

153 FERC ¶ 61,299  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Appalachian Power Company

Project No. 2210-252

ORDER DENYING REHEARING

(Issued December 17, 2015)

1. On August 7, 2015, William C. Brush, on behalf of Cut Unnecessary Regulatory Burden, Inc., filed a request for rehearing of a July 10, 2015 Commission staff letter order (July 2015 Order), which found that Appalachian Power Company (Appalachian Power) was not in violation of several of the requirements of the license for the Smith Mountain Pumped Storage Project No. 2210 (Smith Mountain Project). This order confirms Commission staff's conclusions, finds that Mr. Brush's additional arguments lack merit, and therefore denies rehearing.

**I. Background**

2. The Federal Power Commission, the Commission's predecessor, originally licensed the 636-megawatt Smith Mountain Project in 1960 for a 50-year term. The Smith Mountain Project is located on the headwaters of the Roanoke River in Bedford, Campbell, Franklin, and Pittsylvania counties, Virginia. The project is a two-dam, two-reservoir combination pumped storage and conventional hydroelectric project, which includes two developments, Smith Mountain Lake and Leesville Lake. Smith Mountain Lake comprises 20,260 acres, with a normal water surface elevation of 750.0 feet National Geodetic Vertical Datum (NGVD), and Leesville Lake comprises 3,260 acres, with a normal water surface elevation of 613.0 feet NGVD.<sup>1</sup>

3. In 1998, at the request of the licensee, the Commission issued an order amending the license by adding Article 41, the Commission's standard land use article, which allows the licensee to authorize certain uses of project lands and waters without prior

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<sup>1</sup> *Appalachian Power Company*, 129 FERC ¶ 62,201, at P 8-9 (2009).

Commission approval.<sup>2</sup> Since the licensee still needed to request authorization from the Commission for uses outside of the parameters of the standard land use article, in 2001 Appalachian Power formed a steering committee of various stakeholders to develop a Shoreline Management Plan (SMP).<sup>3</sup> In addition to serving as a management tool to guide the licensee to fulfill its license responsibilities with regard to protecting shoreline resources, the SMP, which was approved by the Commission on July 5, 2005,<sup>4</sup> also granted the licensee authority to permit some development beyond the parameters of the standard land use article without case-by-case authorization by the Commission.

4. With the original project license due to expire on March 31, 2010, Appalachian Power filed an application, on March 27, 2008, for a new major license under sections 4(e) and 15 of the Federal Power Act (FPA).<sup>5</sup> On December 15, 2009, Commission staff issued a new license (December 2009 Order).<sup>6</sup>

5. Among other things, the December 2009 Order approved Appalachian Power's sixteen Exhibit G drawings, which depicted the project boundary and showed all project lands, to the extent of the licensee's interests in those lands.<sup>7</sup> The project boundary

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<sup>2</sup> The standard land use article has been included in Commission licenses issued since 1980, to reduce some administrative burden on the licensee and the Commission by allowing the licensee to permit relatively minor uses of project property. *See Appalachian Power Company*, 82 FERC ¶ 62,109 (1998).

<sup>3</sup> An SMP is a comprehensive plan to manage the multiple resources and uses of the project's shorelines in a manner that is consistent with license requirements and project purposes, and addresses the needs of the public. *See Guidance for Shoreline Management Planning at Hydropower Projects*, Office of Energy Projects, Federal Energy Regulatory Commission, at 7 (July 2012), <http://www.ferc.gov/industries/hydropower/gen-info/guidelines/smpbook.pdf>.

<sup>4</sup> *Appalachian Power Company*, 112 FERC ¶ 61,026 (2005).

<sup>5</sup> 16 U.S.C. §§ 797(e) and 808 (2012).

<sup>6</sup> *Appalachian Power Company*, 129 FERC ¶ 62,201.

