

1 V I R G I N I A:

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3 IN THE CIRCUIT COURT FOR THE COUNTY OF FRANKLIN

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6 APPALACHIAN POWER COMPANY,)
7)
8 Plaintiff)
9)
10 -vs-)CASE No. 170001605-00
11)
12 WILLIAM W. NISSEN, II, and)
13)
14 LORA J. NISSEN,)
15)
16)
17 Defendants)
18 -----

11

12 HEARD BEFORE:

13 THE HONORABLE JAMES J. REYNOLDS

14

15 DATE: June 16, 2017

16 TIME: 2:00 P.M.

17 LOCATION: Franklin County Circuit Court
18 275 South Main Street
19 Rocky Mount, Virginia 24151

19

20 REPORTED BY: Mary J. Butenschoen, RPR, #44952
21 Team Trial
22 (540)204-3918
23 butema@gmail.com

23

24

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

3 WOODS ROGERS
4 10 S. Jefferson Street, Suite 1400
5 Roanoke, Virginia 24011
6 540-983-7600

7
8 BY: MATTHEW P. PRITTS, ESQ.
9 pritts@woodsrogers.
10

11 ON BEHALF OF THE DEFENDANTS:

12 CASKIE FROST
13 2306 Atherholt Road
14 Lynchburg, Virginia 24505
15 (434)846-2731

16 BY: J. FREDERICK WATSON, ESQ.
17 fwatson@caskiefrost.com
18 PAVLINA B. DIROM, ESQ.
19 pdirom@caskiefrost.com
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(None)

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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E X H I B I T S

(None)

EXHIBIT	DESCRIPTION	PAGE
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1 P R O C E E D I N G S

2 Whereupon at 2:13 p.m.,

3 THE CLERK: Appalachian Power Company
4 versus William Nissen, et al. Is the
5 plaintiff ready?

6 MR. PRITTS: Yes, Your Honor.

7 THE CLERK: Is the defendant ready?

8 MR. WATSON: We are.

9 THE COURT: I appreciate you-all
10 giving me all this stuff, but I don't need
11 nine copies of it. I've got an email, I've
12 got it scanned, I've got it overnighted to
13 me. It's appreciated, but it's a little
14 bit overkill. We are electronically
15 scanning everything, so if you file in
16 court of record, I can access it.

17 Plaintiff may proceed.

18 MR. PRITTS: Yes, Your Honor. May it
19 please the Court, Matt Pritts here on
20 behalf of Appalachian Power Company. And
21 Your Honor, if I may approach, these are
22 some documents that were based on our -- in
23 our pleadings either by request for
24 admissions or photographs of the dock in

1 question. I thought if you had those handy
2 and needed to look at anything, including a
3 copy of flowage easement, it would help.

4 THE COURT: I think I can probably
5 recite the flowage easement. The pictures
6 were in the pleadings that I got.

7 MR. PRITTS: Pardon me?

8 THE COURT: I said I've seen these
9 pictures before.

10 MR. PRITTS: Okay. Yes, those are
11 the same pictures, Your Honor. Your Honor,
12 we're here on our motion for summary
13 judgment and also the motion for protective
14 order.

15 Taking the motion for summary
16 judgment first, Your Honor, this is the --
17 we think based on the undisputed facts in
18 the record, the pleadings, the responses to
19 the request for admissions, the documents,
20 the Court can rule upon the interpretation
21 of the flowage easement in this case.
22 There is no dispute about that flowage
23 easement. The Court has read and
24 understands that it applies to the property

1 and it applies especially to the portion of
2 the property below the 800-foot contour.

3 This easement has the same operative
4 language as the Pressl case that you heard
5 two months ago, Your Honor. The difference
6 here is I'm sitting on this side of the
7 courtroom instead of that side. I'm the
8 plaintiff and not the defendant.

9 Everything else is the same, and this case
10 is even more simpler because that case
11 dealt with dredging, shoreline
12 stabilization, and this case does not deal
13 with those issues.

14 This cases deals with the oversized
15 dock. It's undisputed, Your Honor, and
16 you've seen the photos of the dock. It's
17 3,520 square feet, larger than your typical
18 house. It is 26 feet high -- or more than
19 26 feet high. It's got a walkway that's
20 larger than 6 feet. It's got an enclosure
21 that's out on the end of the dock, which
22 since the time of the photographs I believe
23 they have added windows, closed in part of
24 the building. The enclosed part of the

1 building out over the dock is longer than a
2 hundred feet.

3 The reason I bring these parameters
4 up, a hundred feet, the height of 26 feet,
5 Your Honor, those are the requirements in
6 APCO's license, which incorporates the
7 Shoreline Management Plan, and that
8 provides Appalachian when you operate the
9 project you need to not grant permission
10 for uses that are being done now that are,
11 you know, based on the construction, people
12 seeking new construction now.

13 They can't have a dock that exceeds
14 these certain parameters. They deal with
15 the length, the size, the height of that.
16 This dock violates those parameters in
17 numerous different ways, and I think that
18 is uncontested. They may contest whether
19 or not the Shoreline Management Plan should
20 be applied or not applied, but I don't
21 think there is any dispute that that's part
22 of the license and this dock violates the
23 Shoreline Management Plan. It's too long.
24 It's bigger than a hundred feet.

1 His shoreline, Your Honor -- he's got
2 about 98 feet of shoreline -- this dock
3 takes up 65 feet of that shoreline, and he
4 would be allowed under the Shoreline
5 Management Plan a dock that's 1,500 square
6 feet. A couple of boat slips, you could
7 have there a jet ski ramp, whatever.
8 That's the normal size dock for something
9 of this -- a shoreline of this size, but
10 what he has is a shoreline or dock that is
11 2,000 square feet larger than what is
12 allowed by 3,500 square feet.

13 Your Honor, we would submit -- and
14 Mr. Nissen here is a dock builder. He
15 knows what the rules are. He gets permits
16 for his clients. He just chose not to get
17 a permit in this case and wants to test and
18 see what you will do on this case.

19 As far as the issue of unclean hands
20 or latches or whatever, Your Honor, I think
21 it's pretty clear from the records here
22 that we have there was no -- Mr. Nissen
23 buys the property in 2014. There is no
24 dock there at that time, okay?

1 In 2014 he starts to build a dock by
2 driving the pilings. This is in the fall
3 of 2014. APCO immediately filed suit in
4 federal court to stop that. There was an
5 agreement reached in that case that he
6 would not continue construction during the
7 pendency of that litigation.

8 That litigation went through
9 discovery, many motions were filed,
10 including a summary judgment motion by
11 APCO, which was granted by the Court. That
12 was Judge Moon up in Lynchburg. And then
13 that case was appealed to the Fourth
14 Circuit. And the Fourth Circuit didn't
15 address the merits of the case but
16 addressed the jurisdiction issue, was there
17 jurisdiction in federal court for that
18 claim. The Court said there was not and
19 the case was vacated and remanded back to
20 Judge Moon for a dismissal order. He
21 entered the dismissal order in January of
22 this year, Your Honor.

23 Mr. Nissen contacts APCO at that
24 time, as we put in our pleadings. He says,

1 As a matter of professional courtesy, I'm
2 going to go ahead and build my dock. Do
3 you have any objection?

4 Well, heck yes, Your Honor, we do.
5 The response back to him was, If you are
6 talking about building that behemoth of a
7 dock, we do have an objection. But if you
8 are talk about building a dock that will
9 meet the Shoreline Management Plan, that's
10 a whole different issue. Again, if you can
11 build a dock that can meet the Shoreline
12 Management Plan, that's not -- you know,
13 that would be acceptable.

14 But he went ahead and just continued
15 to build and build and build. And what
16 you've seen in these photographs is what he
17 built from the time in January until today
18 when -- after we told him not to build, and
19 he went ahead and built. So he asked if we
20 had an objection to building, we said yes,
21 but he went ahead.

22 THE COURT: I guess a question I'll
23 have is why didn't you file for an
24 injunction?

1 MR. PRITTS: Well, Your Honor, my
2 approach was let's get a quick resolution
3 on this case.

4 THE COURT: Well, I understand that,
5 but, I mean, now what you've invited is
6 pretty extreme economic waste, haven't you?

7 MR. PRITTS: Well, it's economic -- I
8 don't know that it's economic waste.

9 THE COURT: If it's got to be torn
10 down.

11 MR. PRITTS: Well, but, Your Honor, I
12 think that you have got to have clean hands
13 before you can make the economic waste a
14 factor.

