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22 September 2011

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Subject: Smith Mountain Project P-2210-090
Allegation of non-compliance under the shoreline management plan
CONCURRENT MOTION TO INTERVENE AND REQUEST FOR REHEARING

Dear Secretary Bose:

MOTION TO INTERVENE

Pursuant to 18 C.F.R. § 385.214, the undersigned hereby moves to intervene in the matter of the Commission's Issuance (See eLibrary no. 20110826-0109), mandating that Gangplank Pointe docks and eventually all heretofore grandfathered docks be brought in to conformance with Shoreline Management Plan (SMP) regulations under Project No. 2210-090, which was noticed on 24 August 2011.

This mandated action will cause substantial and unreasonable loss of access to the project waters, by private and public stakeholders causing irreparable and unbalanced harm contrary to the letter and spirit of applicable law.

I as Movant hereby move to intervene in this proceeding in opposition to the final agency action because I dispute the sufficiency of this order to comply with the license and relevant law. I believe the order should be changed to be consistent with the terms of the new license, specifically Article 415, and relevant federal and state law, which will improve the benefits of shoreline management by limiting its regulation to substantive issues that better serve the greater public benefit. Thus, this proceeding is not "uncontested" under the meaning of 18 C.F.R. § 375.301(c).

STANDING

Movant has property affected by these proceedings and is directly affected thereby. Movant has served on organizations [Concerned Citizens for Craddock Creek, Smith Mountain Lake Association, Association of Lake Area Communities, Smith Mountain Marine Business Association, and West Piedmont Planning District Commission] directly involved in these proceedings, to wit, serving as a Franklin Co. Va. Representative on the Appalachian Power Company 2010 SMP Steering Committee. Movant is also an intervener in proceedings under Docket #P2210-207. Movant also files this intervention action in the public interest. This motion is timely under applicable filing requirements. Relevant C.F.R. regulations provide and validate these grounds for standing. 18 C.F.R. § 385.214 et al.

MOTION FOR REHEARING

Pursuant to 18 C.F.R. § 385.713, Movant requests a rehearing of the Office of Energy Products, Division of Hydropower Administration and Compliance (DHAC) Staff's final decision directing that Gangplank Pointe docks and eventually all heretofore grandfathered docks be brought in to conformance with SMP regulations under Project No. 2210-090 (See eLibrary no. 20110826-0109), which was noticed on 24 August 2011.

LIST OF ISSUES

1. The order does not adequately take into account the interest and rights of the shoreline property owners and the entire Smith Mountain community that depends on the waterway for its economic survival.

The Commission failed to articulate the basis for this determination, other than to generally state that the licensee must enforce Shoreline Management Plan rules consistently, regardless if those rules are harmful to the public safety and project aesthetics.

The Order is contrary to both the public interest and the requirements of reasoned decision-making due to the substantial hardship it creates on shoreline residents and its licensee. The Order falls short of reason because it fails to give sufficient weight to the socioeconomic impacts of its modifications to the non-conforming structure guidelines. Therefore, the order is contrary to the Commission's responsibility to strike an equitable balance between power and non-power values in making its comprehensive development and public interest determinations.

2. The Smith Mountain Project Shoreline Management Plan (SMP) Violates the Commonwealth of Virginia's Constitution and Code.

Only the sovereign state and locality have the right to "zone" to regulate land use and development. Appalachian Power is a corporate citizen of the Commonwealth and as such is subject to the lawful regulation of the Commonwealth.

The Smith Mountain Project is privately owned and Appalachian Power owns in fee simple only a portion of the project's lands. The remainder of the project is owned by private individuals and corporations (no federal lands are in the project boundary), which granted to Appalachian Power by easement deed the right to flood within the project boundary.

a. Virginia Constitution; Article 1 Bill of Rights:

Section 7. *Laws should not be suspended. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.*

Section 14. *Government should be uniform. That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.*

b. Code of Virginia

§ 15.2-102. Definitions. "Locality" or "local government" shall be construed to mean a county, city, or town as the context may require.

§ 15.2-2201. Definitions. "Zoning" or "to zone" means the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as "zones," by legislative action and the prescribing and application in each area and district of regulations

concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.

