, property values on Smith Mountain Lake and the surrounding area, as well as businesses, employment, and the overall economic health of our community will be severely and negatively impacted.

To preserve the value of the investments we have ALL made in the Smith Mountain Lake community, we need to join forces and contribute to the fund to stop this action by APCo. Visit www.curb-ferc-aep.com to learn more about this unlawful action and to make a donation to fund the defense of APCo's claim.

If APCo wins, we ALL lose!!! Donate today!!!

SML PROPERTY VALUES & BUSINESSES ARE AT RISK

This affects all residents, businesses, and the economic future of Smith Mountain Lake

PROPERTY RIGHTS: 9 THINGS EVERY LAKEFRONT PROPERTY OWNER AT SMITH MOUNTAIN LAKE SHOULD KNOW…

CUT UNNECESSARY REGULATORY BURDEN, INC.

1. AEP's Federal operational license is a contract between the Federal Energy Regulatory Commission (FERC) and AEP. Neither the FERC nor AEP have the federal authority to regulate State or County governments or their citizens. The only power AEP has to control a property owner's recreational access is through AEP's State property rights. AEP's license grants it zero authority to change your recorded property rights without your agreement.

2. Around 1960 AEP wrote flowage right and easement deeds for all lake front parcels. At that time AEP had no license requirement to permit docks, regulate shoreline or control our recreational access. Local governments were responsible for land use and development in the project, guided by federal and state regulations. In 1998 AEP agreed to amend its license, which required it to regulate and limit shore owner recreational access to the lake. AEP's renewed license imposed far more restrictive lake access terms on shore owners, but the underlying recorded flowage easements were not and could not be changed.

3. Our right of recreational access to the lake is guaranteed by two key recorded documents: the property deed that describes your property and the appurtenant original 1960 flowage easement. Both of these documents travel with the title of your property when it is sold. Regardless of who owns the land under the water, the flowage easement guarantees property owners the right to use the flowage easement for recreation.

4. AEP's federal license requires it to obtain necessary property rights either through purchase, other agreement or through eminent domain. When the new federal license was signed by AEP (effective 1 April 2010) AEP was required to certify that the company held all necessary property rights to implement the new license and the Shoreline Management Plan (SMP). AEP's certification to FERC stated: "LICENSEE HAS OBTAINED ALL FLOWAGE RIGHTS NECESSARY FOR ADEQUATE OPERATION OF THE PROJECT EITHER IN FEE TITLE OR EASEMENTS. ALL PROPERTY RECORDS ARE KEPT ON FILE WITH THE LICENSEE." Their certification is untrue; consequently AEP is in violation of its federal license.

5. AEP demands you sign its mandatory "permit" to build, repair or maintain docks, remove vegetation and stabilize shoreline. This so called "permit" was authored by AEP and was not approved by the FERC, nor is it a requirement in AEP's license. This "permit," if you agree to its terms, significantly restricts your deeded rights of recreational access. Signing this "permit" places you under the control of AEP's SMP and its federal license. AEP can revoke its permit at any time and for any reason, including if AEP determines your dock is no longer in the "public interest."

6. AEP has no legal authority (federal or state) to demand a property owner sign its permit and surrender your deeded right of lake access. The Federal Power Act also requires AEP to resolve any property dispute with the property owner in a state court of appropriate jurisdiction. We believe AEP is illegally steering lakefront owners to surrender their land rights without paying additional condemnation damages. FERC is complicit in AEP's effort.

7. AEP filed its latest lawsuit in Federal Court to purposely avoid the issue of property rights. It accuses the property owner of violating the Federal Power Act and AEP's federal license. A property owner cannot violate the Federal Power Act or AEP's license, only FERC and AEP can do so.

8. If the AEP v. Nissen case is lost, then every shoreline property owner's land value will be negatively impacted. We can expect to be paying permit fees and annual fees for docks and improvements in the near future. We can expect AEP to continue to interfere in the sale of property by citing inconsequential "violations" of SMP regulations and halting closings. This is happening today; AEP usually waits until there is a sale closing to interfere, when the parties are most vulnerable. Our lakeshore owner community must advance a united front to vigorously defend our rights to enjoy and use our property, consistent with recorded property rights and the laws of our Commonwealth.

9. **C.U.R.B** is a 501c(4) not-for-profit Virginia corporation that is raising funds to mount a vigorous defense of our property rights. Contributions less than $5000 are anonymous and cannot be discovered. Contributions over $5000 paid to legal counsel directly are anonymous and are not discoverable by AEP. Contact CURB to discuss and make your donation at www.fercaep.com.

CUT UNNECESSARY REGULATORY BURDEN, Inc.

