

RECORD NO. 15-2348

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RICHARD A. PRESSL;
THERESA PRESSL,

Plaintiff - Appellant,

v.

APPALACHIAN POWER COMPANY,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

**PETITION FOR REHEARING AND
PETITION FOR REHEARING *EN BANC***

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STATEMENT OF PURPOSE

Appellee hereby petitions the Court for rehearing and rehearing *en banc* because in counsel's judgment:

1. The decision of this Court is at odds with the opinions of numerous courts, as well as the frequent practice in the Fourth Circuit.  Federal jurisdiction is routinely applied to cases raising state law claims that require determination of rights and duties set forth under the Federal Power Act, 16 U.S.C. §791a, *et. seq.*, or set forth in orders from the Federal Energy Regulatory Commission (FERC). There is federal jurisdiction pursuant to 28 U.S.C. § 1331 and under the holdings in *Grable & Sons Mtl. Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) and *Gunn v. Minton*, -- U.S. --, 13 S.Ct. 1059, 1065 (2013). (*See infra*. Sec. IA.)

2. Material factual and legal matters were overlooked in the decision, including the fact that FERC has twice issued specific Orders rejecting the proposed development now sought by the Pressls on the environmentally sensitive

¹ *Appalachian Power Co. v. Longenecker*, No. 7:00CV00731 (W.D. Va. 2001) (action brought by APCO to remove encroachments from within boundary of project); *J.W. Holdings, Inc. v. Appalachian Power Co.*, No. 6:04CV00033 (W.D. Va. 2005) (case removed under 28 U.S.C. §1331 and 16 U.S.C. §825p in which property owner sought declaration that APCO had no rights to restrict his ability to build boat docks at Smith Mountain Lake); *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 (W.D.Va. 2008), *aff'd*, 343 F. App'x 915 (4th Cir. 2009)(case removed under 28 U.S.C. §1331 and 16 U.S.C. §825p in which property owner contended APCO could not limit its ability to build docks at Leesville Lake in the Smith Mountain Project); *Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790 (W.D. Va. 2014)(court orders defendants to remove their unpermitted docks and other structures from within project boundary).

shoreline at issue. (JA 71-75, 78-86.) Remanding the instant case will permit a state court to pass on the reasonableness of those FERC Orders and obligations under the FPA, and issue rulings contrary to them. The panel opinion improperly places state courts in the role of overruling the comprehensive federal scheme that addresses development on the shoreline of the project. 

SUMMARY

Appalachian Power Company (“APCO”) requests that this Court grant a rehearing *en banc*. This is a case about federal jurisdiction, and whether federal or state courts should determine what acts are required for – or inconsistent with – the “operation” and “maintenance” of a hydroelectric power station  that is licensed by FERC and governed by the FPA, 16 U.S.C. §791a, *et. seq.*

In the case below, the central dispute was whether construction on the shoreline and dredging of the lake bottom in an environmentally sensitive area was barred under an easement between FERC's licensee, APCO, and landowners William and Theresa Pressl. FERC had twice issued orders denying this type of construction at this location. (JA 71-75, 78-86.) The language of the easement only permitted development that is not inconsistent with the “operation” and “maintenance” of the federally licensed hydroelectric power station. (JA 42.) The FPA and certain FERC orders define what restrictions APCO must impose on landowner's development within the project boundary to “operate” and “maintain”

the project. (JA 260-339.) For this reason, and because two FERC orders barred specifically the construction and dredging at issue on this shoreline, APCO removed the case to federal court.

Removal was appropriate because resolving the easement dispute necessarily required interpretation of APCO's duties to protect this shoreline under federal law and administrative agency acts, and because in relevant part federal law determines the meaning of the easement. But in a published decision, a panel of this Court ordered the question back to state court – allowing a state court to decide what is necessary for APCO's "operation" and "maintenance" of a federal hydroelectric project. *Pressl v. Appalachian Power Co.*, No. 1502348, 2016 U.S. App. LEXIS 20790 (4th Cir. Nov. 21, 2016).

