BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

JIMMIE E. SMALL,	)	
	)	
Complainant,	)	
	)	
v.	)	Case file No. EC-2012-0050
	)	
AMEREN MISSOURI,	)	
	)	
Respondent,	)	

SUGGESTIONS IN SUPPORT OF DEFAULT ORDER BY UTILITY

NOW COMES the Complainant and in further support of a MPSC Order of Default, presents unto the Honorable Commission the following particulars.

BACKGROUND

On April 19, 2011 during the prehearing conference page 11, Lines 12 -17 Hon Judge JORDAN states; [" and Ms. Tatro, I understand from Mr. Small's pleadings that a lot of the current dispute and for the subpoena, et cetra, has to do with

the production of documents. Do you know currently of any objection that Ameren will have to producing the kinds of documents that Mr. Small has ask for"]?

Transcript, Page 11, Lines 18-24. Ms. TATRO: [" As you know, I am not the attorney primarily handling this case. I don't believe that we had an objection to his request. If we did, I'm sure she would have sent that objection to him, and it's my understanding that we're still in that process. I don't think the time to answer that data request has expired and we're still planning on answering them, to the best of my knowledge, so.

LAWS

As noted in the case *HENRY FORD & SON v. LITTLE FALLS FIBRE CO.*, 280 U.S. 369 (1930) 280 U.S. 369 74 L Ed 4839, the issue of liability here [EC-2012-0050] involves the Federal Waters Power Act, not mentioned by Ms. Tatro or Counsel S. Giboney in its repeated objections following the April 19, 2011 prehearing conference, making an order of default appropriate for abuse of discovery personal decisions.

Section 10 (c), Federal Water Power Act (title 16, U.S. Code, 803 (c), 16 USCA 803(c), provides that licensees' shall be liable for all damages occasioned to the property of others by

the construction, maintenance, or operation of the licensed project, ect.; (16 USCA 799). [provides] all licenses are required to be conditioned upon acceptance by the licensee of all the terms and conditions of this Act.

Federal Licensee, Respondent Ameren Missouri's private enterprise right to collect monies from Missouri electrical customers [remuneration] for actual KWH used each month, does not extinguish Missouri customers vested federal right to object under federal contract laws, to occasions when Respondent Gross Negligent Conduct results in discriminatory Billing, Harassment decisions.

DEBT COLLECTION

The Fair Debt Collection Practices Act, 15 U.S.C. sect 813 provide for civil liability resulting from the 2006 disputed account bill and ***all taxes*** allegedly due *Missouri Department of Revenue* occasioned by the discriminatory practices and policies commissioned by Respondent Ameren Missouri.

Some 10 months after the April 19, 2011 subpoena was served on Expert witness Cathy Hart, Respondent Utility continues to suppress its Federally Ratified written contract

showing that the Utility Company agreed to be bound by federal as well as state laws, including trespass laws.

ARGUMENT

During the dispute between *Ameren UE. v. Missouri* Department of Conservation, et al, 366 F. 3d 655, Union Electric Utility defended against liability asserting ex parte Young doctrine under U.S.C.A. Const. Amend 11. 209 U. S. 123, 28 S. Ct. 441, 52 L Ed 714 (1908).

UE v. MDOC, [366 F. 3d 655] court held, [We conclude that the Federal Power Act ("the ACT") unmistakably evidences an intent to exclude licensees such as Ameren UE from maintaining an Ex Parte Young action seeking to prevent a State from recovering damages to its property resulting from the licensee's negligence in the operation of the licensed power project. Cf. Seminole Tribe, 517 U.S. 44, 74, 116 S. Ct. 1114, 134 L.Ed2d 252 (1996) (holding that existence of a detailed remedial scheme shows Congressional intent to prohibit recourse to the Ex Parte Young fiction)

The MDOC appeals court went on to say, in relevant part, the Act provides:

["Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, *construed under the license* and in no event shall the United States be liable therefor"].

