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CURB UPDATE



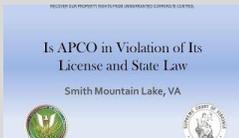
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OUR MISSION IS TO EDUCATE AND INFORM ...

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CURB UPDATE US 4th CIRCUIT ORAL ARGUMENT: PRESSL v. APCO 26 October 2016

On Wednesday, 26 October, attorneys representing Rick and Terry Pressl presented oral arguments in their appeal to a three-judge panel of the US 4th Circuit Court of Appeals in Richmond. The three justices hearing the case were William B. Traxlor (SC), Diana Gribbon Motz (MD) and Henry F. Floyd (SC). The Pressls were represented by Caskie and Frost attorneys Frederick Watson and Pavlina Dirom. APCO was represented by Woods Rodgers attorneys Freidman and Pritts. Each side was allotted 20 minutes to present arguments and answer questions from the three-judge panel.

I attended the hearing along with 12 other lake residents and CURB supporters. First and foremost, it was evident that each of the justices had read the all briefs and supporting evidence and were obviously informed and familiar with the case.

Pressls' attorney, Frederick Watson, argued that the district court (Judge Moon) lacked federal jurisdiction to hear and rule on Pressls' state court complaint. The determination of whether APCO possesses adequate state property rights, under its flowage easement to regulate Pressls' use of their property, belongs in state court. He quoted from a December 2015 FERC order reiterating that APCO must obtain all necessary property rights because neither FERC nor APCO has any right to regulate the private property of others, unless APCO holds the necessary state property rights to do so. The FERC order also stated that if a court found that APCO did not possess the necessary property rights FERC "could require the licensee to obtain the additional rights by easement or eminent domain." Mr. Watson explained that neither the award of a federal license or approval of a shoreline management plan can change property rights and that FERC also has ordered that all matters concerning property rights should be adjudicated and resolved in a court of appropriate jurisdiction (meaning state court).

APCO's attorneys, Friedman and Pritts, used their 20-minute allocation to plead that APCO must follow FERC orders strictly or lose their license. They discussed how the flowage easement phrasing: 'overflow and/or affect the premises in any manner' meant that APCO could impose its license and SMP responsibilities upon the Pressls. Both spent a great amount of time explaining that their federal license was a good thing because it saves the lake from chaos, over building of docks and excessive dredging. What they failed to do was present any legal argument why state court was not the proper court to determine APCO's rights under the flowage easement or provide any evidence for federal jurisdiction.

There is a 42-minute audio file of the oral arguments at the flowing link you can listen to:
<http://coop.ca4.uscourts.gov/OAarchive/mp3/15-2348-20161026.mp3>

Here are some noteworthy questions from the justices beginning at the following times:

@1:20 min – Justice Floyd to Fred Watson (Pressls' attorney): Why shouldn't Virginia state court construe the property rights in this case?

2:00 min – Justice Floyd: How do property rights interfere with FERC's license.

14:45 min – Justice Traxlor to Friedman (APCO's attorney): The question is whether the easement gives APCO authority. There is no dispute as to APCO's obligations and responsibilities to FERC.

15:15 min – Justice Traxlor: The question is not whether your license is a good idea. The question is whether you even have the right to make the decision, which they [Pressls] argue is based upon the easement.

16:00 min – Justice Floyd: But if you don't have the property rights you claim you do. And if they [Pressls] go to state court and get a decree that says you don't, your remedy would be to go back to FERC and modify your license or condemn the property, correct? And that's what state courts are for. Justice Motz: And if you do have the property rights, state court would say you do.

18:50 min – Justice Traxlor: But your right to enforce [docks] is dependent upon the easement.

20:15 min – Justice Motz: As you know federal jurisdiction is confined, so we have to have some basis for federal court. So, are you saying that any license would give rise to federal Court?