15 Your Honor, I mean, could we have
16 filed for an injunction? Maybe we should
17 have filed for an injunction, but, Your
18 Honor, what we did is we filed the case as
19 quickly as possible, and we filed the
20 request for admissions because the facts
21 were undisputed, and that's why this
22 hearing is here today, Your Honor.

23 We would submit, Your Honor, that
24 this case is on all fours with the Pressl

1 case. I've got a copy of what I gave you
2 there of the order in Pressl. And your
3 findings in that case, Your Honor, were
4 that the flowage easement gives APCO the
5 right to enter the property at any time at
6 its discretion and cut, burn, and remove
7 any structures below the 800-foot contour.
8 That's what we got in this case, a
9 structure below the 800-foot contour.

10 You held in that case, Your Honor,
11 that APCO has a right to regulate the
12 construction of structures below the
13 800-foot contour. That's the issue that we
14 have in this case.

15 You held in that case, Your Honor,
16 that the right to cross, the reserved right
17 in the flowage easement to cross the
18 property to reach the water for
19 recreational purposes does not give a right
20 to build. And they have raised that same
21 argument here, Your Honor, and they argue,
22 Well, Judge, you should infer -- because
23 it's a motion for summary judgment, you
24 should give them every inference and you

1 should infer that a right to cross gives
2 them a right to build. That would be
3 contrary to the actual language. It would
4 be contrary to your own ruling in Pressl.
5 It would be contrary to other courts that
6 have considered the same issue such as
7 Judge Moon when he had this case in federal
8 court and he said the right to cross did
9 not give a right to build even if those
10 structures are in furtherance of
11 recreational use.

12 They want to argue, Your Honor,
13 that -- that the right to remove is somehow
14 limited by you've got to show that this
15 particular dock violates the operation of
16 the dam, or it violates your ability to
17 overflow. Your Honor, that's not what the
18 flowage easement says. The language of the
19 flowage easement is pretty clear. It's
20 black and white.

21 If you compare it to a case that was
22 cited in our opening brief, the Tri-Dam
23 case out of California, their flowage
24 easement said you can remove any

1 obstruction which would interfere with the
2 use of the reservoir or render the waters
3 for the shoreline unsafe or unsanitary.

4 That's not what our easement says,
5 Your Honor. So to bootstrap in -- try to
6 bootstrap in some sort of extra conditions
7 to the removal, Your Honor, is -- I would
8 submit is an incorrect application of the
9 plain language of the flowage easement.

10 You also held in the Pressl case that
11 this flowage easement was unambiguous, and
12 nothing has changed in this case.

13 Your Honor, some of the arguments
14 that they raised -- of course in their
15 brief -- we got their brief on Monday. As
16 quickly as we could get a response so we
17 could get it to you so you'd have a chance
18 to read it. They don't cite or try to
19 distinguish any of the cases that -- such
20 as Pressl or such as the Nissen case on
21 federal court or any of the other cases
22 like the Arthur case or the Longenecker
23 case that have ruled that the flowage
24 easement gives Appalachian the right to

1 come in and remove structures.

2 They instead cite some case from
3 Massachusetts, an easement case, a view
4 easement, which isn't a flowage easement,
5 which relies upon another Massachusetts
6 case, which I noticed today was from 1841.
7 So they are relying upon out of state
8 authority from 170 years ago, which doesn't
9 really apply in this case, Your Honor. And
10 I would submit that you have in front of
11 you and from your own decision in Pressl
12 what you need to decide this case.

13 They argue that there is this need to
14 discover and go into the issue of
15 historical regulation of the lake prior to
16 2000, or prior to 1998, or prior to 2003,
17 kind of jump around with different dates.
18 Regulation of the shoreline or lack of
19 regulation of the shoreline they say is
20 crucial to this case.

21 This same argument was made in front
22 of Judge Moon, and Judge Moon addressed it
23 in a footnote where he said said, and I
24 quote: The Nissens' argument suggests the

1 Court rule that APCO's historical
2 regulation or lack thereof should prove
3 that APCO did not have the right to
4 regulate the property. Whether APCO
5 regulated property in the past or not is
6 not at issue before the Court. The issue
7 concerns only the regulation of the Nissen
8 property at the current time. Therefore,
9 the Court cannot concern itself with what
10 APCO decided to regulate or not regulate in
11 the past, as it is irrelevant to the
12 current action. The current action is
13 based on questions concerning a flowage
14 easement that the Court can ascertain from
15 the clear language of the easement itself.

16 That was in the decision, footnote 2
17 of his decision, from 151 F. Supp. 3d at
18 page 689.

19 Your Honor, the discovery, and we
20 will go over the motion for protective
21 order in a second if the Court wants to
22 take it out of the order, but all the
23 discovery in the past, all of that is not
24 of relevance according to Judge Moon. I

1 would agree with him on that in this case.

2 And again, here this case is not
3 about a dock that's -- Mr. Nissen's dock
4 that's supposedly been there for years and
5 years and years. This is a brand-new dock.
6 It had pilings driven in 2014, suit filed,
7 nothing happens until continuation of
8 construction in January of this year.

9 They seem to argue some sort of
10 waiver argument that APCO may have waived
11 its rights. And I would submit, Your
12 Honor, if you look at the flowage easement,
13 which you said you've read very closely,
14 the language in there about the paragraph
15 1A, which deals with, If the grantor's
16 exercise. So if the Nissens would exercise
17 any of the rights set forth above, which
18 would be the rights to use the property in
19 any manner and not inconsistent with
20 Appalachian's rights, if they exercise any
21 of those rights or such -- any other use of
22 the property, which this would be, Your
23 Honor, this would be an other use of the
24 property because they -- the building of

1 this dock would not fall on the first group
2 of rights, the first group of activities,
3 because it would be inconsistent with
4 APCO's rights that are granted, removal of
5 the dock. So this is an other use of the
6 property, the building of this dock.

7 And it says that any other use shall
8 be deemed to be made under revocable
9 license from Appalachian and not adverse to
10 any right, title, interest or privilege of
11 Appalachian.

12 So to the extent they argue, well,
13 this dock was here or these other docks
14 were out there, they are under revocable
15 use. This one is there under revocable
16 use. Now, Appalachian issues a permit.
17 Appalachian says in its permit that these
18 are the conditions under which we would
19 revoke this permit, and everyone
20 understands what those are. But to argue
21 somehow that APCO lost its right to
22 regulate here because of what happened in
23 the 1960s, 1970s, 1980s is incorrect, Your
24 Honor.

1 They cite the Brown v. Haley case,
2 Your Honor. I will just touch on that
3 briefly. They cite some dicta in there.
4 They make it sound like the Supreme Court
5 of Virginia has interpreted the scope of
6 the flowage easement in some of the
7 overflow language or the affect language by
8 the dicta in that case. And that's --
9 couldn't be farther from the truth, Your
10 Honor, because that case is about implied
11 easement between the upper land property
12 owner and the lower property owner. Could
13 the lower property owner sell the upper
14 land property, then come back later and
15 withhold the ability for them to cross over
16 that land, and the Court said no. But the
17 Court didn't interpret APCO's flowage
18 easement in that case. Any dicta to that
19 they try to twist and say it interpreted
20 the flowage easement is incorrect because
21 that did not happen in that case.

22 Judge Moon dealt with the same
23 argument. I'm sorry to keep bringing up
24 Judge Moon, but they are making the same

1 arguments again. So I think it's helpful
2 to know what someone else has already said
3 about it. In the transcript we attached to
4 our brief you can see in there he said
5 Brown v. Haley is not about APCO's easement
6 at all. It's the same thing FERC has said
7 in the argument that had been made to them.
8 Brown v. Haley is not about Appalachian's
9 easement.

10 This may be a new argument, Your
11 Honor. They said it under Virginia Code
12 Section 62.1-164 that came out of the
13 Ramaker -- Smith Mountain Yacht Club versus
14 Ramaker. I don't know if you have had a
15 chance to read that case. They say under
16 that statute they have a right to build a
17 dock.

18 That statute does not say that, Your
19 Honor. That statute says any person owning
20 land upon a watercourse may erect a private
21 wharf on the same in such watercourse
22 opposite his land.

23 What that's talking about, Your
24 Honor, if you look at this case, it's

1 talking about the waters of the
2 Commonwealth. It's really talking about if
3 I've got property on the James River down
4 in the Tidewater area, and that's the water
5 of the Commonwealth underneath there, do I
6 have a right to build a dock there. It
7 really doesn't talk about Smith Mountain
8 Lake.