Ameren UE could not separate the dead fish [property] owned by MDOC from the federal water location under the Act. Mo. Rev. Stat. sect. 252.030(2000) ("The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri."). MDOC Owns the fish property, while the National Government appears to own the water[s] where dead fish were situated near Bagnell Dam Oage River basin.[Missouri jurisdiction]

It appears that MDOC simply wanted UE to pay the equitable value of the dead fish resulting from the Utilities Operation and personal negligence occasioned by the operation of a Public Utility concern at Bagnell Dam operations.

In Small's case at Lot # 23, 23067 Potter Trail, the public Utility Operations ratified at Bagnell Dam project filtered up to Adair County and eventually back into the MPSC

jurisdiction where UE elects to conceal its federally issued license and contract claimed to have been breached.

Without evidence of a federal contract placed into evidence, its becomes increasingly more difficult for the ADA pro se, male, white to meet his burden of proof that Ameren Missouri, by and through gross negligent conduct or other motive engaged conduct which resulted in discriminatory charges and billing dispute practices federally prohibited by the suppressed contract and license issued to Union Electric Company, passed on to Ameren Missouri affiliates and Holding Company entities.

In the present case, UE, Ameren Missouri, attempted to create a defense by stonewalling the MPSC officials by suppressing material license relevant to liability factors, several months following the April 19, 2011 assurances given to Hon. ALJ D. Jordan, and continuing unresolved as a default discovery matter.

Not only did Respondent Utility engage a personal choice to suppress Federal license and contract documents relevant to the ADA pro se' s ability to meet his burden of proof timely, Respondent used the State of Missouri quasi judicial systems

to deny Small his federally protected liberty interest in fair and impartial proceedings based on Small's view point discovery sequence, timing; and based on Small's diversity citizenship jurisdiction [Iowa Resident status]. Small object and appeals Utility's discriminatory policies and practices in clear violation of its federal license similar to the license involved in the dead fish contested case proceedings. . See *Garden Homes, Inc., v. Macon*, C.A. Mass. 238 F 2d 651— *Garden Homes, Inc., v. Mason*, C.A.N.H., 249 F 2d 71 cert den, 78 S. Ct. 562, 356 U.S. 903.

While MDOC was a resident of Missouri asserting its standing to protect property rights [dead fish property], the undersigned also has standing to protect his liberty interest in fair and impartial proceedings before the MPSC while asserting a federal right based on *diversity jurisdiction* during discovery and timely data request responses. *Finch v. Small Business Administration of Richmond*, Va., 112 S.E2d737, 252 N.C. See also *Central Louisiana Elec. Co. v. Rural Electrification Administration*, D.C. La., 236 F. Supp. 271. Revd. on oth grds., C.A. 354 F 2d 859 cert. den. 87 S. Ct. 34,

385 U.S. 815, 17 L Ed 2d 54 reh den. 87 S. Ct. 388, 385 U.S. 964, 17 L Ed 2d 309 Complaint held sufficient.

Complainant takes the position that Iowa Resident ADA pro se venturing into Missouri in defense of fraudulent and discriminatory claims have Constitutional rights under the Privileges and immunities Clause of the Federal Constitution.

Those very same constitutional rights in EC-2012-0050 is being asserted against Respondent.

The defending Utility has stated not a single non-discriminatory or non-pre-textual reason for the manner of account servicing and related breach of discovery violations, knowing that its ADA customer from 2002 and continuing in 2012 opposed said discriminatory treatment. See also law of the Case and Collateral estoppels as to Respondent's Federal license knowingly concealed after discovery and data request and subpoena request were made. *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 102 Ill. Dec. 360, 499 N.E.2d 1373, 1375 (1986).

Had Small been a Native American, Hispanic female, Black utility customer Respondent Utility[UE.AM.MO.] would have treated him with equal protection of Iowa State law and

Federal laws equally and not discriminated against the Iowa resident opposing and disputing the Utilities effort to circumvent federal law including Section 10 (c) of the Federal Water Power Act.