29:54 min – Justice Traxlor to Pritts (APCO Counsel) That's not the issue. They [Pressls] are saying you can't require them to do anything the easement doesn't allow. The issue is not whether the license is a good idea or not.

30:30 min – Justice Motz: Isn't this the argument on the merits that you need to make to state court, if we find there is no federal jurisdiction?

34:15 min – Justice Floyd: What about their argument that is not what was agreed to in 1960 [regulation of the project boundary]?

36:35 min – Fred Watson rebuttal begins

37:25 min – Justice Motz to Fred Watson: Do we have to accept this argument [that there is nothing in their federal license that gives APCO any authority over individual property rights]? Isn't that the argument you're going to make in state court?

Opinion – My view, based upon the questions the justices asked and resulting dialog, was the justices feel determination of Pressls rights under the flowage easement is not a federal issue and should be adjudicated in state court. They began at 1:30 minutes into the arguments questioning why this matter was not before a state court, and continued to repeat this line of questioning throughout APCO's presentation. Therefore, I expect 4th Circuit to vacate Judge Moon's district court ruling and direct the Pressl case be remanded to state court for trial. I'm hopeful we will see that order by early December.

Also, all attorneys received an order from the 4th Circuit on October 27th holding the Nissen appeal in abeyance, pending its decision in Pressl v. APCO. This is extremely good news. When Pressl is won, Nissen will be won, rapidly bringing matters to an unfavorable outcome for APCO. Pressls' complaint against APCO will be litigated in Franklin County Circuit Court and the matter of APCO's limited rights under the flowage easement will be decided. There is a reason APCO has never sued anyone in state court – because Virginia easement law is well defined and validated by Virginia Supreme Court decisions, and those decisions do not favor APCO's innovative contrary claim that a federal license can an individual's state property rights.

We haven't popped the Champagne cork yet, but I do believe we're much closer doing so than APCO. But, go ahead and listen to the audio file and form your own conclusions.

DONATIONS ARE NEEDED – We need your continued financial support to continue these legal fights. Everyone will benefit from these victories and it's only right that everyone shares the cost of this legal defense of our property rights. For those that have already signed APCO's permits and encumbered your property rights, victory will mean the terms of the flowage easement holds precedence over the permit and render any conflicts invalid. 100% of your contribution goes to fund legal expenses. CURB Officers and Directors are legally bound not to financially benefit. Please consider donating to support the ongoing legal effort and education programs. CURB is a registered 501c (4) not-for-profit Virginia corporation. Your donations to support CURB efforts are not discoverable and remain anonymous. Use the donate button on the first page of this update. Thanks for your continued support. ***For Our (Your) Property Rights ...***

Do Your Property Rights Apply Here—Absolutely APCO has no legal regulatory federal power to directly require a property owner to do anything. APCO's federal license simply documents APCO's responsibilities and obligations to its licensing authority FERC. APCO's only recourse is to go to a court of law and prove to that court that an individual property owner has violated APCO's flowage rights. Recall that APCO's limited property rights are detailed in its flowage easement. Nowhere in that flowage easement does it require individuals to get a permit from APCO to use the easement, to adhere to the Shoreline Management Plan or to adhere to APCO's federal license. In fact, nowhere in the flowage easement do the phrases 'project boundary,' 'federal license' or Shoreline Management Plan' even appear.

ELIMINATE IGNORANCE – Before you agree to sign any APCO's property stealing revokable permits, at least read the permit and your flowage easement. Seek the professional advice of a competent attorney. We know several. If you can postpone efforts for another few months, do so to avoid signing away your property rights without being compensated. Remember APCO will allow you to maintain or repair your dock without interference, so long as you don't change its footprint.

Be patient, vigilant and stay informed. For a more in-depth understanding, we recommend viewing the following CURB videos: [Read Your Flowage Easement](#) [Read APCO's Dock Permit](#) [History of Regulation](#) [What Did APCO Permit](#) [APCO Manipulated the Judicial System](#)

Bill Brush