§ 15.2-2280. Zoning ordinances generally. Any locality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;
2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
3. The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used; or
4. The excavation or mining of soil or other natural resources.

3. Docks are neither a nuisance nor a threat to environmental, recreational or scenic attributes.

Docks do not limit or in any way impede power generation. Docks also provide shade and coverage for the fishery, which benefits the larger species. Since all of the fish species are dependent upon each other, a balance of fisheries and habitat is promoted.

Dock ownership promotes stewardship of the shoreline, which is in the greater public interest (e.g. shoreline maintenance, erosion control, water quality, sediment removal).

Docks impact to shoreline is negligible as they occupy ~ 1.1% of total surface area of Smith Mountain Lake and less than .01% of Leesville Lake; and dock access ramps occupy 1.7% of shoreline on Smith Mountain Lake and 0.15% on Leesville Lake.

4. SMP dock regulations that limit maintenance serve no legitimate purpose and are inconsistent with License Article 415. -- Use and Occupancy.

All structures require maintenance, even pilings have an estimated life of between 30 and 40 years, and structure maintenance should be encouraged rather than arbitrarily and irrationally limited.

Article 415 requires: "... *The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements.*" (Emphasis added).

Limiting maintenance to 50% of a structure is an arbitrary judgment. An improperly maintained structure will eventually become unsafe, result in its abandonment, and harm the project's aesthetic resource, which violates both SMP and other license requirements. The added burden of Appalachian's SMP regulation discourages rather than encourages necessary maintenance, and consequently violates this license provision and jeopardizes safety and aesthetics.

5. SMP dock maintenance limitation and unwritten policy are arbitrary, impractical, inconsistent and thus unenforceable.

Residents have made significant investments in docks and shoreline improvements and should have the ability to maintain their investment without irrational regulation. The SMP encourages maintenance of all structures and at the same time imposes an arbitrary limit on maintenance to 50% or less of the physical structure, excluding the pilings. According to SMP regulations, if more than 50% of a structure is maintained, the structure must conform to the latest SMP requirements. SMP requirements are fluid as they are subject to future changes, and enforcement is totally dependent upon Appalachian's and FERC's ad hoc interpretation of existing regulations. This uncertain regulatory target discourages rather than encourages proper maintenance. There is no rational basis for the 50% rule.

Unwritten SMP policy enforced by Appalachian goes further to state 50% of the structure can be maintained “at one time.” Does “at one time” mean during one activity, one day, one week, one year, one permit, or once in the life of the structure? “At one time” is ambiguous, and consequently unenforceable.

Unwritten SMP policy enforced by Appalachian requires a permit for maintenance, only if the locality requires a building permit. In general, repairs and maintenance activities (including piling replacement) do not require a locality to issue building permits. Since replacement / repair of decking, roofing, and floaters do not require the locality to issue building permits, these types of repairs, according to Appalachian’s unwritten policy, are not limited. Therefore Gangplank docks did not violate the 50% rule or the underlying unwritten enforcement policy.

6. As it should be, there is no stated goal in the SMP to require previously grandfathered structures to comply with future regulations. Such a goal would violate Virginia code and existing flowage easement agreements, and discourage private investment.

There is no legitimate reason (scientific or other) to require existing docks to conform to some indeterminate future regulation; nor is there any apparent public benefit. Does an SMP compliant dock create less harm or less benefit?

Such a goal violates Virginia Code § 15.2-2307. Vested rights not impaired; nonconforming uses and flowage easement agreements: “... Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes ...”

7. The arbitrary limitation on maintenance, which resulted in the final agency action (order) requiring Gangplank Docks be brought into conformance with the requirements of the SMP, is a substantial violation of due process resulting in severe and immediate economic consequences.

The docks at Gangplank Pointe have existed in their current form since before 1987. According to the US Supreme Court, the existing use of property constitutes an owner’s “primary expectations” about the use of that property¹. The condominium owner’s expectation here is that all members continue to enjoy and use their individual dock to access the waters of the project.