<sup>7</sup> The sixteen Exhibit G drawings were originally filed on March 27, 2008, with Appalachian Power's application for a new license. On July 15, 2008, Appalachian Power filed electronic files of the Exhibit G drawings, in response to Commission staff's May 16, 2008 request for additional information. The December 2009 Order approved, and made part of the license, the sixteen Exhibit G drawings as filed in electronic format on July 15, 2008. On April 3, 2015, Commission staff approved two revised Exhibit G

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encompasses about 25,600 acres of land and water and encloses the dams, reservoirs, intakes, penstocks, powerhouses, primary transmission facilities, tailraces, and the Smith Mountain Lake Visitor's Center and Picnic Area.<sup>8</sup> The project boundary for the Smith Mountain development generally follows the 800.0-foot contour around the perimeter of Smith Mountain Lake, which is five feet above the normal operating level of 795.0 feet NGVD. Around Leesville Lake, the project boundary generally follows the 620.0-foot contour, which is seven feet above the upper operating level of 613.0 feet NGVD.<sup>9</sup>

6. The December 2009 Order also included several standard articles related to uses of project lands. The order included Article 415, which is the standard land use article that allows the licensee to authorize certain minor uses of project lands and waters without prior Commission approval (this was Article 41 in the previous license), as well as standard license Article 5, which requires a licensee to acquire and retain possession of all project property covered by the license, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use.<sup>10</sup> Appalachian Power noted on its Exhibit G drawings that it "has obtained all flowage rights necessary for adequate operation of the project either in fee title or easements. All property records are kept on file with the licensee."<sup>11</sup>

7. The December 2009 Order required Appalachian Power to continue to implement its SMP, as amended and filed with its relicensing application.<sup>12</sup> License Article 413 required Appalachian Power to file an updated SMP because the existing plan did not

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drawings, which were filed pursuant to Article 302 to show the recently constructed Oak Grove Recreation Area. *Appalachian Power Company*, 151 FERC ¶ 62,016 (2015).

<sup>8</sup> *Appalachian Power Company*, 129 FERC ¶ 62,201 at P 16.

<sup>9</sup> *Id.*

<sup>10</sup> Standard Article 5 is incorporated into the license by ordering paragraph (J). Standard articles have been included in licenses since the 1950s and were updated and standardized in 1975. *See Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part 1 of the Federal Power Act*, 54 F.P.C. 1792 (1975).

<sup>11</sup> *See* March 27, 2008 Exhibit G maps, Index Sheet.

<sup>12</sup> As stated above, the Commission had approved the original SMP on July 5, 2005. Commission staff approved amendments on April 14, 2006, and February 23, 2007. *See Appalachian Power Company*, 112 FERC ¶ 61,026 (2005); *Appalachian Power Company*, 115 FERC ¶ 62,071 (2006); and *Appalachian Power Company*, 118 FERC ¶ 62,149 (2007).

address the replacement of habitat along the shoreline removed during shoreline construction activities, did not include a setback between commercial/residential and resource protection areas, and did not include measures included in the Habitat Management Plan.<sup>13</sup> Under Article 413, Appalachian Power was required to consult with various state agencies, community associations, counties, and other stakeholders in developing the updated SMP.

8. Appalachian Power filed its updated SMP on January 3, 2011, and supplemented it on February 18, 2011.<sup>14</sup> Subsequently, it reached a settlement with a number of interested entities, including Mr. Brush, resolving issues regarding the updated SMP.<sup>15</sup> On January 30, 2014, Commission staff issued an order modifying and approving Appalachian Power's revised updated SMP.<sup>16</sup> The order found that the revised updated SMP "is a reasonable compromise between protecting the project's environmental values and providing adequate opportunities for development at the lakes."<sup>17</sup> Consistent with the settlement, the revised SMP included a number of substantive changes, including altering the shoreline classifications, increasing the licensee's authority to approve

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<sup>13</sup> *Appalachian Power Company*, 129 FERC ¶ 62,201 at P 106.

<sup>14</sup> To fulfill the consultation requirement of Article 413, Appalachian Power formed a Steering Committee and held eleven committee meetings, as well as eight separate meetings with various stakeholders. The licensee also created a website and held two public meetings concerning the SMP. *See Appalachian Power Company*, 146 FERC ¶ 62,083, at P 6 (2014).