9 But anyway, the important part of
10 this provision goes on and says you may
11 build a dock provided that it's for
12 non-commercial purposes and navigation is
13 unobstructed, nor the private rights of any
14 other person be otherwise injured thereby.
15 That's the important clause there. The
16 private rights of any other person be
17 injured thereby.

18 Well, if you try to apply that
19 statute in this case, that's why that
20 statute would not give them right to build
21 a dock, because it would be interfering
22 with the private rights of APCO here, and
23 then APCO's rights would be injured if you
24 say, well, this gives you a right to build

1 a dock.

2 So in the Ramaker case we have a
3 property owner building a dock extending
4 across the submerged land to another
5 property owner. They try to rely upon the
6 statute, and the judge said no, you're
7 interfering with the private rights of that
8 other property owner. Same analogy applies
9 here. So I don't think that statute
10 applies here, Your Honor.

11 Now, here is another argument. This
12 is a new one. The argument that because of
13 the word "discretion" is in that right to
14 remove paragraph, they say that brings in
15 some sort of implied duty of good faith and
16 they need to do discovery to determine why
17 is APCO going after Mr. Nissen in this case
18 or are they exercising discretion in the
19 right way.

20 Your Honor, I submit this argument is
21 wrong for various reasons, one of which,
22 Your Honor, this requires a close look at
23 that paragraph. Discretion is not
24 modifying what they think it's modifying,

1 okay? Discretion is modifying APCO, you've
2 got the right to cut it, burn it, or remove
3 it. Cut it, burn it, or remove it.

4 Because what it says, Your Honor, Grantors
5 hereby grant to Appalachian the further
6 right to enter upon said premises at any
7 time and from time to time, okay? It's an
8 absolute right, unconditional right, the
9 right to enter.

10 Then it says, And -- it says "and",
11 Your Honor -- at Appalachian's discretion,
12 to cut, burn, or remove therefrom the
13 buildings, the structures, et cetera, as
14 long as they are below 800 feet -- the
15 800-foot elevation contour.

16 Your Honor, I would submit that
17 discretion is not talking about some sort
18 of discretion to come in and exercise the
19 right. It's the discretion of how are you
20 going to exercise that right. Are you
21 going to cut it, are you going to burn it,
22 are you going to remove it.

23 If there was a tobacco barn there,
24 the farmer can't say you've got to take my

1 barn down board by board so I can have each
2 board. APCO could under this language burn
3 it down. I don't think they would do that.
4 That's what that means. There wasn't going
5 to -- it was APCO's choice in there, APCO's
6 discretion, but that's what it's talking
7 about, Your Honor. That's the provision.
8 How are you going to exercise those rights.
9 It's not are you going to exercise those
10 rights. It's how do you choose to exercise
11 them. Cut, burn, remove, you choose, APCO.

12 Now, they turn around, Your Honor,
13 and they say, well, because of this word
14 "discretion" in there, there is an implied
15 duty of good faith, and we don't know
16 whether they are exercising the discretion
17 properly in this case and there needs to be
18 discovery.

19 THE COURT: Can't discretion also
20 mean you can decide to do it or not, right?
21 If you decide not to cut, burn, or remove
22 any or all buildings or structures or
23 improvements or trees, bushes, driftwood,
24 or other objects or debris.

1 MR. PRITTS: Well, Your Honor, I've
2 got two responses to that. One, I would
3 say if you look at this and look at that
4 and, comma, I would submit that my
5 interpretation of that clause is the more
6 reasonable way to interpret that clause.

7 But even if you were correct, Your
8 Honor, I don't think it makes a difference
9 in the final issue of what we're dealing
10 with here. Because as we stated in our
11 brief, Your Honor, the Supreme Court of
12 Virginia says when the parties to a
13 contract create valid and binding rights,
14 an implied covenant to good faith and fair
15 dealing is inapplicable to those rights.

16 So there is -- this is a valid and
17 binding right. And the right, Your Honor,
18 it accrues when that structure is built
19 below the 800-foot contour. So it's not
20 a -- a question such as in some of the
21 cases that talk about, well, has there been
22 a material misrepresentation and therefore
23 you've got a right if there's a material
24 misrepresentation --

1 THE COURT: So if I understand what
2 you're saying, I mean, as -- what it's
3 going to reduce to is Mr. Nissen can build
4 the Taj Mahal, but he can only build 1500
5 square feet past the 800-foot contour.

6 MR. PRITTS: Yeah. What he builds
7 above the 800-foot contour, Your Honor, is
8 not of concern to Appalachian Power Company
9 because that's outside of the project
10 boundary. There is provisions in the
11 flowage easement you can't allow
12 contaminating matter to drain into below
13 the 800. So if he builds a hog rendering
14 plant that's got a pipe that's draining
15 below the 800, that would be construction
16 below the 800 that would be of concern.

17 But our -- what it means is, if you
18 are going to build something within the
19 project boundary, which is the 800-foot
20 contour or below, then it's got to be --
21 you know, Appalachian has the right to
22 remove it underneath.

23 And the discretion, Your Honor, and
24 what I would say is there is a case called

1 Land and Marine Remediation versus BASF
2 Corporation, and it says: If exercising an
3 express contractual right to demand payment
4 or express contractual right to issue a
5 notice of default were permitted to be
6 recast by the discretion of the decision
7 merely because the non-breaching party
8 could opt not to exercise that right, every
9 contractual right would be subject to being
10 recast at the discretion.

11 What the Court says there is
12 Appalachian has an absolute right, the way
13 these courts would look at it. Once that
14 structure is built -- you know, we would
15 prefer it's built in a way that meets the
16 Shoreline Management Plan. But if they
17 build something else without permission,
18 once that is built and it's below the
19 800-foot contour, it is -- Appalachian has
20 a right to remove it. And you can't recast
21 that and say, well, if they decide to do it
22 or not decide, that's discretion, and we
23 can make a claim that they have an implied
24 duty of good faith. These Courts stand for

1 decision that's not right.

2 THE COURT: But, I mean, are you
3 saying that in this instance Appalachian
4 has to remove or are you saying Appalachian
5 wants to remove?

6 MR. PRITTS: I'm saying in this case
7 Appalachian's license provides that it can
8 allow occupancy and use of project lands
9 and waters that's below the 800-foot
10 contour of docks that meet the Shoreline
11 Management Plan. Otherwise, they are in
12 violation of their license, okay?

13 The Shoreline Management Plan says
14 how big the dock can be, how tall it can
15 be, how big the walkway can be. So here if
16 APCO allows this to remain, APCO is in
17 violation of their license.

18 THE COURT: All right. And if this
19 particular structure had been built 10
20 years before the Shoreline Management Plan,
21 it would be grandfathered in?

22 MR. PRITTS: That's right, Your
23 Honor, it would be an existing
24 non-conforming structure. And there are

1 existing non-confirming structures in the
2 provisions of the Shoreline Management
3 Plan, and they essentially recognize that
4 back in the day things had been built when
5 docks were smaller, or there were less
6 docks out there, and it was not an issue
7 that was of such concern as it is today.
8 And those existing non-conforming
9 structures as of the first Shoreline
10 Management Plan in 2003 were allowed to
11 remain and there were provisions.

12 It's just like a grandfathered house
13 that doesn't meet zoning. You know, the
14 county doesn't have zoning and the county
15 starts zoning, does that mean every house
16 that's been built that doesn't comply with
17 the zoning that went into effect at that
18 time has to be torn down? No. They are
19 grandfathered in. And that's the way that
20 works. This dock, again, is new and it
21 doesn't meet the Shoreline Management Plan.

22 So, Your Honor, I would submit that
23 that argument that they need to do
24 discovery and know about discretion, look

1 into discretion and all that is really a
2 red herring and it's -- I wouldn't let it
3 stop you from ruling on this motion today
4 in Appalachian's favor.

5 I would also -- Your Honor, we're not
6 talking about -- we're not talking about a
7 dock that's 10 square feet too big,
8 supposed to be 1500 square feet and it's
9 1510.

10 THE COURT: If you are going to make
11 a test, you might as well make a test,
12 right?

13 MR. PRITTS: Well, it's a test. It's
14 a test. Maybe all these people are
15 planning to use that dock, I don't know.
16 Maybe he needed one that big so everyone
17 could get on it. It's a huge dock. I've
18 never seen a dock that big, Your Honor.
19 Why is that dock that big? And that's the
20 question. Why do you need a dock that big?
21 Where do they explain in their brief they
22 need a dock that big?