The FERC 24 August 2011 order states: “... Gangplank docks, as constructed, are not consistent with the requirements of the approved SMP, and should be brought into conformity with the current requirements (e.g., length, setbacks, orientation, height, number of slips allowed per shoreline frontage, etc.) of the plan.”

If the Gangplank Docks were made to conform to the current SMP regulations, they would have to be dismantled and because of shoreline length restrictions, only 52% of the existing slips could be rebuilt, resulting in a severe diminution of property values for those owners that would no longer have a boatslip. The cost of removal, disposal and rebuild, plus the diminution of value because of lost access could approach \$6,000,000 for the Gangplank Pointe Condominium Association.² This is an economically damaging result with no justifiable benefit to the project operations.

Courts invalidate regulations that they find arbitrary or irrational. As the Supreme Court recently explained, the Due Process Clause prevents government regulations that are arbitrary or irrational, including regulations that have an insufficient means-end fit.³ Perhaps more to the point, the SMP carries no weight of law; rather it amounts to an unenforceable set of rules, written by a private company that was approved by the Commission.

8. The arbitrary limitation on maintenance amounts to an uncompensated taking and as such violates both the 5th and 14th Amendments to the United States Constitution.

¹ Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

² Tear out and dispose of existing slips between \$108K and \$270K; Build 28 new slips between \$420,000 and \$454,000K; Devaluation of 26 condos because of lack of access to water between \$3.9M and \$5.2M

³ Lingle v. Chevron, 544 U.S. 528, 542 (2005) (“[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”).

According to the 25 August 2011 final agency action: “As you know, the purpose of the 50% rebuild rule is to eventually bring all docks in conformance with the SMP through attrition when significant repairs are needed, without requiring dock owners to immediately conform to the SMP.”

The purpose of restricting structure maintenance to 50% or less, excluding pilings, is to eventually force all existing structures to conform to the latest SMP regulation, through attrition. The 50% rule is a de facto amortization rule to defer taking of property without compensation. A number of courts have held that an amortization period is nothing but a deferred taking of property. Eliminating an existing use immediately would be an unconstitutional taking of property, and putting off eliminating the use until tomorrow is no more constitutional.⁴ Allowing a dock to remain in existence for a while – even for a few years – is no substitute for the compensation the Takings Clause requires.⁵

The US Supreme Court identified the following factors for evaluating whether a regulation amounts to a taking: (1) the extent of the diminution of property value it caused; (2) its interference with reasonable investment-backed expectations; and, (3) its character.⁶

1. The diminution in values of the property is steep, as only 52% of the condo units would have access to a boat slip, whereas now all units have access, and if applied to all grandfathered structures as the Commission intends would result in an even larger diminution of property values.
2. The owners of Gangplank docks have established reserves to care for (maintain) the structures for safety and aesthetics. It is both an obligation of their joint ownership and a requirement of the project license. The owners have every right to expect the existing use of the docks will continue.
3. The character of the shoreline will remain the same, and is not a factor.

9. SMP regulations, regarding maintenance of existing non-conforming structures approved by the Commission in 2005 and 2010, are irreparably flawed (contradictory and inconsistent) and consequently the 24 August 2011 agency action cannot be implemented without violating other approved SMP regulation.

- a. According to Appalachian replacement of decking and handrails do not require a permit from Appalachian since a local building permit is not required. The upper decks were repaired first (which is less than 50% of the structure), followed by floater repairs (also less than 50% of the structure). These repairs were in fact separate actions and not one continuous repair. Floater repairs required a permit that was issued subsequent to the replacement of decking and handrails. Consequently the 50% rule was not violated “at one time.”
- b. The method of calculating the 50% rule is unspecified in the SMP and instead uses an unwritten, arbitrary ad hoc policy. Appalachian on 23 June 2011, in response to the Commission’s inquiry stated: “Appalachian calculates the square footage of both the upper and lower levels of structures. For example, in the case of Dock 100, Appalachian would calculate the total square of the upper level and lower level, including the open water space, as it contains a lift for the boat.”
- c. Appalachian on 23 June 2011, in response to the Commission’s inquiry stated: “No structural modifications were made by Gangplank. The dock was not expanded in any way. Gangplank only replaced defective decking and hand rails and floating docks which if not maintained and/or replaced can become a safety issue for the numbers of individuals accessing their slips.”