<sup>15</sup> The settlement was filed with the Commission on February 28, 2013. Mr. Brush filed a statement of support for the settlement on March 1, 2013. On rehearing, Mr. Brush states that Commission staff falsely implied in the July 2015 Order that the settlement reached to revise the SMP update resolved his property rights issues. *See Request for rehearing at 5.* Footnote 10 of the July 2015 Order noted that Mr. Brush was involved in the settlement discussions and supported the approval of the revised SMP. Therefore, footnote 10 refers to his issues regarding specific SMP requirements. To the extent that Mr. Brush's allegations of property rights deficiencies were not addressed through the settlement process, it is irrelevant because the SMP does not affect property rights.

<sup>16</sup> *Appalachian Power Company*, 146 FERC ¶ 62,083 (2014).

<sup>17</sup> *Id.* at P 40.

variances and exceptions to the SMP, establishing an appeal process for the licensee's shoreline decisions, and revising requirements regarding residential and commercial docks.<sup>18</sup>

9. On April 20, 2015, Mr. Brush filed a complaint alleging that Appalachian Power was in violation of its license by: (1) not accurately disclosing its property interests on its Exhibit G, in violation of section 4.41(h)(4) of the Commission's regulations;<sup>19</sup> (2) not obtaining all necessary property rights required by standard license Article 5; (3) failing to resolve property rights disputes with third-party non-licensees in Virginia state court; and (4) taking property from third-party non-licensees without compensation. Mr. Brush also alleged that the Commission is in violation of its statutory standards and regulatory requirements for failure to monitor and enforce Appalachian Power's license requirements.

10. On May 8, 2015, Appalachian Power filed an answer to Mr. Brush's April 20, 2015 complaint. Generally, Appalachian Power responded that Mr. Brush's complaint lacked merit and that Appalachian Power was not in violation of its license.

11. In a June 17, 2015 filing, Mr. Brush asserted that the Commission had failed to address the complaint in a manner consistent with its regulations.

12. On July 10, 2015, Commission staff issued its July 2015 Order addressing Mr. Brush's allegations against Appalachian Power and finding that the licensee was not out of compliance with its license. Commission staff did not address Mr. Brush's allegations against the Commission.

13. On August 7, 2015, Mr. Brush filed a request for rehearing of the July 2015 Order. In his rehearing request, Mr. Brush alleges that the Commission failed to publicly notice his initial filing as a formal complaint and that the July 2015 Order failed to address his allegations against the Commission. Mr. Brush generally reiterates his prior arguments and alleges that Commission staff wrongfully concluded that Appalachian Power's Exhibit G drawings comply with section 4.41(h)(4) of the Commission's regulations. With regard to property rights, Mr. Brush argues that Commission staff ignored evidence of Appalachian Power's insufficient property rights presented in the complaint, incorrectly stated how third party claims are resolved, and erred in concluding that Appalachian Power's authorizations of minor non-project uses under the standard land use article (Article 415) do not take landowner property rights without compensation.

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<sup>18</sup> *Id.* at P 16-17.

<sup>19</sup> 18 C.F.R. § 4.41(h)(4) (2015).

14. We discuss each issue below, confirm Commission's staff's conclusions, and conclude that Mr. Brush's other allegations lack merit.

## II. Discussion

### A. Standing

15. As an initial matter, it does not appear that Mr. Brush has standing to raise the issues in his complaint. The Commission has explained that a person may file a complaint "so long as that person is adversely affected by the actions that are the subject of the complaint."<sup>20</sup> In his complaint, Mr. Brush makes general allegations about the negative consequences of the licensee's and the Commission's actions on the community in the project area, but he in no way explains how he is affected by these matters. Mr. Brush does not allege that he owns any property within the project boundary and the licensee states that he does not.<sup>21</sup> In an earlier order regarding this project, the Commission explained that, where entities failed to demonstrate "a more than general interest" in the matters at hand, "they have no standing . . . because any injury to them is purely theoretical."<sup>22</sup> Mr. Brush has failed to establish standing.

### B. Notice of the Complaint

16. Mr. Brush complains that the Commission did not issue public notice of his complaint. However, as discussed below, the Commission was not required to treat Mr. Brush's allegations as a formal complaint.