23 THE COURT: Well, I'm mean, their
24 contention is it's his property and he can

1 build whatever he wants.

2 (People cheer.)

3 THE COURT: Let me tell you all: I
4 don't care what side you're on. If I hear
5 any more, I'm going to kick every one of
6 you out of here.

7 MR. PRITTS: And, Your Honor, their
8 contention is they have the property rights
9 to do it, but they are not understanding
10 what the flowage easement says. And I
11 would submit, Your Honor, you have already
12 ruled what the flowage easement says in the
13 Pressl case and the same would apply here.

14 Now, I'm not going to address every
15 single argument that they make in their
16 brief, Your Honor. The question about the
17 1960 license, they make a partial reference
18 to the 1960 license, Your Honor. It
19 doesn't show the whole license, it shows a
20 provision of it. The license required
21 APCO -- and they talk about, well, APCO had
22 no obligation to do anything until a
23 certain period of time. Well, that's not
24 exactly right, Your Honor.

1 In 1998 APCO's license was lessened,
2 not upward. And it was lessened in a way
3 where the Court said, Appalachian, you now
4 don't have to come to us. You can go ahead
5 and we're going to delegate the authority
6 to you without having to come to FERC, you
7 can allow certain docks to be built and
8 you can issue permits for them without
9 coming to us. So there was a lessening.
10 So if there was a lessening of that, that
11 means -- and it's true. Back in the 1960s,
12 when they issued a license, APCO wasn't
13 supposed to allow all of these docks to be
14 built, but they did, and it wasn't an issue
15 at that point in time, but then this
16 changed, and this dock is after that.

17 The point is Appalachian always had,
18 starting in 1960 and the flowage easement,
19 it had the right to remove the structures.
20 That legal right is there. It's their
21 right to remove any structure below the
22 800-foot contour.

23 So, Your Honor, I would say what we
24 would like you to do in this case is issue

1 an order granting that they are in
2 violation of the flowage easement and,
3 again, asking them to remove the dock or to
4 allow us to enter to remove the dock.

5 And if the Court doesn't want to get
6 into the issue of permanent injunction or
7 non-permanent injunction, I don't know that
8 we need to get to all that. The key issue
9 is does this dock have a right to be there
10 or not have a right to be there. And it
11 would be our position it doesn't at this
12 point.

13 Your Honor, finally I will say
14 getting their brief on Monday, didn't get
15 until Tuesday all the paper that they had
16 attached until -- and, Your Honor, I would
17 submit there's a lot of things in there
18 that just aren't the right thing to be
19 opposition for motion for summary judgment.
20 For example, a newspaper article from 1957
21 where there's portions of a PowerPoint
22 presentation or something there where
23 someone has got -- it's right before you
24 get to Exhibit C. There's pages that are

1 out of someone's PowerPoint presentation.

2 Your Honor, I would submit those
3 types of things are not -- they are -- you
4 know, you've got hearsay issues, you've got
5 issues of authentication, you've got issues
6 of do these really say -- support what they
7 are supposedly supporting. You know, the
8 issue are there some existing
9 non-conforming structures around the lake,
10 well, they are -- we're not contesting
11 that. As we talked about here, there are
12 some existing non-conforming structures
13 around the lake, but I don't think that
14 makes a difference on the issue in this
15 case.

16 Now, Your Honor, on the motion for
17 protective order, the discovery is not
18 due until --

19 THE COURT: Let's not worry about the
20 discovery. A, that's not due, and if I
21 find summary judgment --

22 MR. PRITTS: Yes, sir.

23 THE COURT: -- there is not going to
24 be any discovery anyway.

1 MR. PRITTS: Okay.

2 THE COURT: So let's argue that last.
3 I'd like to hear from the Nissens on any
4 summary judgment.

5 MR. WATSON: Thank you, Your Honor.
6 My name is Fred Watson and with me is
7 Pavlina Dirom. Together we represent Bill
8 and Lora Nissen and we're here today asking
9 the Court to deny the motion for summary
10 judgment filed by Appalachian because the
11 motion relies on misreadings of the flowage
12 easement, and also because under a plain
13 meaning or a plain reading of the language
14 of the flowage easement there are genuine
15 issues of material fact.

16 Now, Appalachian, their arguments
17 rely on several assertions. On page 3 of
18 their memorandum APCO asserts -- and they
19 have asserted it here today and asserted it
20 throughout their memorandum, but their
21 primary assertion is that the flowage
22 easement deed conveys to them the right to
23 remove any structure below the 800-foot
24 contour, and that according to Appalachian

1 that would include docks. But they say
2 they can do it at any time for any reason.
3 APCO also asserts that the Nissens violated
4 the flowage easement by building a dock on
5 their own property.

6 Now, these two assertions that are
7 made repeatedly by Appalachian are the
8 linchpins of Appalachian's argument on
9 summary judgment. And if these assertions
10 are without merit, if these assertions are
11 not supported by the plain language of the
12 flowage easement deed, then their motion
13 for summary judgment must fail. And we
14 would assert --

15 THE COURT: But if they are --

16 MR. WATSON: If they are, if the
17 Court finds that a plain -- that the plain
18 meaning of the flowage easement conveys an
19 absolute unlimited right, I think we're
20 going to have a hard time. But I think a
21 plain -- the plain meaning of that document
22 is less -- it doesn't provide that sort of
23 conclusion.

24 Now, first, the Nissens did not

1 violate the flowage easement deed by
2 construing a dock on their property. And
3 one thing, there's a lot of things that
4 Mr. Pritts and I disagree about, but one
5 thing that we do agree about is that the
6 language of the flowage easement deed is
7 pretty clear in some respects. We just
8 disagree. You know, he believes its
9 clarity weighs one way and I believe its
10 clarity weighs another way.

11 Now, with regard to what the Nissens
12 cannot do based on the language of the
13 flowage easement seems to me to be pretty
14 clear. And what they can't do on their
15 property below the 800-foot contour, and I
16 want to quote if the Court would allow me,
17 from the flowage easement deed. The
18 flowage easement deed expressly says that
19 in this case the Nissens can't, quote,
20 cause, permit, or suffer any garbage,
21 sewage, refuse, waste, or other
22 contaminating matter to be cast, drained,
23 or discharged onto the portion of said
24 premises below the contour, the elevation

1 of which is 800 feet or onto any of the
2 other lands or waters referred to in A,
3 section A above, or directly or indirectly
4 into such impounded waters.

5 That is the total content of the
6 flowage easement deed as to what the
7 Nissens cannot do. It's pretty clear.
8 What is clear from this flowage easement
9 deed is there's nothing in here that says
10 that they cannot build docks. It's silent.
11 The parties could have put that in there,
12 but they didn't.

13 The flowage easement deed in no way
14 can be read as a relinquishment by the
15 property owner of their right to build.
16 And that's the argument that's being urged
17 on the Court by Appalachian. So we take
18 the position --

19 THE COURT: I don't think that's the
20 position that they are taking. What they
21 are saying is that they have the right to
22 regulate what docks are put in and the
23 regulations are spelled out in the
24 Shoreline Management Plan.

1 MR. WATSON: I think that's part of
2 what they are saying, but I think they go
3 further. Not only did they say that they
4 have the right to regulate, but they say
5 they have the unlimited and unchecked right
6 to regulate, that they can do anything they
7 want, and that's not supported by the
8 flowage easement.

9 THE COURT: All right. Well, let's
10 talk about the first paragraph on that
11 page, on the flowage easement.

12 MR. WATSON: Okay.

13 THE COURT: You tell me what this
14 means: Grantors hereby grant to
15 Appalachian the further right to enter upon
16 said premises at any time and from time to
17 time and at Appalachian's discretion to
18 cut, burn and/or remove therefrom any and
19 all buildings, structures, improvements,
20 trees, bushes, driftwood, and other objects
21 and debris of any and every kind or
22 description which are or may hereafter be
23 located on the portion of said premises
24 below the contour, the elevation of which

1 is 800 feet.

2 What does that mean if it doesn't
3 mean what they say it means?

4 MR. WATSON: It does not mean what
5 they say it means.

6 THE COURT: I said if it doesn't,
7 what does it mean?

8 MR. WATSON: Discretionary right, not
9 an absolute right. And that's the main
10 point of contention is whether they have an
11 absolute right to enter onto property and
12 remove structures.