This decision threatens to create dueling systems of rights and responsibilities related to hydroelectric projects: the first in federal courts under FERC orders and the FPA, and a second in state court under the same bodies of *federal* law. This decision fails to follow the United States Supreme Court's decisions in *Grable* and *Gunn*, which dictate that complex regulatory schemes should not be consigned to state court simply because their meaning is implicated by a state cause of action or easement. And this decision is further in tension with decisions from other jurisdictions, and the regular practice in this Circuit, where questions regarding a federal hydroelectric project licensee's responsibilities to

protect the shoreline through enforcement of their easements are regularly heard in federal court. Finally, the opinion allows the Pressls, and other property owners in the future, to collaterally attack FERC orders in state court. This presents a significant risk to the long-standing regulatory structure surrounding hydroelectric projects.

STATEMENT OF CASE AND FACTS

Federal Law Defines the Operation & Maintenance of a Hydroelectric Project.

Smith Mountain Lake is a lake that would not exist, but for the fact that FERC licensed APCO to build a federal hydroelectric project. *Appalachian Power Co.*, 23 F.P.C. 624 (1960). FERC has the power to regulate federal hydroelectric projects directly, but it has delegated (and imposed) much of the responsibility on its licensee APCO. The requirements to "operate and maintain" the dam and hydroelectric project are governed by federal law and are set out in a FERC order that constitutes APCO's license. *Appalachian Power Co.*, 129 FERC ¶ 62,201 (2009) (emphasis added) (JA 260-339.) That FERC license order incorporates a Shoreline Management Plan, which specifies the restrictions on development such as dredging near wetlands and construction of docks on Smith Mountain Lake, and which dictates what APCO can or cannot allow to "operate and maintain" the hydroelectric project. (JA 316-18.) The project includes the dams, powerhouses, and all lands enclosed by the project boundary, which generally conforms to the

contour elevation 800 feet above mean sea level all around the lake. (JA 265, 300-01.)

The Easement at Issue Provides for the Operation & Maintenance of a Hydroelectric Project.

The property at issue is owned by the Pressls and was previously owned by Richard Frie. That property is subject to a Flowage Easement Deed. (JA 42-44.) That easement reads in part that APCO may "affect . . . in any manner whatsoever the property at issue, as is necessary for the "existence, *operation and/or maintenance* of the aforesaid dam and/or power station" (JA 42 (emphasis added).) The easement also grants APCO the right to remove any structures in its discretion below the 800-foot elevation contour. (JA 43.)

FERC Issued Orders Barring The Types of Proposed Shoreline Construction on the Property at Issue, so the Pressls File in State Court.

The particular property at issue is in a shallow area of the lake and it also contains a narrow strip of protected wetlands along the shoreline. (*See* Pressls' drawing at JA 343.) When the Pressls' predecessor in title Mr. Frie cleared all the vegetation and then wished to dredge the lake bottom and build a dock nearly identical to the development now proposed by the Pressls, APCO requested permission from FERC to grant permission for the development under certain conditions. (JA 71-75.) Taking into account "the proximity of the proposed dock and associated dredging to wetlands, and the continual environmental harm that

would likely occur by dredging in a shallow, sensitive shoreline area," FERC issued an Order denying the request to allow the Pressls' predecessor to build a dock and dredge on the property. (JA 75.)

The Pressls' predecessor then intervened and sought permission from FERC to build and dredge, and was again denied by that federal agency. (JA 78-86.) In particular, the second FERC Order noted that the shorelines of federal projects are "intended for the benefit of the general public ...[and] .. are subject to reasonable regulation in the public interest, and cannot be completely altered at the whims of adjacent property owners." (JA 85.) The Pressls' predecessor appealed these FERC Orders to this Court, but the case was later dismissed as moot.  *Frie v. F.E.R.C.*, Case No. 11-1331 (4th Cir. 2011). The net result is that FERC has twice told APCO that it would be improper operation and maintenance of the federal hydroelectric project to permit construction of the dock and the dredging at issue.

The Pressls propose to build virtually the same dock – using some of the same pilings of Frie's unfinished dock - and to do the same dredging. After initially working with APCO to meet FERC's requirements (JA 363-71), they filed suit in Virginia state court arguing that the Flowage Easement Deed does not permit APCO to "regulate" their property. (JA 22.) The capstone request for relief in the Complaint was the Pressls' request for a declaration that they "be allowed to use their property in any manner *not inconsistent with the maintenance of a dam*

and hydro-electric power generation plant operated by APCO.  (JA 35-36 (emphasis added)).