RECOVER OUR PROPERTY RIGHTS FROM UNWARRANTED CORPORATE CONTROL

MONETA, VA 24121-1991
On the Web: www. curb-ferc-aep.com
Email: Contact-us@curb-ferc-aep.com

October 17, 2004

7 Important Answers

… from the Law Offices of Bart S. Fisher, which provided a comprehensive legal opinion regarding the relationship between AEP/APCO's federal license, our property rights (Deeds and Flowage Easement) and AEP/APCO's permit.

"In light of the pending litigation issues, we recommend that lakeshore property owners not sign the permits that AEP/APCO require. The assertion of authority by AEP over Smith Mountain Lake residents beyond its very limited flowage easement license violates not only property rights but also the rights of the state of Virginia to regulate what is an inherently local matter, property ownership." Bart S. Fisher, esq.

1. **If the Federal Energy Regulatory Commission (FERC) knew that their licensee did not hold sufficient property rights to implement license responsibilities, did FERC violate the Federal Power Act when it awarded AEP/APCO a license?**

   ANSWER: NO

   We would certainly argue both in court and to Virginia state political authorities that FERC's and AEP/APCO's attempts to use the SMP as a lever to unilaterally broaden property rights they do not have without purchasing them is an unlawful overreach of federal power and an unlawful delegation of power by FERC to AEP/APCO.

   However, in the typical course of a licensing proceeding, FERC does not determine whether the licensee actually holds sufficient rights in lands within the project boundary. If a shoreline landowner or other third party disputes this, FERC will direct the licensee to resolve the dispute in a State court with jurisdiction over the lands at issue.

   > "Standard license Article 5 requires the licensee to acquire and retain all interests in nonfederal lands and other property necessary or appropriate to carry out project purposes. The licensee may obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to FPA section 21. A licensee's property interests can range from fee simple to perpetual or renewable leases, easements, and rights-of-way. If there is a question concerning specific property rights, it will have to be resolved between the property owners and Appalachian in a property law action in a [State] court of appropriate Jurisdiction." (*Appalachian Power Company,* 112 FERC at *61,189.)

2. **Does AEP/APCO have the authority to demand a property owner sign any shoreline construction or maintenance permit that violates or defeats the owner's state law supported deeded property rights?**

ANSWER: NO

The AEP/APCO Permit is not a part of its license; FERC did not order the Permit language. AEP/APCO refuses to change the Permit to recognize residual landowner's property rights or allow landowners the right to modify the Permit to retain their residual property rights.

A license does not create, supersede, or modify property rights under state law, whether held by the licensee or a third party. Such rights generally arise under state laws. *See Public Utility Dist. No. 1 of Pend Oreille County v. City of Seattle***,** 382 F.2d 666, 670 (9th Cir. 1967). A license does not itself condemn land or authorize damages to property owned by a non-licensee.

The FPA section 10(c), 16 U.S.C. § 803(c), expressly provides that a licensee is liable for all damages to property of others, even if it has operated the project entirely in compliance with the license. If a licensee does not already hold, and cannot acquire through voluntary transactions, necessary rights for project use of lands within a project boundary. FPA section 21, 16 U.S.C. § 814, only authorizes the licensee to condemn such rights in federal or state court, relying on the preemptive authority of the license. A license is FERC's decision, using delegated legislative authority, that such uses are "…justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce…" *Id.*; see *State of Missouri v. Union Electric Company,* 42 F.2d 692 (W.D. Missouri 1930).

3. **If a Permit holder (shoreline landowner) relied upon AEP/APCO's certifications, as a private party licensee of FERC; and it is later proven than AEP/APCO misrepresented its authorities to the Permit holder; and the Permit holder suffered damages as a result of AEP/APCO's misrepresentations; can that Permit holder collect damages; can similar Permit holders form a class?**

ANSWER: LIKELY

We believe—subject to further research—that a permit holder who suffers damages as a result of AEP/APCO misrepresentations on which they relied in making a purchase could possibly have a colorable claim for fraud against the party who made the misrepresentations. Moreover, similarly situated plaintiffs who suffered similar harms in similar situations could potentially form a class, subject to the discretion of the courts.

4. **How should original flowage easement agreements reached in 1960 be interpreted? Should they be interpreted under (1) conditions in 1960, or (2) present conditions of more restrictive SMP land use regulation?**

ANSWER: CLEARLY UNDER CONDITIONS IN 1960 WHEN THE PARTIES REACHED AGREEMENT

The Flowage Right and Easement Deeds, which were written by Appalachian Power *circa* 1960, contain no reference of a Federal License or Shoreline Management Plan. AEP/APCO's present demand that all shoreline owners recognize the authority of their Federal license and SMP to impose additional restrictions into their Permit language is unauthorized and illegal.

Prior to 2003, AEP/APCO witnessed the construction of 6,336 residential docks on Smith Mountain Lake and 98 residential docks on Leesville Lake, absent any license or regulation set. FERC and AEP/APCO allowed normal lake access facilities/structures to be constructed in the project boundary (e.g. restaurants, floating gas pumps, fuel storage tanks, homes over docks, enclosed boat garages, drain fields and septic

systems, paved access paths, ramps, beaches, stairs, gazebos, decks, parking, camping trailers, fire pits, storage buildings, marinas, night clubs, etc.).