13 They take the position, and they have
14 repeatedly taken the position, that that
15 right is absolute. They say that they can
16 remove -- enter the property and remove
17 structures, any structure, at any time for
18 any reason.

19 What I read is that that is not an
20 absolute right. It is a discretionary
21 right. And what the -- what Appalachian is
22 urging is to ignore part of the language in
23 that paragraph. They ask the Court to
24 ignore the part about discretion, or to

1 effectively ignore it. If the Court were
2 to take a pen and strike through that
3 language, it would mean what -- it may mean
4 what Appalachian says, but if you leave
5 that language in there, it means something
6 else, okay?

7 But what Appalachian is arguing is to
8 read it as though it were struck through.
9 And what that does is have the Court treat
10 part -- they are urging the construction
11 that would leave part of the language
12 superfluous. And one of the principles of
13 contract construction is that in
14 constructing a contract you should give
15 effect to all language in the contract and
16 no part of the contract should be rendered
17 superfluous by the construction. And
18 that's what we -- that's what we're dealing
19 with here, an argument that is urging a
20 construction of the contract that renders
21 that language superfluous.

22 So I think that leads to a question,
23 what does that mean. What does a
24 discretionary -- the language using the

1 term "discretion" mean.

2 THE COURT: Well, it doesn't say at
3 the discretion of the property owner.

4 MR. WATSON: It does not.

5 THE COURT: It says Appalachian's
6 discretion, doesn't it? So doesn't that
7 give them -- I mean, it doesn't say
8 unfettered discretion, but it doesn't say
9 guided discretion, or it doesn't say
10 limited discretion. It says discretion.
11 And what does that term modify in the
12 clause?

13 MR. WATSON: The term "discretion" I
14 think is a limiting term and it has legal
15 significance. And the legal significance
16 of contract discretion means that the
17 discretion cannot be exercised arbitrarily
18 and it cannot be exercised capriciously.
19 There has to be some reasonableness
20 underlying the exercise of that discretion.
21 And --

22 THE COURT: Well, what does the
23 adoption of Shoreline Management Plan,
24 which they are going to say guides their

1 discretion. I mean, again, if the Nissens
2 want to build a 1,500 square foot dock,
3 they are not going to have the same
4 position as if they are building a 3,500
5 square foot dock. So isn't that the
6 guiding discretion that you're asking for?

7 MR. WATSON: No, I'm not asking the
8 Court to look at the Shoreline Management
9 Plan as the barometer of what's reasonable.
10 I think that is one of the things that
11 Appalachian is arguing, but what I would
12 say to that is Appalachian takes somewhat
13 conflicting positions. First they say that
14 this flowage easement is clear and
15 unambiguous and extrinsic evidence does not
16 need to be brought in to define what the
17 contract means. But on the other hand,
18 they say, But here's our Shoreline
19 Management Plan. Look at that to see what
20 our contract means to be the barometer of
21 reasonableness.

22 So one, I think if -- and I think
23 that the term "discretion" can be
24 ambiguous. So I think that the Nissens

1 should be afforded the opportunity that
2 Appalachian is exercising to bring in
3 extrinsic evidence, parol evidence, what
4 was the parties' understanding when the
5 contract was first entered into.

6 THE COURT: Well, are Mr. and
7 Mrs. Cundiff still around?

8 MR. WATSON: No, they are not.

9 THE COURT: Then how are you going to
10 bring in extrinsic evidence of what was
11 between the parties?

12 MR. WATSON: Your Honor, the law in
13 Virginia is fairly clear when you have a
14 term when there is doubt about the meaning
15 of the contract. And as a matter of fact,
16 laws are clear and there's a model jury
17 instruction on it. What they say is if
18 there's doubt about the meaning of a term
19 in a contract, the conduct of the parties
20 under the contract may furnish the proper
21 interpretation.

22 So we might not be able to talk to
23 the Cundiffs. Maybe we can. I don't know
24 if they are still alive or not, but we can

1 look at the conduct of the Cundiffs back
2 then.

3 Your Honor, we've got a large sample
4 size. We've got 500 miles of shoreline
5 where most of the property owners have
6 almost identical flowage easements. And
7 we've got Appalachian who has been
8 consistent since 1960, a consistent party
9 to all of these contracts. So we can't
10 look at the Cundiffs, but we can look at
11 APCO. What was their conduct? What was
12 their practical construction of this
13 contract?

14 THE COURT: You can't look at that in
15 a vacuum.

16 MR. WATSON: No, I --

17 THE COURT: I mean, you've got -- I
18 mean, look, we all know what's driving
19 this. I mean, FERC is driving this. The
20 EPA is driving this. So it's -- it's not a
21 function of one side or the other's
22 conduct. It's looking at it through the
23 spectrum of federal decisions to regulate
24 and mitigate environmental issues that

1 nobody frankly cared about 50 years ago and
2 they care about now, right?

3 MR. WATSON: Maybe. What I would say
4 to that is -- is, you know, Appalachian may
5 have pressure from FERC, and they may want
6 to please FERC. They may have to please
7 FERC.

8 THE COURT: Well, they have no
9 choice. They have got to get a license
10 from FERC.

11 MR. WATSON: I agree with that, that
12 they don't have a choice, but they are not
13 in a position -- they do not have a private
14 property right to go out and to
15 unilaterally change a contract in order to
16 please FERC.

17 THE COURT: Don't disagree with you
18 there.

19 MR. WATSON: And the statutory scheme
20 provides an avenue if they are not pleasing
21 FERC to do that. The scheme is clear. All
22 right. The whole scheme, the whole Federal
23 Energy Regulatory Commission scheme with
24 regard to hydroelectric power, is

1 predicated on the acquisition of private
2 property rights by the licensee. And they
3 can acquire those through contract. They
4 can acquire those through --

5 THE COURT: Condemnation.

6 MR. WATSON: Easements. And if they
7 can't get them that way, then the federal
8 law gives them the power to exercise
9 eminent domain.

10 And so the question is if FERC
11 changes the rules on Appalachian and says
12 we expect more out of you, but we look at
13 the contract and say, well, the private
14 property rights you've acquired don't allow
15 you to go that far, there's something for
16 them to do. They don't get to change the
17 interpretation of the contract.

18 And I would certainly argue strongly
19 that -- that the --

20 THE COURT: But can it change what
21 they desire to enforce as, say, if somebody
22 wanted to build a 3,500 square foot dock in
23 1968 when FERC and the EPA didn't care and
24 APCO didn't care, either.

1 MR. WATSON: I don't think so, Your
2 Honor. I think one of the things you look
3 at, what was the practical construction of
4 the parties. And we've got a 60-year
5 sample size to look at. And even
6 Mr. Pritts said in his argument back in the
7 day it was different. And back in the day
8 it was different. And because it was
9 different back in the day, that tells us
10 that the practical construction of the
11 parties --

12 THE COURT: We're not talking about a
13 back-in-the-day construction. We're
14 talking about pilings driven three years
15 ago.

16 MR. WATSON: Right, but we're talking
17 about a contract that was entered into in
18 1960. So that's the point in time we've
19 got to look at what the parties intended.
20 We don't look at what the parties intend
21 today. We look at what they intended when
22 they entered the contract. So I do think
23 back in the day is important. As a matter
24 of fact, I think it is primarily important,

1 what did the parties intend when they
2 entered the agreement.

3 And so -- and I may be wrong about
4 all this, but I think that -- I mean, we
5 have to keep in mind we're at a summary
6 judgment stage. And I do think one of the
7 many factual issues that need to be
8 explored is the practical construction of
9 the parties.

10 THE COURT: But that's not a
11 factual -- I mean, that's a legal
12 determination, isn't it? What does the
13 flowage easement mean?

14 MR. WATSON: No. The practical
15 construction you look at the conduct of the
16 parties. And that's a purely factual
17 question.

18 THE COURT: Well, but that's only if
19 there is ambiguity, right?

20 MR. WATSON: No. Well, if there's --
21 maybe. The -- what the law says is if a
22 term or terms in a contract are in doubt.
23 So I guess that's the definition of
24 ambiguity. So if there is doubt about what

1 the term "discretion" means, and I believe
2 that there is based on the argument that
3 we're having today, I think that's
4 certainly in doubt. And so since the term
5 "discretion" is in doubt we have to look at
6 the conduct of the parties to see what they
7 meant in 1960, in 1961 when they were --

8 Well, I guess the lake came full-pond
9 in I think 1966. So how did they apply
10 this contract then? And through the years,
11 I think Mr. Pritts even said 10 years ago,
12 they would have interpreted this contract
13 differently. The practical construction
14 would have been different.