APCO removed the case to federal court pursuant to 28 U.S.C. § 1331 and under the holdings in *Grable* and *Gunn*. APCO alternatively removed it on the basis of 16 U.S.C. § 825p. (JA 6-13.) The United States District Court upheld the removal, holding that if APCO brought a suit to enforce its rights it would do so under federal law, and also that to "rule on the Pressls' request for declaratory relief, the terms of the FERC issues [sic] license would be necessary to the resolution of the case and these licenses are interpreted under federal law." (JA 493-94.) The District Court recognized this to be a significant federal issue, key to the integrity of the FPA's regulatory system; it alternatively found jurisdiction sufficient on the basis of 16 U.S.C. § 825p.  (JA 494-96.)

But the published opinion of this Court overlooked the two FERC orders (JA 71-75, 78-86), which specifically prevented APCO from allowing the type of development of the shoreline which is at issue in this case. This Court's opinion held that having a state court decide whether to overrule the FERC orders and allow the development "could not substantially affect federal interests." *Pressl*, 2016 U.S. App. LEXIS 20790, at *13. Because the determination of what it means to maintain and operate a federally regulated hydroelectric project is a question of

federal law that is key to the integrity of the Federal Power Act, APCO filed this petition for rehearing.

ARGUMENT & AUTHORITIES

I. The Meaning of the Disputed Portion of the Easement is Drawn from the Federal Power Act, and FERC Orders, such as APCO's License; a Federal Issue was Substantially at Issue and Necessarily Disputed Below.

A. "Operation" and "Maintenance" of a Hydroelectric Plant are Defined by Federal Law.

A court cannot resolve the Pressls' request for relief in the Complaint without resolving what APCO is required to do for the "maintenance" and "operation" of the federal hydroelectric project. This is necessarily a question of federal law.

Federal jurisdiction exists over a plaintiff's claims if such claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314.

The Pressls' summary request for declaratory relief, on its face, requires resolution of the meaning of APCO's federal license. The Pressls specifically seek a declaration in this action that they "be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydro-electric power generation plant." (JA 35-36.) To prove that the activities for which the Pressls seek court approval are "not inconsistent" with APCO's operation of the Project,

the District Court would clearly have to consider what is required of APCO to operate the Project. Pursuant to the FPA, APCO must operate its "dam and hydro electric power generation plant" in accordance with the terms of the FERC license. 16 U.S.C. § 797(e). Given this, a court would have to necessarily interpret what is inconsistent with the federal license to determine what uses of the Pressls' property are "not inconsistent" with APCO's maintenance of the Project. (Complaint ¶ I, JA 35-36.)

This Court has previously recognized this principle, albeit in an unpublished decision in *VA Timberline, L.L.C. v. Appalachian Power Co.*, 343 F. App'x 915, 916 (4th Cir. 2009) (per curiam). Notably, the panel decision did not overturn that result, but rather attempted to distinguish it. The panel reasoned that in *Va. Timberline* "Because the plaintiff's easement only gave it the right to construct docks that complied with APCO's license, interpreting the license was necessary to resolve the case." *Pressl*, 2016 U.S. App. LEXIS 20790, at *11 n.2.

But this precise issue is *again* before this Court. The only difference is that this easement includes the terms "operation and maintenance" governed by the license and FPA.²

² Federal jurisdiction has also been invoked to ensure that a state law duty of care is not created in derogation of the duties imposed by the federal license, issued by FERC order, for the maintenance and operation of a hydroelectric plant on Lake Murray, South Carolina. *See, e.g., Snyder v. S.C. Elec. & Gas Co.*, 2016

Not every case about the Flowage Easement will trigger federal jurisdiction. For example, questions regarding title, or the boundaries described in the deed of easement, would implicate state law and not federal law.³ But in this case, the terms of the grant to APCO in the easement – to affect the property in any manner necessary to operate and maintain the project – are terms of federal law. The dispute over what dredging or construction is consistent with the operation and maintenance of the hydroelectric project can only be a dispute about the definitions of those terms under the License Order (a FERC Order), and its incorporated Shoreline Management Plan. (*See, e.g.*, JA 280-81, 286-88, 291-92, 300-03, 316-18.)