CONCLUSION

The April 19, 2011 subpoena issued under seal of the Missouri Public Service Commission, created a vested liberty interest in timely discovery to Utility entered contracts, licenses, which Respondent Utility knowingly elected to breach, to the detriment of Iowa Resident/Complainant Jim Small.

Wherefore, owing to the longstanding nature of the prehearing conference assurances, and resulting breach of discovery, the Complainant prays the MPSC officials find that Respondent Utility did engage in material discovery violations warranting entry of a Default Order as a matter of law.

Respectfully submitted

JIMMIE E. SMALL
3535 Locust street
General Delivery
Quincy, Illinois, 62301

Small v. UE. AM. MO.

EC-2012-0050

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box, on the 10th, day of January 2012.

JES

Jimmie E. Small

JIMMIE E. SMALL

cc: J. Hernandez

366 F.3d 655
(Cite as: 366 F.3d 655)

H

United States Court of Appeals,
Eighth Circuit.
UNION ELECTRIC COMPANY, doing business as Ameren UE, Plaintiff-Appellant,
v.
MISSOURI DEPARTMENT OF **CONSERVATION**; John D. Hoskins, in his official capacity as Director of the **Missouri** Department of **Conservation**; Stephen C. Bradford, in his official capacity as Commissioner of the Conservation Commission; Anita B. Gorman, in her official capacity as Commissioner of the Conservation Commission; Cynthia Metcalfe, in her official capacity as Commissioner of the Conservation Commission; Howard L. Wood, in his official capacity as Commissioner of Conservation Commission, Defendants-Appellees.
State of Missouri; Missouri Clean Water Commission, Amici on Behalf of Appellees.

No. 03-2135.
Submitted: Dec. 17, 2003.
Filed: April 9, 2004.
Amended: April 30, 2004.

Background: Electric utility that operated hydroelectric power plant brought action against Missouri Department of Conservation (MDOC) and, in their official capacities, director of MDOC and four commissioners of the Missouri Conservation Commission, seeking declaration that Federal Power Act preempted MDOC from imposing liability on utility for fish kill allegedly caused by utility's negligence and seeking injunction to prevent MDOC from bringing any state-court or administrative actions to impose liability on utility for the lost fish. The United States District Court for the Western District of Missouri, Scott O. Wright, J., dis-

(11)

missed action as barred by the Eleventh Amendment, and utility appealed.

Holdings: The Court of Appeals, Bowman, Circuit Judge, held that:
(1) utility could not maintain action under *Ex Parte Young* doctrine;
(2) MDOC did not waive its Eleventh Amendment immunity by making general appearance and defending against action; and
(3) state Attorney General did not waive immunity by seeking to intervene in suit.

Affirmed.

West Headnotes

|1| Federal Courts 170B ⚿269

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases

Federal Courts 170B ⚿272

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk272 k. Injunctive or Mandatory Relief; Declaratory Judgments. Most Cited Cases

Judicial inquiry into whether *Ex Parte Young* doctrine avoids the Eleventh Amendment's bar to suits against the states does not include an inquiry into the merits of the claim at issue,

(12)

but court may inquire into whether an applicable federal statutory scheme evidences an implicit or explicit intent to exclude *Ex Parte Young* actions, and court may also question whether the suit and the remedy it seeks implicate special sovereignty interests such that an *Ex Parte Young* action will not lie. U.S.C.A. Const.Amend. 11.

|2| Electricity 145 ⇐19(.5)

145 Electricity
145k12 Injuries Incident to Production or Use
145k19 Actions
145k19(.5) k. In General. Most Cited Cases

Electric utility licensed by Federal Energy Regulatory Commission (FERC) could not, under *Ex Parte Young* doctrine, maintain action seeking to prevent state from recovering damages to its property allegedly resulting from utility's negligence in the operation of the licensed power project; Federal Power Act unmistakably evidenced intent to exclude licensees from maintaining such an action. Federal Power Act, § 10(c), 16 U.S.C.A. § 803(c).

|3| Federal Courts 170B ⇐266.1

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

Missouri Department of Conservation (MDOC) did not waive its Eleventh Amendment immunity in action brought by electric utility to prevent state from recovering damages from utility for loss of fish allegedly caused by utility's negligence, by making general appearance and defending against action; there was no showing that MDOC had power to bring suit in

(13)

federal court, as required for it to have ability to waive state's immunity, and MDOC asserted immunity in dismissal proceedings and thereafter. U.S.C.A. Const.Amend. 11.