15 So I think that is a factual inquiry
16 that is certainly relevant to this case and
17 I think the Nissens should be permitted to
18 explore those facts to develop an argument
19 before a trial.

20 Now --

21 THE COURT: Well, hasn't all that
22 already been done? I mean, you were in
23 federal court for three years, right?

24 MR. WATSON: No, it wasn't done, Your

1 Honor.

2 THE COURT: Why not?

3 MR. WATSON: Well, it's really hard
4 for me to answer that question because I
5 was not their lawyer in the U.S. District
6 Court. We did not represent them
7 in District Court. We represented them
8 before the Fourth Circuit on the appeal.
9 So I can't speak to why certain tactical
10 decisions were made in the U.S. District
11 Court.

12 I know we have a different case now.
13 We have different lawyers in the case. And
14 so I don't -- and that case was vacated.

15 THE COURT: I understand.

16 MR. WATSON: Right. And it was
17 vacated -- I think the issues were somewhat
18 different in that case.

19 THE COURT: I don't think the issues
20 were really any different. I mean, the
21 issue was whether feds had jurisdiction and
22 whether there was a federal question or
23 not.

24 MR. WATSON: That was one of the

1 issues, sure. And that's not an issue that
2 we have here, so maybe the discovery in the
3 U.S. District Court wouldn't help us at all
4 here. You know, there are different
5 issues.

6 Now, Mr. Pritts brought up several
7 cases that he said support the position
8 that they are taking today. And a number
9 of those cases they have cited in their
10 brief, some of them he argued today. And
11 most of those -- almost all of them, with
12 the exception of this Court's ruling in the
13 Pressl case, were federal cases.

14 And I do want to address --
15 Mr. Pritts took me to task a little bit
16 saying I had not addressed them in the
17 brief, but what I would say is based on the
18 Fourth Circuit's decision recently and the
19 Pressl case and in the Nissen case, those
20 courts would now be without jurisdiction to
21 make the decisions or make the rulings that
22 they did.

23 I would also point out that in the
24 Pressl case in the Fourth Circuit the --

1 the Fourth Circuit didn't merely say there
2 was no jurisdiction. They offered a reason
3 why there was no jurisdiction. And they
4 said that the property owners are not
5 affected. They are not bound by the
6 Shoreline Management Plan or the federal
7 license. FERC has no regulatory control
8 over the property owner. It is purely a
9 relationship between FERC and Appalachian.
10 And FERC can put pressure on Appalachian.
11 They can impose conditions for issuing a
12 license, but they don't confer onto
13 Appalachian any regulatory authority to
14 govern property owners, if they don't
15 already have through the acquisition of
16 private property rights.

17 So going back to the cases cited by
18 Mr. Pritts in his brief, the federal cases,
19 one was the Longenecker case, one was the
20 Arthur case. Both of those cases relied,
21 at least in part in finding, that
22 Appalachian had the property rights it was
23 asserting saying that some of those rights
24 came from the Federal Energy Regulatory

1 Commission. Well, the Fourth Circuit in
2 Pressl said that's not true. So that kind
3 of undermines those decisions right there.

4 In the Arthur case, that was a
5 summary judgment case in federal court,
6 which is a much different animal than
7 summary judgment in state court. In the
8 Arthur case the Court relied primarily on
9 testimony submitted through affidavit. So
10 they were able to resolve factual disputes
11 through affidavits that were submitted,
12 which, obviously, we cannot do in state
13 court. Also, Arthur there was -- Arthur
14 was a pro se litigant who just really
15 didn't put up much of a fight and was run
16 over by Appalachian.

17 So I would just suggest to the Court
18 that most of the cases cited by Mr. Pritts
19 are really not operative to the issues that
20 the Court is dealing with today.

21 Now, going back to what I think is
22 one of the primary issues, is discretion,
23 all right? I would urge an interpretation
24 of that word which is consistent with the

1 case law we've cited in our brief that
2 contractual discretion must be exercised
3 reasonably. It cannot be exercised
4 arbitrarily and capriciously.

5 So the question becomes is what
6 APCO -- is their conduct in this case, is
7 it reasonable or is it arbitrary and
8 capricious. That turns on factual
9 questions. You have to look at their
10 conduct in light of --

11 THE COURT: Well, I mean, if they
12 had -- if they had said, you know, this is
13 too much headache, we don't want to deal
14 with FERC anymore so we're just not going
15 to permit any new docks to be constructed,
16 that's pretty arbitrary.

17 Saying, you know, we're going to
18 permit docks, we're not going to interfere
19 with the building of docks provided they
20 are limited in size and scope, they are not
21 overly obtrusive to adjoining property
22 owners, blah, blah, blah. Why isn't that
23 sufficient?

24 MR. WATSON: Well, a couple things.

1 one --

2 THE COURT: Whether or not there is a
3 Shoreline Management Plan.

4 MR. WATSON: If I could answer using
5 the Shoreline Management Plan maybe as an
6 example.

7 In this case Appalachian points to
8 the Shoreline Management Plan, one, as kind
9 of a tool to interpret the flowage easement
10 deed, which the Fourth Circuit in Pressl
11 says you can't do, but also as the
12 barometer of what is reasonable. They can
13 say, well, we're complying with the
14 Shoreline Management Plan, so what we're
15 doing is reasonable, all right? Maybe
16 that's true, but maybe it ain't. And what
17 they are asking the Court to do is to infer
18 that it's reasonable, all right? We're
19 asking the Court to infer that maybe it's
20 not reasonable. And since we're the
21 non-moving party on summary judgment we are
22 entitled to that inference, they are not,
23 okay?

24 Now, to kind of add to the argument

1 that maybe that is not a warranted
2 inference, that it is a reasonable
3 barometer of what's reasonable, the -- I
4 would just point out, the Shoreline
5 Management Plan is 200 pages, okay? It
6 is -- it goes way beyond the construction
7 of docks. And what it requires, at least
8 what I think our evidence would show if we
9 were to try the case, what it would require
10 is in order to build the dock or at least
11 in order to get the permission of
12 Appalachian Power to build the dock, the
13 property owner has to sign a permit. And
14 that permit goes well beyond issues
15 involving the construction of docks.

16 What it does is kind of back doors
17 what Appalachian couldn't do through the
18 front door. Appalachian can't bind
19 property owners who don't sign a permit to
20 be bound by the Shoreline Management Plan
21 terms, okay? The property owners are bound
22 by what's in the flowage easement deed and
23 that's it.

24 So what they say is we'll let you

1 build a dock, but you've got to sign this
2 permit. And by signing this permit you
3 bring down all this regulation that we're
4 now entitled to enforce because you have
5 contractually allowed us to do it, and it
6 goes well beyond docks. It talks about
7 what plants they can grow, what plants they
8 have to remove. It talks about dredging.
9 It talks about shoreline management --
10 shoreline stabilization. It goes well
11 beyond docks.

12 So I think a very strong argument
13 could be made that that is not a reasonable
14 exercise of discretion. It is putting a
15 gun to somebody's head in a figurative
16 sense and saying either you agree to all of
17 this or you're not having a dock. And a
18 lot of property owners buy this property at
19 the Smith Mountain Lake because of the
20 lake -- I'm assuming all of them do -- and
21 when you buy shoreline property, you want
22 to build a dock.

23 And so Appalachian has people in a
24 pretty difficult position. So I think what

1 they are imposing, what conditions they are
2 seeking to impose on property owners, is a
3 valid factual inquiry to determine whether
4 or not they are exercising discretion in a
5 reasonable way or whether it is an
6 arbitrary and capricious exercise in
7 discretion.

8 Now, in looking at whether the
9 exercise of discretion is arbitrary and
10 capricious, you know, we look at these
11 things like what are the conditions that
12 Appalachian is seeking to impose. How has
13 Appalachian treated similarly situated
14 landowners, how are they reacting to the
15 construction of other docks.

16 Mr. Pritts has described this dock as
17 being, you know, huge and long and all this
18 other stuff. Well, I mean, that's a
19 question of fact. You know, are there
20 other docks that are that big? How has
21 APCO responded to that?

22 And I think an important question is
23 what has led APCO to drastically change the
24 way it looks at docks when it used to look

1 away from them for 40 years. I think I
2 know the answer, and I think the Court has
3 touched on it, it's pressure they have
4 gotten from FERC. It's the need to reapply
5 for a license. But that may not be the
6 reason. I mean, there may be other reasons
7 and we need to be able to explore those to
8 determine whether or not they are acting
9 reasonably.