B. The Federal Questions are Squarely at Issue and No State Question is Determinative.

By removing this question from federal court, this Circuit breaks with jurisdictions surrounding other hydroelectric projects in the United States. Issues surrounding the use of the shoreline on federally regulated hydroelectric projects have been litigated in federal court throughout the country. *See, e.g., Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 WL 2474692 (E.D. Cal. 2013)(action brought by

U.S. Dist. LEXIS 54032 (D.S.C. 2016); *Soles v. S.C. Elec. & Gas Co.*, 2016 U.S. Dist. LEXIS 52744 (D.S.C. 2016).

³ The decision in *Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552 (4th Cir. 1999), which was relied upon by the panel, reflects this reality. The question in that case was simply how wide was the undefined easement. No federal law was implicated by that purely state law question of interpretation.

FERC licensee for injunction requiring defendant to remove his unpermitted additions to dock); *Otwell v. Alabama Power Co.*, No. 6:11-cv-02139 (N.D. Ala. March 21, 2012)(property owner's damage claims against FERC licensee arising from licensee's use of shoreline at reservoir removed to federal court), *aff'd on other grounds*, 747 F.3d 1275 (11th Cir. 2014); *Union Elec. Co. v. Devine*, 2007 WL 4244989 (W.D. Mo. 2007), *aff'd*, 334 F. App'x 37 (8th Cir. 2009) (action brought by FERC licensee to require defendant to remove his docks).⁴ Thus, courts within the Eighth, Ninth, and Eleventh Circuits have upheld federal jurisdiction.

And, where a state claim requires the determination of a federal regulatory structure – and in particular the FPA – other courts have exercised jurisdiction so that issues determined by orders or tariffs of the FERC are determined by federal courts. *See e.g., Cal. ex rel. Lockyer v. Powerex Corp.*, 2006 U.S. Dist. LEXIS 19634, at *12 (E.D. Cal. Apr. 13, 2006) (state law conspiracy claim presented question of federal law, because FPA and FERC determine rates that can be charged for electricity), *aff'd California v. Powerex Corp.*, 274 F. App'x 574, 575 (9th Cir. 2008) (affirming federal jurisdiction); *Great Lakes Gas Transmission Ltd.*

⁴ The fact that these cases were not dismissed or remanded is significant considering that a federal court has an independent obligation to assess its subject matter jurisdiction, and it will "raise a lack of subject matter jurisdiction on its own motion." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982).

P'ship v. Essar Steel Minn., LLC, 103 F. Supp. 3d 1000, 1025 (D. Minn. 2015) (state contract law issue subject to federal jurisdiction because it turned on Natural Gas Act tariff). Similarly, federal cases bar collateral attack of FERC regulations and orders in state court because allowing such inquiry would inappropriately permit state court modifications of a federal regulatory system. *Otwell v. Alabama Power Co.*, 747 F.3d 1275, 1282 (11th Cir. 2014) (barring state court challenges that are in effect an attack on requirements for maintenance and operation of hydroelectric project).

In short, where the meaning of a federal regulatory system is squarely at issue, courts reviewing the matter have found in favor of federal jurisdiction. This goes to the core issue of *Grable*, 125 S.Ct. at 2368 (upholding, in a tax context, the availability of a federal forum to vindicate federal administrative action). As Judge Turk determined in another shoreline development dispute within this same project:

The meaning of the FERC license is a substantial and “important issue of federal law that sensibly belongs in a federal court.” *Grable*, 125 S.Ct. at 2368. The Federal Government has an “obvious concern in maintaining control over [the] engineering, economic, and financial soundness” of water power resource projects licensed by FERC. *First Ia. Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 172 (1946). “The Government ... has a direct interest in the availability of a federal forum to vindicate its own administrative action,” *Grable*, 125 S.Ct. at 2368, and those affected by FERC licenses may find it valuable to come before judges used to federal regulatory matters. *See id.*

VA Timberline, L.L.C. v. Appalachian Power Co., 2006 WL 1993557 *2 (W.D. Va. 2006).