[4] Federal Courts 170B ⚿266.1

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

General rule regarding state's waiver of sovereign immunity is that when a state voluntarily invokes federal jurisdiction and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment; thus, a state's Eleventh Amendment immunity may be waived if a state actor with the power to bring suit in federal court invokes federal jurisdiction in a clear and voluntary manner. U.S.C.A. Const.Amend. 11.

[5] Federal Courts 170B ⚿266.1

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

Application by state Attorney General to intervene in electric utility's action against state Department of Conservation, which sought to prevent Department from seeking to recover damages from utility for loss of fish allegedly caused by utility's negligence, did not amount to waiver of state's sovereign immunity, as state was already a defendant in the suit and did

not voluntarily invoke federal court's jurisdiction, and a stated aim of intervention application was to permit Attorney General to argue for dismissal. U.S.C.A. Const.Amend. 11.

***656** Ann E. Buckley, argued, Armstrong & Teasdale, St. Louis, MO (John R. Molm, Charles A. Zdebski, Jennifer A. Kerkhoff, Troutman & Sanders, Washington, DC, on the brief), for Plaintiff-Appellant.

Phillip B. Grubaugh, argued, Kansas City, MO (Spencer J. Brown, Mimi E. Doherty, Deacy & Deacy, Kansas City, MO, on the brief), for Defendants-Appellees.

***657** Shannon L. Haney, Attorney General's Office, Jefferson City, MO, for Amici on Behalf of Appellees.

Before MELLOY, MCMILLIAN, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

This is a suit by AmerenUE, an electric utility, against the Missouri Department of Conservation ("MDOC") and, in their official capacities, the director of MDOC and four commissioners of the Missouri Conservation Commission. We affirm the District Court's [FN1] dismissal of the action as barred by the Eleventh Amendment.

> FN1. The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

AmerenUE, which is licensed and regulated by the Federal Energy Regulatory Commission, operates Bagnell Dam, a hydroelectric power plant on the Osage River. It was the damming of the Osage River by Bagnell Dam that created the Lake of the Ozarks. In the Spring of 2002, a significant fish kill occurred below the dam. The parties agree that the fish kill occurred soon after the Army Corps of Engineers released a substantial amount of water from

(15)

the Harry S. Truman Dam, which is upstream from Bagnell Dam. MDOC, believing the fish kill was preventable and was caused by AmerenUE's negligence in failing to prevent it, demanded that AmerenUE provide compensation for the alleged $3.256 million worth of fish that were destroyed. When MDOC and AmerenUE were unable to agree on compensation for the lost fish, AmerenUE filed this suit in the District Court seeking a declaratory judgment and an injunction. Specifically, AmerenUE sought a declaration that the Federal Power Act, 16 U.S.C. §§ 791a-828c (2000), preempts MDOC from imposing liability on AmerenUE for the dead fish and sought an injunction to prevent MDOC from bringing any state-court or administrative actions to impose liability on the company for the lost fish. After AmerenUE filed its federal action, MDOC filed suit against AmerenUE in state court seeking precisely that relief, namely, damages for the loss of the fish. Later, the Missouri Attorney General filed an application to intervene in the federal case and requested that the case be dismissed on a number of grounds, including the State's Eleventh Amendment immunity. Thereafter, without ruling on the merits of the Attorney General's application to intervene, the District Court granted judgment to all of the defendants on Eleventh Amendment grounds, dismissed the case, and denied the application to intervene as moot. AmerenUE appeals the dismissal of its suit. We review a district court's dismissal of an action on Eleventh Amendment grounds de novo. *Allen v. Purkett,* 5 F.3d 1151, 1153 (8th Cir.1993) (per curiam), *cert. denied,* 513 U.S. 829, 115 S.Ct. 100, 130 L.Ed.2d 49 (1994).