There were no issues with docks or landowner rights until FERC amended AEP/APCO's license requirements in 1998. Since that license change, AEP/APCO as a private corporate licensee with FERC's knowledge and encouragement has unilaterally and wrongfully attempted to expand its easement rights limiting, in some cases denying, the landowner's right of recreational use and enjoyment. AEP/APCO misleads the public claiming the original 1960 easement agreement held by shoreline land owners is now reduced to a a revocable license that AEP/APCO can revoke at any time, for any reason.

When construing a deed, a court must ascertain the intention of the parties. Davis v. Henning, 250Va. 271, 274, 462 S.E.2d 106 (1995). If the intention can be discerned by giving the words of the deed and their natural and ordinary meaning, such intention controls and other rules of construction may not be invoked. The rules governing interpretation of easements by grant are the same as those for the construction of deeds. Hamlin v. Pandapas, 197 Va. 659, 663, 90 S.E.2d 829 (1956). "When an easement is granted by deed, unless ambiguous, "the rights of the parties must be ascertained from the words of the deed, and the extent of the easement cannot be determined from any other source."" Pyramid Development v. D&J Associates, 262 Va. 750, 754, 553 S.E. 2d 725 (2001) (quoting Gordon v. Hoy, 211 Va. 539, 541, 178 S.E.2d 495, 496 (1971)).

A deed may expressly create an easement but fail to define specifically its dimensions. See Waskey v. Lewis, 224 Va. 206, 211, 294 S.E.2d 879, 881 (1982); Cushman, 204 Va. at 252, 129 S.E.2d at 639. When this situation occurs, and the deed language does not state the object or purpose of the easement, the determination of the easement's scope "is made by reference to the intention of the parties to the grant," ascertained from the circumstances pertaining to the parties and the land at the time of the grant.

5. Since flowage easements do not specify where, or limit or define how the Grantor can cross AEP/APCO's flowage easement, can AEP/APCO now restrict the location, width, type of surface and maintenance of the Grantor's access?

ANSWER: NO

To the extent that the terms of original flowage are general, lacking specific restrictions we would argue that AEP/APCO's sudden attempt to severely restrict normal shoreline owner's access rights evident from 40 plus years of operation before the SMP would be unlawful. We would further vigorously argue that the federal SMP does not give AEP/APCO the right to vastly expand its easement at the expense of residual owner property rights. We would argue that this would constitute an unlawful uncompensated taking by FERC through the unlawful delegation of regulatory authority to a private party. Moreover, FERC's and AEP/APCO's arbitrary and suddenly restrictive view of the 1960 flowage easement conflicts with the original mandate to promote recreational uses on Smith Mountain Lake. AEP/APCO's recent attempts to constrict dock building arbitrarily, undermine property values, regulate automatic boat covers, and harass lakeshore property owners with lawsuits flies directly in the face of that mandate.

Also see the answer to Question 4. above.

6. Since the flowage easement makes no reference to a Federal license or Shoreline Management Plan, if AEP/APCO now limits Grantor's rights with its new license and SMP regulations, has AEP/APCO illegally overextended its easement?

ANSWER: YES

Also see the answers to Questions 4. and 5. above.

7. Can the landowner Grantor make reasonable easement improvements to access the waters for recreational purposes? Is a dock a reasonable recreational easement improvement to reach the waters?

ANSWER: YES TO BOTH

Here is the universal language found in the AEP/APCO flowage easements:

> "*Grantors [landowner] shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes ...* "

The owner has the right to make reasonable improvements to an easement, so long as the improvement does not unreasonably or materially diminish AEP/APCO's easement rights to construct, operate and maintain the project under the circumstances pertaining to the parties and the land at the time of the grant [*circa* 1960].

The flowage easement grant reserved for the landowner the general right of access for recreation. As a general rule, when an easement is created by grant or reservation and the instrument creating the easement does not limit the use [for recreational purposes] to be made of it, the easement may be used for any [recreational] purpose then, or in the future. If there are no words limiting recreational purposes, then a change in reasonable use does not affect the easement. However, the landowner grantor cannot change the type of use from recreational to some other use.

To resolve the issue of interpretation of an easement, state law is followed. The general rule is clearly established that the owner of the servient tenement [Landowner who granted the flowage easement to AEP/APCO] may make any use of the land that does not interfere unreasonably with the easement. Whether a particular use of an easement by either the landowner owner or the easement holder [AEP/APCO] unreasonably interferes with the rights of the other party is a question of fact that must be proven. When this situation occurs, and the deed language does not state the object or purpose of the easement, the determination of the easement's scope "is made by reference to the intention of the parties to the grant," ascertained from the circumstances pertaining to the parties and the land at the time of the grant.