II. The Panel Decision Also Failed to Consider the Issues Regarding Dredging and Replacement of Vegetation, which are also Determined by Federal Law.

The decision of the panel focused solely on the issue of construction of the proposed dock. However, the Pressls' Complaint seeks declaratory relief on other issues, such as whether APCO has authority to regulate dredging in wetland areas, and shoreline vegetation management. (JA 35.) In order to secure a declaration that APCO does not have the right to "regulate" their property under the Flowage Easement, the Pressls must prove that they are not "obliged to suffer, or refrain from doing something on [their] own tenement to the advantage of [APCO]." *Bunn v. Offutt*, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976). To rule on this necessary element, a court would obviously have to interpret APCO's License Order. That Order determines what restrictions APCO is required to place on dredging, vegetation management, and dock construction. (*See, e.g.*, JA 280-81, 286-88, 291-92, 300-03, 316-18.) Thus, these are properly questions for a federal court.

III. Federal Law has a Substantial Interest in the Federal Resolution of the Requirements for the Maintenance and Operation of a Hydroelectric Project that is Regulated by FERC and the FPA.

The federal government has an interest in the coherent and consistent interpretation of the FPA, which is "a complete scheme of national regulation,

promot[ing] the comprehensive development of the water resources of the Nation." *Albany Engineering Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2009) (citing *First Iowa Hydro-Electric Coop v. FPC*, 328 U.S. 152, 180, 66 S.Ct. 906 (1946)). Permitting a state court to decide the scope of the easement by ruling on what restrictions on shoreline development are necessary for APCO to comply with the federal license, would permit state courts to pass on the "reasonableness" of the FPA and the Federal License, *i.e.*, a FERC order. A state court should not be granted the right to review, and render unenforceable as "unreasonable" portions of a federal regulatory scheme.

Even the Virginia legislature has recognized the priority of APCO's shoreline management at Smith Mountain Lake, and it requires that localities defer to APCO's rights and responsibilities. Va. Code §15.2-1226 (1988). By state law, the localities in and around Smith Mountain Lake must not conflict "with the rights and responsibilities accorded Appalachian Power Company under its federal license to operate the Smith Mountain Project" when they regulate the construction of docks, bulkheads and similar structures along the shoreline. *Id.*⁵

The number of shoreline management cases brought in or removed to federal court over the years is small. *See, e.g., Appalachian Power Co. v. Arthur*, 39 F.

⁵ This provision was published as Va. Code § 15.2-1226. *See* copy at JA 373; *see also* Acts 1988 c. 876. It remains valid but was removed from the published code under a policy to include only provisions having general application throughout the Commonwealth.

Supp. 3d 790 (W.D. Va. 2014) (court orders defendants to remove unpermitted docks and other structures from within project boundary); and *Appalachian Power Co. v. Longenecker*, Case No. 7:00CV 00731 (W.D. Va. 2001) (successful action brought by APCO to remove encroachments from within the Project boundary). But they are important because their consideration under a consistent system of precedent in the same court system ensures the integrity of the FPA regulatory scheme.

IV. Federal Jurisdiction Additionally Exists Pursuant to the Federal Power Act's Exclusive Jurisdiction Provision, 16 U.S.C. § 825p.

Between the time that this case was briefed and the panel opinion was issued, the United States Supreme Court handed down *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, --- U.S. ---, 1365 S.Ct. 1562, *, 2016 U.S. LEXIS 3049, *** (2016). The panel opinion overextends *Merrill Lynch*, which actually supports federal jurisdiction in this case. The coercive suit at issue in this case would not be a complaint "that simply mentions a duty established by federal law". Rather, it would be a complaint of the type described in *Merrill Lynch*.

Merrill Lynch explains that the "brought to enforce" language in federal jurisdictional statutes similar to 16 U.S.C. § 825p refers to suits that are "commenced" for the "consequence" to "give force [or] effect to" a duty set forth in federal law. *Merrill Lynch*, 1365 S.Ct. at 136 S.Ct. *1568. The coercive suit brought by APCO would be commenced to enforce the duties imposed on APCO

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December 5, 2016

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Counsel for Appellees