Structural members, joists, rafters, trusses, pilings and support beams are a critical part of the physical structure and as such should be a part of any calculation for replacement and/or repair.

⁴ *E.g.* Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965) (“[N]o one has, as yet, been so brash as to contend that . . . a pre-existing lawful nonconforming use might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such a taking for a ‘reasonable’ time.”).

⁵ *See PA Northwestern Distributors*, 584 A.2d at 1376; *see also* 83 Am. Jur. 2d Zoning and Planning § 622, n.5 (2007) (collecting cases invalidating amortization rules under Takings Clauses); Reynolds, *supra* note 66, at 105-06 (citing cases striking down amortization on Takings Clause grounds).

⁶ *Penn Central*, 438 U.S. at 124.

Appalachian's undocumented, arbitrary ad hoc methodology fails to account for these structural components. Appalachian cannot rationally state that replacement of decking boards on the upper deck of Dock 100 constitutes 50% of the structure, when none of the underlying structural components, necessary to support the decking where changed.

As an example to illustrate the irrationality of this rule, painting, staining, and sealing are also maintenance activities. Would a literal interpretation of the 50% rule require a structure to conform with the latest SMP regulations if more than 50% were repainted or resealed "at one time?"

- d. Appalachian on 23 June 2011, in response to the Commission's inquiry stated: *"Further, the property owners filed their existing nonconforming structure documentation. Should the time come when the pilings need to be replaced, then they will be allowed to replace the structure in its current location, assuming that they continue to maintain the structure and that there are no other outstanding issues."*

Yet in the 24 August 2011 order, the Commission states: *"... As you know, the purpose of the 50% rebuild rule is to eventually bring all docks in conformance with the SMP through attrition when significant repairs are needed, without requiring dock owners to immediately conform to the SMP. In this case, the Gangplank docks were documented as non-conforming docks in 2005, but were not required to conform to the SMP at that time. Now, as significant repairs were needed, the docks should be required to conform to the SMP."*

Apparently when a replacement of a piling is permitted, and the structure is in good repair, the structure may continue to exist in its non-conforming nature in perpetuity.⁷ Likewise if the structure is damaged / destroyed beyond use, it can also be rebuilt. But should the owner wish to keep the entire structure maintained and safe, the owner will be required to bring the structure into conformance with an indeterminate future SMP regulation, if more than 50% of the structure is maintained. Such a policy is irrational – the owners of Gangplank Pointe docks would have been better off to set fire to the structure, and then rebuild in the original footprint, rather than seek permission from Appalachian to rebuild their floating docks.

10. Requirement to register existing non-conforming structures with Appalachian Power violates applicable Virginia code, was improperly noticed, and required expert knowledge of SMP requirements.

The Commission approved Shoreline Management Plan states: *"To be considered as part of the nonconforming structures provisions of the Shoreline Management Plan, property owners must submit documentation of any structures that have been built below the 795 contour NGVD on Smith Mountain Lake and the 613 foot contour NGVD on Leesville Lake. Documentation may consist of photographic documentation along with any associated drawings. Such documentation shall be provided to AEP by August 31, 2005. AEP will then issue an acknowledgement of adequacy of documentation."* This provision violates Virginia Code § 15.2-2307. Vested rights not impaired; nonconforming uses.

The licensee instead of notifying each lake front property owner by registered mail, elected to save funds and place notifications in local newspapers, instead. Your licensee knew that many lakefront property owners are not local residents and do not subscribe to local papers. Appalachian also did not hold up their end of this bargain as they failed to acknowledge the adequacy of submitted documentation, and in several cases even misplaced/lost documentation that was submitted.

The determination of a structure's compliance with SMP regulations requires expert knowledge; apparently knowledge that neither the Commission nor Appalachian possess, based upon the lack of consistency in enforcement and ad hoc interpretation of policy.

