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CURB UPDATE

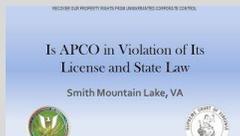


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OUR MISSION IS TO EDUCATE AND INFORM ...

VOLUME 2 NUMBER 7



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DEFENSE OF PROPERTY RIGHTS WINS THE TRIFECTA

APCO REQUEST FOR EN BANC REHEARING IN PRESSL BEFORE 4TH CIRCUIT DENIED

On 5 December 2016 APCO filed for rehearing. It was APCO's right to ask the entire court (15 justices) to rehear the case, and for the Court to decide if it will rehear. Now comes:

"The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc." DENIED DECEMBER 19, 2016 BEFORE JUDGE MOTZ, JUDGE TRAXLER AND JUDGE FLOYD.

NISSEN CASE WON ON APPEAL TO 4TH CIRCUIT

After 26 months of APCO legal maneuvering ... ***"Because we conclude that the district court lacked subject-matter jurisdiction, we vacate the judgment of the district court and remand."*** DECIDED: DECEMBER 19, 2016 BEFORE SHEDD, DUNCAN, AND AGEE, CIRCUIT JUDGES.

The previous edition of CURB Update (2 Dec 2016) generated inquiries as to what federal authority FERC granted APCO and its direction for resolution of private property disputes. Lest there be any ambiguity, we use FERC's explicit language:

"The Commission [FERC] has regulatory authority only over the licensee and, thus, can administer and enforce the terms of the license only through the licensee and the licensee's state property rights." (130 FERC ¶ 62,033, 13 January 2010)

Translation FERC speak to English: FERC granted APCO zero legal authority to regulate 3rd party non-licensees!

The Commission requires every licensee to certify that the licensee holds necessary property rights sufficient to meet their license obligations. However, the Commission unequivocally accepts the licensee's certification of rights without verification. Instead, the Commission burdens private property owners with the cost of defending their property rights against multi-billion dollar corporations. This all too convenient 'trust but not verify arrangement,' allows the Commission to award licenses to entities not holding the requisite property rights.

Further Quoting FERC on Property Rights ...

"Any disputes regarding property rights are not within the Commission's jurisdiction; rather, they are matters for state courts to resolve."¹

Please note that the SMP applies only to those lands in the project boundary where Appalachian Power has property rights. The licensee has no authority to regulate construction on privately owned lands, unless the property owner has given the company those rights."²

The instruments of conveyance define the extent of the licensee's rights; therefore, neither the Commission nor a licensee/transferee can interfere with the transferor's retained rights."³

The inclusion of lands within a project boundary will not restrict landowners' uses, since inclusion of lands within a project boundary does not itself create or alter property rights."³

The Commission's inclusion of the standard land use articles, the approval and adoption of the SMP, or the approval of a project boundary in an Exhibit G map will not affect the property interests obtained."³

If a landowner believes that a licensee's easement precludes certain activity, such a dispute must be resolved between the property owner and Appalachian Power in a property law action in a court of appropriate jurisdiction."³

If it is determined that a licensee does not have adequate rights to comply with license requirements, the Commission could require the licensee to obtain the additional rights by easement or eminent domain."³

Commission staff stated that "[a]ny disputes regarding property rights are not within the Commission's jurisdiction; rather, they are matters for state courts to resolve." ... That order was not dictating the court of appropriate jurisdiction, but merely stating that the issue of property rights is a matter of state law."³

As we have explained, the issuance of a hydropower license or the approval of an SMP does not give a licensee any new property rights. Rather, these approvals simply direct the licensee's use of lands in which it holds interests. To the extent that there are disputes as to the nature of a licensee's rights, those matters must be resolved in a court of competent jurisdiction: the Commission has no authority to resolve property rights issues."³

¹ 142 FERC ¶ 62,256 at P 16, n.12 (2013)

² Commission Chairman Cheryl A. LaFleur's December 8, 2014 reply to Congressman Robert Hurt.

³ 153 FERC ¶ 61,299 Appalachian Power Company Project No. 210-252, December 17, 2015

THE IRONY HERE IS THAT APCO WOULD BE IN FULL COMPLIANCE WITH ITS LICENSE IF IT FOLLOWED THE FERC'S DIRECTION, HONORED ITS FLOWAGE EASEMENT AND STOPPED IMPOSING SMP REGULATIONS ON PRIVATE LANDOWNERS. HOWEVER, BY FORCING SMP REGULATIONS ON PROPERTY APCO NEITHER OWNS NOR CONTROLS, APCO IS VIOLATING FERC DIRECTION. GO FIGURE?

DONATIONS ARE NEEDED for STATE COURT DETERMINATION OF FLOWAGE RIGHTS Why does APCO continue to avoid state court? Simply, APCO cannot prevail in Virginia state court because it cannot re-write decades of easement law and erase its decades long history and practice of not regulating shorelines. APCO's limited flowage rights will be determined on state easement law, without consideration of their federal license or shoreline management plan. Only the language of the easement, the understanding of the parties at the time of easement creation and the 45 years of custom and practice recognizing shoreline owner's rights to construct, own and maintain docks without seeking APCO's approval, will be considered.

WHAT IS UNCONSCIONABLE HERE IS THAT APCO, AFTER PURCHASING FLOWAGE EASEMENTS AND MAKING MILLIONS OF DOLLARS SELLING SHORELINE LAND TO DEVELOPERS, 45 YEARS LATER UNILATERALLY IMPOSES HUNDREDS OF PAGES (347PAGES) OF NEW REGULATIONS, WITHOUT RENEGOTIATING THE UNDERLYING EASEMENT. INSTEAD APCO HAS DISHONORED ITS WORD AND RENEGED ON ITS COMMITMENTS. RATHER THAN SWALLOW ITS LEGAL MEDICINE IN STATE COURT, APCO CONTINUES TO USE LEGAL MANEUVERS TO CONFUSE LANDOWNERS, LOCAL GOVERNMENTS, LAKE ORGANIZATIONS AND FEDERAL JUDGES ALL TO AVOID STATE COURT JUSTICE. THE CORPORATE BODY HAS NO CONSCIENCE.

Code of Virginia § 55-50.1. *Enjoyment of easement.* ... the owner of a dominant estate [APCO] shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate [shoreline landowner] shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent thereto which unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate.

The flowage easement granted APCO the limited right to flood private property for the purpose of operating and maintaining the dam and power station. Since 2003, APCO has tried to 're-purpose' its easement by redefining 'dam and power station' as 'project.' APCO then argues it has absolute control over all uses below the 800 foot contour on SML/LVL and insists FERC granted them this authority. Repurposing of an easement violates Virginia law and a court can order the easement to be vacated. As we also know, FERC granted APCO zero federal authority to regulate private property. In the end, APCO must prove in state court that a dock prevents the company from flooding and operating the dam and power station--an impossible hurdle, because for every year since 1966, APCO has continuously operated the dam and power station and paid FERC fees to do so.

THERE ARE NO FEDERAL OR STATE LAWS THAT REQUIRE A PROPERTY OWNER TO SIGN A PERMIT TO BE REGULATED BY APCO. SO WHY ARE SELLERS AND BUYERS BEING LED TO COORDINATE REAL ESTATE TRANSACTIONS WITH APCO? Ans: BAD LEGAL ADVICE

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. 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](#)

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 Your Property Rights ...

Bill Brush

C.U.R.B. Does Not Provide Legal Advice

MERRY CHRISTMAS & A HAPPY NEW YEAR