17. First, although styled as a complaint, the April 20 filing failed to comply with a number of the requirements of Rule 206 of the Commission's Rules of Practice and Procedure, which governs formal complaints. For example, the complaint: did not set forth the business, commercial, economic, or other issues presented by the licensee's alleged action or inaction as those issues relate to or affect the complainant; did not make a good faith effort to quantify the financial impact or burden created for the complainant as a result of the action or inaction complained of; did not indicate the practical, operational, or other non-financial impacts resulting from the action or inaction; did not state whether the issues are pending in an existing Commission proceeding or other

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<sup>20</sup> *Southern Union Gas Company v. Northern Natural Gas Company*, 71 FERC ¶ 61,198, at 61,717 (1995).

<sup>21</sup> See May 8, 2015 answer at 4, note 3.

<sup>22</sup> *Appalachian Power Company*, 137 FERC ¶ 61,065, at 17 (2011).

forum; and did not serve a copy of the complaint on the respondents, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint.<sup>23</sup>

18. Here, consistent with Commission practice regarding allegations of non-compliance by hydropower licensees, the Commission's Office of Energy Projects, Division of Hydropower Administration and Compliance, reviewed Mr. Brush's filing.<sup>24</sup> Because the Division of Hydropower Administration and Compliance has the responsibility to examine hydropower compliance issues, it is generally most efficient to treat similar allegations of non-compliance the same, whether or not they are styled as complaints.<sup>25</sup> Mr. Brush's complaint regarding the licensee did not raise substantial legal or policy issues that would warrant deviating from our standard practice. We find the treatment of the April 20 filing appropriate.

19. Finally, the April 20 filing and July 2015 Order were both included in the Commission's public record via the agency's online eLibrary system, giving adequate public notice of Mr. Brush's allegations. Mr. Brush does not explain what harm, if any, occurred from the lack of formal public notice. Regardless of whether the Commission treated the pleading as a formal complaint, Mr. Brush's allegations received full and fair consideration.

### **C. Allegations Against the Commission**

20. Mr. Brush's April 20 filing alleges that the Commission is in violation of its statutory standards and regulatory requirements for failure to monitor and enforce Appalachian Power's license requirements. In the July 2015 Order, Commission staff did

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<sup>23</sup> 18 C.F.R. § 385.206(b) (2015).

<sup>24</sup> See *Pacific Gas and Electric Co.*, 115 FERC ¶ 61,324, at 62,155 (2006) (Chairman Kelliher concurring) ("It would be inconsistent, and a waste of administrative effort, for us to treat differently those allegations of license non-compliance that are styled "formal complaint" and those that are not. It is only those complaints that raise substantial legal or policy issues that warrant immediate Commission consideration as formal complaints, rather than being handled at the initial state by our compliance staff. Therefore... as a general matter, allegations regarding compliance with hydroelectric license should be handled in the first instance by our compliance staff.")

<sup>25</sup> See *PPL Montana, LLC*, 139 FERC ¶ 61,231, at P 28 (2012). The Commission has the discretion to determine the best procedures to address matters that come before it. *Id.* at n.87.

not address these assertions because it concluded that the licensee is not out of compliance with its license requirements.

21. To the extent that the April 20 filing sought to be a complaint against the Commission, such a complaint does not lie. Section 306 of the Federal Power Act states, in relevant part, that “[a]ny person... complaining of anything done or omitted to be done by any licensee... in contravention of the provisions of this Act may apply to the Commission by petition....”<sup>26</sup> A complaint can only be against an entity subject to the Commission’s jurisdiction, not against the Commission itself.<sup>27</sup> If a person wants the Commission to take a particular course of action, it may so urge in the course of a proceeding or by filing a petition. Should the Commission’s resultant orders aggrieve a party, the party may seek appellate review or other appropriate judicial relief. However, our regulations regarding complaints are designed to deal with the conduct of regulated entities, not objections concerning the Commission.

22. In any event, as discussed below, we agree with Commission staff’s conclusion that the licensee was not out of compliance with its license. Thus, Mr. Brush’s claims that the Commission is failing to properly enforce Appalachian Power’s license are moot.