10 What's the decision-making process
11 that Appalachian employs in deciding
12 whether that person can have a dock and
13 whether that person cannot have a dock.
14 And who at APCO makes those decisions.
15 Another factual question, what's wrong with
16 this dock? All right, it's big. Why is
17 that a problem for APCO? That's a factual
18 question that needs to be explored.

19 Now, if the Court grants summary
20 judgment, we don't get to explore any of
21 that. These are fact-based questions that
22 we will not have the opportunity to
23 explore. And the Nissens I believe
24 strongly are entitled to have the

1 opportunity to develop a full case on the
2 facts as well as the law.

3 And so for these reasons, Your Honor,
4 we would ask the Court to deny the motion
5 for summary judgment.

6 THE COURT: Mr. Watson, explain to me
7 on the flowage easement what your position
8 is on paragraph 1A in the revokable license
9 argument that Appalachian makes.

10 MR. WATSON: Okay. What that says,
11 Your Honor -- you're talking about where it
12 says they have a revokable license, right?

13 THE COURT: No, that the property
14 owner has -- the property owner gets a
15 revokable license from Appalachian in order
16 to do the things in paragraph 1.

17 MR. WATSON: Right. I just want to
18 make sure that I'm on the same page.
19 You're talking about the language in --

20 THE COURT: And for the above
21 mentioned considerations, grantor hereby
22 covenant and agree to and with Appalachian
23 that, A, if grantors exercise any of the
24 rights set forth in 1 above or make any

1 other use of said premises or any other
2 lands or of any waters in or to which any
3 estate, right, or privilege is now or
4 hereafter owned or held by Appalachian,
5 such exercise or use shall be at the sole
6 risk of grantors. No claim shall be made
7 against Appalachian for any of the damages
8 and such other use shall be deemed to be
9 made under revokable license from
10 Appalachian and not adverse to any right,
11 title, interest, or privilege by
12 Appalachian.

13 MR. WATSON: Sure. What they are
14 talking about in that paragraph are two --
15 I mean, they kind of divide uses of the
16 property into two sections. The one of
17 those granted in paragraph 1 above. So we
18 have to first look at what's granted in
19 paragraph 1 above. And basically those are
20 uses that have been retained by the owner
21 that are not inconsistent with the rights
22 given to Appalachian, all right? And those
23 rights given to Appalachian are the right
24 to overflow and effect the property with

1 water and the right to come onto the
2 property at its discretion and remove.

3 There's nothing in here that says the
4 property owner cannot build, all right? So
5 I'm pretty sure there's going to be a
6 dispute between me and Mr. Pritts about
7 this issue as to the interpretation. The
8 way I interpret it is that building a dock
9 falls within the first set of uses in
10 section A. It is a use that is not
11 inconsistent.

12 THE COURT: The right to cross said
13 land or reach the impounded waters for
14 recreational purposes.

15 MR. WATSON: I'm not even -- I mean,
16 I think that's right, but I think it goes
17 further than that. I think there's nothing
18 in the language of the easement that says
19 that the Nissens cannot build a dock. If
20 they build a dock, maybe there's a risk
21 that there is going to be some reasonable
22 reason why Appalachian can make them remove
23 it. I'm not going to concede that point
24 yet, but it's a possibility.

1 But when you look at the flowage
2 easement, there's nothing that says they
3 can't build a dock. So the building of the
4 dock is not inconsistent with what has been
5 conveyed to Appalachian. So that falls
6 within the first section of uses.

7 The second section of uses in the
8 paragraph you asked about are those other
9 uses. Other uses are those uses that are
10 inconsistent with the rights conveyed to
11 Appalachian, such as let's say that
12 Mr. Pritts brought up they were using their
13 property, I don't know, as a slaughter
14 house and discharging waste into the water.
15 And Appalachian just didn't have time to
16 deal with it for six months or a year or
17 six years, but it is inconsistent with the
18 rights that had been conveyed, inconsistent
19 with the language of the flowage easement.
20 So it's in that other use, that other use
21 that is inconsistent with the rights that
22 you have retained, you are able to do that
23 under a revokable license. So I think
24 that's what that paragraph 1-A means.

1 THE COURT: I don't see how you get
2 there. I mean, it says, If grantors
3 exercise any of the rights set forth in 1
4 above or make any other use of said
5 premises.

6 MR. WATSON: Right. But if you go to
7 the last sentence, the only -- the only
8 rights that are under revokable license are
9 those other uses. That last sentence makes
10 a distinction, also, and it says, And such
11 other use shall be deemed to be made under
12 revocable license. It's only those other
13 uses that are inconsistent.

14 THE COURT: All right. But the right
15 to cross the land -- I mean, they could
16 land a canoe, right? That's the argument
17 that Appalachian is going to make.

18 MR. WATSON: I certainly think they
19 can land a canoe, yeah.

20 THE COURT: Okay. But if they are
21 building anything below 800 feet, doesn't
22 that -- that's still subject to I guess the
23 question of what that first paragraph
24 means --

1 MR. WATSON: Right.

2 THE COURT: -- with the discretion.

3 MR. WATSON: The -- and the
4 question isn't whether Appalachian has the
5 discretion to tell them they can't do it.
6 The question is do they have the discretion
7 to tear it down, to destroy it. There's
8 nothing in here that says they can't do it.
9 Now, there may be a risk to building it,
10 but there's nothing in here that says they
11 can't do it.

12 THE COURT: Okay.

13 MR. WATSON: Thank you, Your Honor.

14 THE COURT: Anything else,
15 Mr. Pritts?

16 MR. PRITTS: Yes, Your Honor. The
17 argument was made that we have a couple of
18 different assertions that they can remove
19 any structure below the 800-foot contour in
20 violation of flowage easement by building.
21 And I would say yes, Your Honor, by the
22 clear language of the flowage easement you
23 can read this FERC document, and you should
24 read that document the same way.

1 They seem to argue that they have a
2 right to construct and then APCO has the
3 right to take down. They can construct,
4 then APCO can take it down, they can
5 construct, they can take it down. I would
6 say that's not right, Your Honor.

7 Judge Moon didn't see it that way
8 when he did the Pressl case. He said why
9 grant removal of structure such as a dock
10 at APCO's discretion -- also provide APCO
11 with the ability to determine the necessary
12 steps that we must take to build the dock
13 to begin with.

14 So he saying, and I think you said
15 the same thing in your ruling in the Pressl
16 case, that if you have got the right to
17 remove any structures then you've logically
18 got the right to say these are the
19 conditions that the permit -- you should
20 get a permit before you build it and if you
21 build it according to those conditions that
22 will be fine, and it's all inherent in that
23 right to remove. It would not make sense
24 to interpret it to say you have a right to

1 build and we have a right to remove.

2 What's the first step to this
3 position, Your Honor is back to paragraph
4 1. They will have the right to possess and
5 use the premises in any manner not
6 inconsistent with the state's rights and
7 privileges granted to Appalachian.

8 Okay, right to possess and use. If
9 it's by building, building, is that
10 inconsistent with the state's rights and
11 privileges granted to Appalachian? Yeah,
12 it is, because Appalachian has the right to
13 remove it. So I would submit they are
14 wrong in saying they have got this right to
15 build.

16 Now, they have argued in the brief
17 that the flowage easement is ambiguous.
18 Now, they have stood up here and said it's
19 plain there is no ambiguity.

20 THE COURT: No, they are saying it's
21 ambiguous. They are absolutely --

22 MR. PRITTS: Well --

23 THE COURT: Because what they're
24 saying is it's ambiguous so you can't use

1 summary judgment, I have got to allow
2 factually.

3 MR. PRITTS: Well, I think they took
4 two positions. And I understand that --

5 THE COURT: No, they said if I find
6 it to be unambiguous, they would still
7 argue against it, but they are not
8 conceding that it's unambiguous, right?

9 MR. WATSON: That's right, Your
10 Honor.

11 MR. PRITTS: Your Honor, I would
12 submit I heard him say the language is
13 clear -- anyway, Your Honor, I would say
14 we're not unilaterally changing the
15 language of the flowage easement. The
16 rights Appalachian has have always been in
17 there. It's been the right to remove any
18 structure below the 800-foot contour. And
19 it's there.

20 And again, Your Honor, there's no
21 changing from that. That intention comes
22 right from the plain language. They want
23 to get into, well, what were the intentions
24 of the parties. They say, well, if there's

1 doubt, you look at that.