⁷ SMP Section 2.5.2 High Density Multi-use Regulation, Paragraph 23. *"... These structures may continue to exist despite their nonconforming nature and may be expanded provided the nonconforming aspect of the structure is not increased. Maintenance of all structures is encouraged. If maintenance requires more than 50% of the physical structure, excluding the pilings, to be replaced or repaired, the structure must conform to the new requirements. If pilings need to be replaced, then the footprint of the structure may be replaced provided documentation has been provided detailing the structure."* [Emphasis added]

11. Commission logic in requiring the Gangplank docks be brought into conformance is irrational.

In its 24 August 2011 order, the Commission states: “... *The issue is not whether or not repairs would benefit aesthetics or safety, but rather, whether the rules of the SMP were followed. Improvements to aesthetics and safety would similarly be accomplished by repairing the dock structures and rebuilding them consistent with the SMP.*”

Is it the objective of the Commission’s order to ensure that existing structures *are maintained in good repair and comply with applicable state and local health and safety requirements* in accordance with License Article 415; or to simply enforce arbitrary, irrational, ad hoc SMP regulations? If the objective is to improve aesthetics and safety, which benefit the general welfare, this can be accomplished without requiring Gangplank docks to conform to this irrational SMP rule.

12. The Shoreline Management Plan creates arbitrary, irrational, inconsistent and unenforceable regulations that unnecessarily conflict with federal, state and local regulations.

The supremacy of the Commission’s regulation over state and local regulations is not universal.⁸ The localities have the sovereign power to regulate land use and development. The superfluous added regulation in the SMP comes with a heavy burden that is not offset by any public benefit. This compels your licensee to enforce ill-crafted, unenforceable and unnecessary SMP regulations which result in increased cost to your licensee and the public, with no resultant benefit.

The Commission has always been forbidden to impose regulatory burdens unless it could be shown that the added regulation benefits the general welfare. For if this were not the case, nothing would prevent Commission from declaring all docks to be painted pink and purple, or to conform to an art deco design, or to limit maintenance to 1% of a structure, or to allow structures to exist at the whim of the Commission or its licensee.

Illustration in point, the SMP regulation regarding the 50% rule fails to serve any legitimate objective and is so arbitrary and irrational that it runs afoul of the Due Process Clause of the US Constitution. The proper maintenance of Gangplank Docks or for that matter of any existing non-conforming dock, in no way harms or prevents Appalachian from meeting its license requirements. Instead it enhances Appalachian’s ability to meet license requirements as it protects and enhances the projects scenic and recreational benefits, without any harm to the environment and without limiting Appalachian’s ability to generate power.

Existing federal, state and local regulations should replace much of the duplicative and inconsistent regulation in the SMP. On 15 April 2011 the Virginia Secretary of Natural Resources wrote the Commission: “*We are confident that Virginia’s environmental protection laws and regulations, together with local zoning provisions, secure the protection of our valuable natural resources, and strike a fair balance between economic development and the environment.*”

Likewise the Army Corps of Engineers regulations and its national permits are sufficient to address shoreline stabilization, dredging and wetlands designation and protection. Similarly the Environmental Protection Agency and US Fish and Wildlife Agency regulations protect environmental qualities and endangered species. Local zoning and subdivision ordinances proved their effectiveness at regulating land use within the project during its first 40 years, when both the FERC and Appalachian regulation was absent. And the Virginia Department of Conservation and Recreation’s storm water management regulations in conjunction with the localities erosion and sediment control regulations are highly effective.

Directing Appalachian Power to continue to impose needless regulations, results in greater cost to your licensee, which runs counter to the Commission’s stated Mission: Reliable, Efficient and Sustainable

⁸ PacifiCorp Project No. 2342-018 ORDER ON PETITION FOR DECLARATORY ORDER (Issued May 18, 2006) ... *We [FERC] prefer for our licensees to be good citizens of the communities in which projects are located, and thus to comply with state and local requirements, where possible. However, to the extent that state or local regulations make compliance with our orders impossible or unduly difficult, we will conclude that such regulations are pre-empted.*

Energy for Customers. -- Assist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through appropriate regulatory and market means.

13. The Shoreline Management Plan and the process followed to develop and amend it, violates Executive Orders⁹ to eliminate unnecessary and burdensome regulations, and apparently FERC Chairman Wellinghoff's latest position.