#### **D. Exhibit G Drawings**

23. On rehearing, Mr. Brush argues that the Commission wrongfully concluded that Appalachian Power’s Exhibit G drawings comply with section 4.41(h) of the Commission’s regulations because the drawings do not include the licensee’s land rights by parcel. He disputes Commission staff’s acceptance of a statement on the Exhibit G drawings that attests to the licensee’s previously reported property rights, arguing that since the guidance document<sup>28</sup> allowing such a statement has not been approved by the Commission, it holds no weight. Further, Mr. Brush argues that, for the Commission to accept a statement on an Exhibit G drawing attesting to the property rights, the Commission would first need to determine that a licensee had previously obtained all necessary land rights, which he claims the Commission did not do. Lastly, Mr. Brush asserts that the Commission is arbitrary and selective in its approval of project drawings and allowing Appalachian Power to avoid disclosing its true property interests.

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<sup>26</sup> 15 U.S.C. § 825e (2012).

<sup>27</sup> See *Alcoa Power Generating, Inc.*, 93 FERC ¶ 61,152, at 61,476 (2000).

<sup>28</sup> See FERC, *Managing Hydropower Project Exhibits, Guidance Document*, at 32-33 (updated August 2014), <http://www.ferc.gov/industries/hydropower/gen-info/guidelines/drawings-guide.pdf>.

24. As an initial matter, as explained in Commission staff's July 2015 Order, any objections regarding the sufficiency of the Exhibit G drawings should have been raised in the licensing proceeding. The Exhibit G drawings were first filed with Appalachian Power's application on March 27, 2008, and then Appalachian Power, on July 15, 2008, filed electronic files of the Exhibit G drawings, in response to Commission staff's May 16, 2008 request for additional information. The December 2009 Order approved the electronic files of the Exhibit G drawings filed on July 15, 2008. Any objections to the approval of the Exhibit G drawings should have been raised by filing a request for rehearing within 30 days of the issuance of the December 2009 Order. Mr. Brush's objections to the Exhibit G drawings now constitute an untimely collateral attack on the December 2009 Order.

25. Nevertheless, we believe that Commission staff's approval of the Exhibit G drawings was reasonable. Pursuant to section 4.41(h)(4), Exhibit G must include a project boundary map of all non-federal lands that identifies by legal subdivision: "(i) lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and (ii) lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired or to be acquired by easement or lease."<sup>29</sup>

26. Applicants need to include sufficient information in their project boundary exhibits for the Commission to make an informed decision about land ownership. Identifying property rights information on the Exhibit G drawings is the most effective way to identify the licensee's responsibilities and to monitor which lands it may need to acquire to comply with its license.<sup>30</sup> In this case, Appalachian Power included project boundary maps in its October 25, 2004 Pre-Application Document (PAD), identifying by parcel the lands Appalachian Power held in fee simple and those lands for which it held flowage rights. In its March 27, 2008 application, Appalachian Power filed Exhibit G drawings that did not reiterate the information in the PAD, but instead included a statement that it obtained all property interests necessary for continued project operation, and that the property records were on file with the licensee. In the July 2015 Order, Commission staff acknowledged that, while the March 2008 and July 2008 Exhibit G drawings did not identify the licensee's land rights by parcel, the statement that was included on the drawings was in lieu of the identification of land rights by parcel and was acceptable. We conclude that Commission staff appropriately approved the Exhibit G drawings.

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<sup>29</sup> 18 C.F.R. § 4.41(h)(4) (2015).

<sup>30</sup> FERC, *Managing Hydropower Project Exhibits, Guidance Document*, at 33.

### **E. Property Rights Issues**

27. Mr. Brush objects to Commission staff's response to his allegations regarding Appalachian Power's property rights. His complaint alleged that Appalachian Power does not have the necessary property rights to implement its SMP under Article 413 and to authorize non-project uses of project lands and waters under Article 415. Mr. Brush objects to Commission staff's response that Appalachian Power has obtained all the necessary property rights to project lands in fee or by holding flowage rights. He states that although Appalachian Power's property rights "may have been sufficient to implement its 1960 license, when Appalachian Power had no license responsibilities to regulate non-project use or impose SMP regulations upon third party non-licensee property owners... those property rights are insufficient to implement [its] current license obligations."<sup>31</sup>