2 But, Your Honor, you were right when
3 you said there's got to be ambiguity.

4 There has got to be a problem with the
5 language. And that language is so clear,
6 Your Honor, and your question to them is
7 what do you think it means? How do you
8 explain that?

9 I saw in the brief where they said,
10 well, this right to remove is not absolute,
11 it's a limited right. And I sat there and
12 I said, okay, let's see, how would that
13 have been written to be more absolute. I
14 asked my partners, How would you rewrite
15 this to give Appalachian more absolute
16 right? Well, it's an absolute right.
17 Appalachian is granted a right to enter and
18 at their discretion they can decide whether
19 it's going to be cutting or burning or
20 removing. That's what it says. It is an
21 absolute right. It's not a discretionary
22 right. It's not --

23 And so, Your Honor, I would go back
24 to the cases we cited in our brief

1 including the Ward's Equipment case that
2 says real estate contracts you don't apply
3 this implied duty of good faith and all
4 this stuff about discretion. The
5 discretion I think goes to whether you are
6 cutting or burning or removing.

7 Your Honor, I would say I disagree
8 that they said that we said we interpreted
9 our flowage easement differently. We don't
10 interpret our flowage easement differently.
11 The flowing easement has always been the
12 same.

13 Your Honor, there were attacks on the
14 federal courts saying the federal courts
15 got it wrong, the judges got it wrong. I
16 will say, Your Honor, if you want to and
17 you need to look at that, you can read
18 them. They are attached to our brief.
19 Judge Turk did the first one in the
20 Longenecker case. He relied on the flowage
21 easement. He looked at the flowage
22 easement. He said APCO has got the right
23 to regulate below the 800-foot contour.

24 Judge Urbanski did the second one.

1 There were some affidavits back and forth.
2 They were dealing with the issue, Your
3 Honor, of there was a question of fill.
4 Was there fill added by the Arthurs or did
5 it come from some other source. That's
6 what that question was about. The question
7 about the docks and docks below the
8 800-foot contour, there was no dispute over
9 that at all in that case, Your Honor. And
10 of course Judge Moon did the Pressl and the
11 Nissen cases.

12 What they are saying is, Judge, all
13 those judges were wrong and they are saying
14 you were wrong in your decision in Pressl.
15 And I would submit we haven't heard
16 anything that would support that position.

17 You know, Your Honor, again, it's all
18 about APCO being arbitrary and capricious
19 how they treated Mr. Nissen. And what they
20 have told Mr. Nissen is you can't build
21 that dock. You can build a dock that meets
22 the Shoreline Management Plan, the same
23 dock as everyone else is allowed to have.
24 And by definition, Your Honor, I think you

1 can find there is not anything there on the
2 arbitrary and capriciousness.

3 And then there's a lot of talk about
4 the Shoreline Management Plan, the
5 provisions in the Shoreline Management
6 Plan. Your Honor, what those are, the way
7 I look at them, they are collateral attacks
8 on the Shoreline Management Plan. The
9 Shoreline Management Plan, which we explain
10 in our brief came after many hours of blood
11 and toil, meetings month after month after
12 month, meetings with all these realtors and
13 dock builders and Chambers of Commerce and
14 marine operators, everybody getting all
15 this input and then come up with a
16 document. And at the end of the day, not
17 everybody's happy with it. There is
18 provisions that they would like changed.

19 This is not the case where -- I would
20 submit, Your Honor, that this Court needs
21 to be rewriting the Shoreline Management
22 Plan through this litigation. If they want
23 to challenge the Shoreline Management Plan,
24 their ability to do that is every time the

1 Shoreline Management Plan gets reviewed.
2 It is on a five-year review. I think it's
3 set to be three or four years from now, I'm
4 now sure. That's the time where you can
5 bring that up.

6 So, Your Honor, I have nothing
7 further on the motion for summary judgment.
8 If you want to hear argument on the motion
9 for protective order?

10 THE COURT: No, not right now.

11 It's obvious that this is -- whatever
12 I decide today is not going to be the last
13 say. The Pressl case is on appeal to the
14 Supreme Court. I expect whatever I decide
15 today is going to be on appeal to the
16 Supreme Court. And they have ultimately
17 got to decide whether or not my
18 interpretation of the flowage easement in
19 the Pressl case is accurate.

20 But as I read the flowage easement,
21 it is almost indecipherable to figure out
22 any way it could be different in any
23 meaningful way than a fee simple.

24 I mean, it gives Appalachian so much

1 authority. The way I read the modifier "at
2 Appalachian's discretion" modifies the
3 following clause. Not the prior clause,
4 but the following clause. At Appalachian's
5 discretion, cut, burn and/or remove
6 therefrom any and all buildings,
7 structures, improvements, trees, bushes,
8 driftwood, and other objects or debris of
9 any and every kind or description.

10 Now -- and it doesn't say until the
11 pond is full. It doesn't say for 20 years.
12 It doesn't say anything other than at any
13 time and from time to time. And if they
14 have as broad a right as that language to
15 this Court implies, then they absolutely
16 have the right to destroy the Nissens' dock
17 for whatever reason they want. It's
18 stupid. It is -- but, you know, people can
19 make foolish contracts. And perhaps at the
20 time that this was done there was an
21 expectation that there really wasn't going
22 to be any limitation on what was done, and
23 I suspect for the first 30 or so years
24 there wasn't any limitation. But times

1 change and situations change, and
2 Appalachian has now essentially been pushed
3 into limiting things.

4 Now, I don't for the purposes of
5 considering summary judgment consider the
6 Shoreline Management Plan. I'm only
7 considering the flowage easement and the
8 breadth to which it governs the rights of
9 the parties before the Court.

10 But I don't see how I can read it
11 reasonably in any way other than to
12 grant -- that grants Appalachian the power
13 to destroy that which is below the 800-foot
14 level. And I think Judge Moon's language,
15 and I know it's not binding on me, but it's
16 certainly persuasive, that the power to
17 destroy includes the power to regulate.

18 I'm going to grant summary judgement
19 in favor of Appalachian. However, I'm
20 going to direct that at this point nothing
21 be done with respect to this dock. It's
22 not to be improved in any way, it's not to
23 be destroyed in any way until such time as
24 Virginia Supreme Court has had an

1 opportunity to consider this, whether it be
2 through direct appeal of this Court's
3 decision on this case or whether it be
4 through the Pressl case, because I think
5 the issue is the same.

6 I don't think there's any point in
7 allowing discovery at this point because if
8 the Court's decision to uphold summary
9 judgment is granted, then discovery won't
10 do anything other than waste a lot of
11 money.

12 Does either side have any questions
13 about that?

14 MR. PRITTS: Your Honor, I don't know
15 if the dock is capable of use at the
16 moment. It shouldn't be improved, it
17 shouldn't be destroyed. Every day that
18 someone sits there and uses it for a year
19 and a half while the case is on appeal,
20 people go by on a boat and they say, well,
21 they are using a big dock, why are you --

22 THE COURT: Well, I'm not going to
23 enjoin the Nissens from using their
24 property. I don't think that's --

1 MR. PRITTS: I just wanted to clarify
2 and see what your ruling would be with
3 regard to use.

4 THE COURT: If it's usable, they can
5 use it. They can't add anything more to
6 it, they can't -- but you're not taking
7 anything away from it, either.

8 MR. PRITTS: Fair enough. Thank you,
9 Your Honor.

10 THE COURT: Just going to freeze it
11 as a status quo.

12 Any questions?

13 MR. WATSON: No, Your Honor.

14 THE COURT: Okay. That will be the
15 judgment of the Court.

16 MR. PRITTS: Thank you, Your Honor.

17 (The hearing was concluded at 3:31
18 p.m.)

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C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA

CITY OF ROANOKE

I, Mary J. Butenschoen, RPR, Notary Public in and for the Commonwealth of Virginia, at Large, do hereby certify that the proceedings were by me reduced to machine shorthand, afterwards transcribed by me by means of computer, and that to the best of my ability the foregoing is a true and correct transcript of the proceedings as aforesaid.

I further certify that these proceedings were taken at the time and place specified in the foregoing caption.

I further certify that I am not a relative, counsel or attorney for either party, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Roanoke, Virginia, on the 23rd day of June, 2017.

MARY J. BUTENSCHOEN, RPR
NOTARY PUBLIC

My Commission expires May 31, 2020
Notary Registration Number 228402

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