The overwhelming consensus of the 14 SMP steering committee members and organizations was that the SMP as written is fatally flawed and should be modified in accordance with the comments of the Tri-County Relicensing Committee (see eLibrary no. 20110415-5003) previously filed with the Commission on 14 April 2011. The following Executive Order compels Commission staff to embrace this public consensus or demonstrate conclusively why SMP regulations, as written better serve the public welfare.

Executive Order--Regulation and Independent Regulatory Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. Policy. (a) Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

(b) Executive Order 13563 of January 18, 2011, "Improving Regulation and Regulatory Review," directed to executive agencies, was meant to produce a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." Independent regulatory agencies, [to include FERC] no less than executive agencies, should promote that goal.

Sec. 2. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

(b) Within 120 days of the date of this order, each independent regulatory agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 3. General Provisions. (a) For purposes of this order, "executive agency" shall have the meaning set forth for the term "agency" in section 3(b) of Executive Order 12866 of September 30, 1993, and "independent regulatory agency" shall have the meaning set forth in 44 U.S.C. 3502(5).

(b) Nothing in this order shall be construed to impair or otherwise affect:

- (i) authority granted by law to a department or agency, or the head thereof; or
- (ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or

⁹ Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, and Executive Order--Regulation and Independent Regulatory Agencies of July 11, 2011.

entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,
July 11, 2011.

“FERC welcomes the President’s new executive order for a more formal, public reassessment of our regulations and their effect on the economy. The Commission complied with the spirit of the President’s January order when I directed staff to perform an internal assessment of the effectiveness of our regulations. And as part of our normal procedure, FERC’s regulatory process is open and public. The President’s new directive will be a useful addition to our continuing efforts to ensure FERC regulations are effective, timely and up to date.” – Jon Wellinghoff Chairman, Federal Energy Regulatory Commission, posted July 11, 2011 on the White House Blog

REQUEST FOR RELIEF

Movant requests the Shoreline Management Plan arbitrary limitation of structure maintenance to 50% or less, at one time, be eliminated as it conflicts with license Article 415 and is unenforceable because of its lack of specificity regarding the method of calculating the percentage of maintenance and the time interval between which separate maintenance actions can be performed.

Movant requests the Shoreline Management Plan arbitrary limitation of structure maintenance to 50% or less, at one time, be eliminated for constitutional reasons as it violates both due process and the takings clause of the Constitution of the United States of America.

Movant requests that all existing (permitted and non-permitted) structures within the project boundary be vested in accordance with Virginia Code § 15.2-2307. Vested rights not impaired; nonconforming uses, as the project contains no federal lands and is operated and partially owned by a for profit corporation operating in the Commonwealth of Virginia.

Movant requests the Shoreline Management Plan requirement to register existing non-conforming structures with Appalachian Power by August 31, 2005 be eliminated because the licensee failed to properly and reasonably notify affected property owners, failed to acknowledge the adequacy of submitted documentation, and unreasonably required the affected property owner to possess expert knowledge of what constituted a compliant structure.

Movant requests that the Commission’s Final Agency Action (See eLibrary no. 20110826-0109), mandating that Gangplank Pointe docks and eventually all heretofore grandfathered docks be brought in to conformance with Shoreline Management Plan (SMP) regulations under Project No. 2210-090, which was noticed on 24 August 2011, be stayed until the Commission acts on the revision to the Shoreline Management Plan (Docket P-2210-207).

Movant respectfully requests expedited review of and action on this request in order to protect the interest of shoreline residents and others who would be directly affected by resolution of these important issues on rehearing and or clarification and would suffer substantial hardship from the immediate implementation of the Order.

CONCLUSION

I request that the Commission, respectively, grant these requests for rehearing and remand the matter for further proceeding.

Dated: September 22, 2011

Respectfully submitted,



William C. Brush

DECLARATION OF SERVICE

Appalachian Power Company, Smith Mountain Pumped Storage Project (P-2210-090)

I, William C. Brush, declare that I today served the attached Request for Intervention and Rehearing on Docket P-2210-090 by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: September 22, 2011

By:

A handwritten signature in cursive script that reads "William C. Brush".

William C. Brush

bill@brushsml.com