28. Mr. Brush claims that the July 2015 Order ignored the evidence of Appalachian Power's insufficient property rights.<sup>32</sup> He argues the flowage easements and deeds grant landowners specific rights (i.e., "rights to possess and use the easement in any manner not inconsistent with the estate, rights and privileges herein granted to [Appalachian Power], including the right to cross said land to reach the impounded waters for recreational purposes" and the "right to construct, maintain and use boat docking and mooring structures and facilities..."). Mr. Brush also contends that Commission staff's July 2015 Order erred in concluding that three Virginia Supreme Court cases do not establish the scope and meaning of Appalachian Power's flowage easements.<sup>33</sup>

29. First, standard license Article 5 requires a licensee to acquire and retain the property interests necessary to carry out project operations. These may be obtained through easement, fee title, leases, or other types of conveyances, or if necessary, by federal eminent domain pursuant to FPA section 21.<sup>34</sup> The instruments of conveyance define the extent of the licensee's rights; therefore, neither the Commission nor a

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<sup>31</sup> Request for rehearing at 7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 16 U.S.C. § 814 (2012) ("... when a licensee cannot acquire by contract or pledges... the right to use or to damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, ... it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the state courts.").

licensee/transferee can interfere with the transferor's retained rights. The inclusion of lands within a project boundary will not restrict landowners' uses, since inclusion of lands within a project boundary does not itself create or alter property rights.<sup>35</sup> The Commission's inclusion of the standard land use articles, the approval and adoption of the SMP, or the approval of a project boundary in an Exhibit G map will not affect the property interests obtained. If a landowner believes that a licensee's easement precludes certain activity, such a dispute must be resolved between the property owner and Appalachian Power in a property law action in a court of appropriate jurisdiction.<sup>36</sup> If it is determined that a licensee does not have adequate rights to comply with license requirements, the Commission could require the licensee to obtain the additional rights by easement or eminent domain.<sup>37</sup> The Commission is aware of no instance in which Appalachian Power has not been able to comply with the requirements of its license or of a Commission order due to a lack of sufficient property rights, and thus has no reason to conclude that the license is out of compliance with standard Article 5 or any other license provision regarding property ownership.

30. Mr. Brush also claims that the July 2015 Order erred in finding that three Virginia Supreme Court cases do not establish the scope of Appalachian Power's easements. We disagree. In *Brown v. Haley*,<sup>38</sup> the court found that the upland owners, the Haleys, had an implied easement to use the land of the lowland owner, the Browns, below the 800-foot contour to access Smith Mountain Lake for recreational use. The court did not address the scope of Appalachian Power's easement. Likewise, in *Smith Mountain Lake Yacht Club v. Ramaker*,<sup>39</sup> the court did not address the scope of Appalachian Power's easement. In that case, a property dispute arose between two neighboring property owners over a boat dock built over the submerged lands under Smith Mountain Lake. The court reviewed the rights of each property owner, including the easements granted to

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<sup>35</sup> See *FirstLight Hydro Generating Company*, 142 FERC ¶ 62,256, at P 16 (2013); citing *PacifiCorp*, 80 FERC ¶ 61,334, at 62,113 (1997).

<sup>36</sup> We note that Mr. Brush has not alleged that he is a property owner, such that he has a flowage easement, deed, or any other contract right to lands within the project boundary.

<sup>37</sup> *PacifiCorp*. 80 FERC at 62,113 ("If the Commission requires additional control in order to accomplish a project purpose, it must direct its licensee to obtain additional rights, whether by contract or eminent domain.").

<sup>38</sup> *Brown v. Haley*, 233 Va. 210 (1987).

<sup>39</sup> *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240 (2001).

Appalachian Power, and concluded that an adjacent property owner could not build a dock extending into a yacht club's adjacent property.<sup>40</sup>

31. Mr. Brush's reliance on a third case cited in his complaint also is misplaced.<sup>41</sup> In *Anderson v. Delore*,<sup>42</sup> the court again addressed a dispute involving two neighboring property owners. The court affirmed the lower court's decision to deny an injunction that would have required a property owner to remove a dock located within the alleged lot of an adjacent property owner. In that case, the rights of both property owners were derived from easements allowing for the use of the land below the 800-foot contour. However, the dispute involved whether one property owner encroached on its neighbor, not the scope of Appalachian Power's easement. For these reasons, the three Virginia Supreme Court cases do provide evidence of a landowner's retained rights under an Appalachian Power flowage easement.

32. In fact, where Virginia courts have addressed the nature of Appalachian Power's property, they have concluded that the licensee has broad rights to control lands within the project boundary on which it hold flowage easements.<sup>43</sup>

33. Mr. Brush also asserts that the Commission contradicts its policy regarding whether state courts are the proper court of original jurisdiction for resolution of property disputes. Mr. Brush appears to misunderstand the Commission's statements that property disputes are matters of state law.<sup>44</sup> As Commission staff stated in the July 2015 Order,

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<sup>40</sup> *Id.*

<sup>41</sup> Mr. Brush cited to the case in his April 20 filing, but did not raise it in his rehearing request.

<sup>42</sup> *Anderson v. Delore*, 278 Va. 251 (2009).

<sup>43</sup> See *Appalachian Power Company v. Nissen*, No. 7:14-cv-00535 (W.D. Va. April 24, 2015) (finding that Appalachian Power's property interests under its flowage easement are sufficient to compel property owners to remove a dock); *Appalachian Power Company v. Richard L Longenecker*, No. 7:00-cv-00731 (W.D. Va. July 11, 2001) (finding that under its license and flowage easement, Appalachian Power maintains control over the use of the land within the project boundary); *Appalachian Power Company v. J. Stephen Arthur*, 39 F. Supp. 3d.790 (W.D. Va. 2014) (finding that Appalachian Power has sufficient property rights with regard to the defendants' property to seek removal of a non-conforming dock).

<sup>44</sup> Mr. Brush's rehearing requests points to a statement Commission staff made in an Order Modifying and Approving a Shoreline Management Plan for the Housatonic River Hydroelectric Project No. 2576-139. See *FirstLight Hydro Generating Company*,  
(continued ...)

the Commission does not require a licensee to resolve property rights issues in Virginia state court. In fact, the Commission does not require licensees or landowners to engage in litigation regarding property disputes at all.<sup>45</sup> If a dispute arises, a claimant would need to address the dispute in an appropriate court; however, the Commission does not dictate which court is the court of appropriate jurisdiction.

### **III. Conclusion**

34. Mr. Brush's primary concern appears to be that Appalachian Power's easements and other land rights unduly restrict the ability of landowners to utilize their property. As we have explained, the issuance of a hydropower license or the approval of an SMP does not give a licensee any new property rights. Rather, these approvals simply direct the licensee's use of lands in which it holds interests. To the extent that there are disputes as to the nature of a licensee's rights, those matters must be resolved in a court of competent jurisdiction: the Commission has no authority to resolve property rights issues. Based on the foregoing, we affirm Commission staff's conclusion that Appalachian Power is not out of compliance with its license and further conclude that the remainder of Mr. Brush's allegations are unfounded. Accordingly, we deny Mr. Brush's rehearing request.

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142 FERC ¶ 62,256 at P 16, n.12 (2013). In that order, Commission staff stated that “[a]ny disputes regarding property rights are not within the Commission’s jurisdiction; rather, they are matters for state courts to resolve.” *Id.* Mr. Brush misinterprets this sentence. That order was not dictating the court of appropriate jurisdiction, but merely stating that the issue of property rights is a matter of state law. However, federal courts have determined that federal jurisdiction exists over property disputes between Appalachian Power and property owners surrounding the Smith Mountain Project. *See Pressl v. Appalachian Power Co.*, 2015 WL 5822538 (2015), appeal filed November 3, 2015 (denying plaintiff’s request to remand action to state court by finding that the U.S. District Court for the Western District of Virginia has proper jurisdiction to decide plaintiff’s claim regarding their ability to construct a dock on Smith Mountain Lake property that is subject to an Appalachian Power flowage easement).

<sup>45</sup> Contrary to Mr. Brush's claims, the Commission only has jurisdiction over the licensee, Appalachian Power. *See, e.g., Appalachian Power Company*, 112 FERC ¶ 61,026, at P 79 (2005) (“The Commission only has jurisdiction over Appalachian. ... Appalachian is responsible for the administration of the SMP and is the sole party that is subject to the Commission’s jurisdiction.”).

The Commission orders:

The request for rehearing filed by William C. Brush, on behalf of Cut Unnecessary Regulatory Burden Inc., on August 7, 2015 is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.