AmerenUE urges that under *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (holding that Eleventh Amendment does not bar suits for prospective injunctive relief against state officials in their official capacity), its action against the individual defendants in their official capacity is not barred by the Eleventh Amendment. The company also argues that the defendants waived any Eleventh Amendment immunity the State enjoyed by entering a general appearance in response to the lawsuit and, alternatively, that the Attorney General

waived the State's immunity by moving to intervene in the action. We consider AmerenUE's claims seriatim.

***658** [1] Our inquiry into whether the *Ex Parte Young* fiction avoids the Eleventh Amendment's bar to suits against the States does not include an inquiry into the merits of the claim. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). We may, however, inquire into whether an applicable federal statutory scheme evidences an implicit or explicit intent to exclude *Ex Parte Young* actions, *id.* at 647, 122 S.Ct. 1753, and we may also question whether the suit and the remedy it seeks "implicate[ ] special sovereignty interests" such that an *Ex Parte Young* action will not lie. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[2] Here, we conclude that the Federal Power Act ("the Act") unmistakably evidences an intent to exclude licensees such as AmerenUE from maintaining an *Ex Parte Young* action seeking to prevent a State from recovering damages to its property resulting from the licensee's negligence in the operation of the licensed power project. *Cf. Seminole Tribe*, 517 U.S. 44, 74, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that existence of a detailed remedial scheme shows Congressional intent to prohibit recourse to the *Ex Parte Young* fiction). In relevant part, the Act provides:

> Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c) (2000). We have no occasion to consider whether this provision-in combination with the rest of the statutory scheme-demonstrates Congressional intent to exclude all *Ex Parte Young* actions under the Act. In the circumstances of this case, it is clear

that the Act bars AmerenUE's federal-court action. Section 803(c) of the Act deals with licensee liability and is part of the Act's remedial scheme, which relies on damage actions, by parties whose property is injured by a licensee's operation of a licensed power project, to provide a remedy to those whose property is so injured. The Act does not draw any distinction between damage actions instituted by States and those instituted by private parties. The remedy that AmerenUE seeks, which would enjoin the State from bringing or maintaining an action to recover damages to its property allegedly caused by AmerenUE's negligent operation of Bagnell Dam, is plainly inconsistent with the Act. [FN2] Accordingly, the District Court's dismissal of the case on Eleventh Amendment grounds was correct inasmuch as the Act itself forecloses application of the *Ex Parte Young* exception to the State's assertion of Eleventh Amendment immunity. Because the *Ex Parte Young* exception thus cannot successfully be invoked in this case, and AmerenUE therefore cannot overcome the Eleventh Amendment bar to such an action against these State defendants, there is no need for us to inquire whether this action implicates any "special sovereignty interests" as in *Coeur d'Alene*, 521 U.S. at 281, 117 S.Ct. 2028.

> FN2. AmerenUE does not contest the proposition that the destroyed fish were the property of the State of Missouri. *See* Mo.Rev.Stat. § 252.030 (2000) ("The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri.").

AmerenUE urges that even if the Eleventh Amendment was initially available to the defendants as a bar from suit, it was waived either by MDOC or by the Attorney*659 General. Specifically, AmerenUE contends that MDOC waived the State's sovereign immunity when it made a general appearance and defended the suit on the merits (MDOC did not raise its assertion of Eleventh Amendment immunity until its motion-to-dismiss reply brief). Alternatively, AmerenUE argues that the State's Eleventh Amendment immunity was waived when the At-

18

torney General filed an application to intervene and to dismiss the action.

[3] In support of its waiver claims, AmerenUE submits that our decision in *Hankins v. Finnel,* 964 F.2d 853 (8th Cir.), *cert. denied,* 506 U.S. 1013, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992), stands for the proposition that whenever a State defendant makes a general appearance in federal court and defends an action on the merits, it waives its Eleventh Amendment immunity. We do not believe that *Hankins* can bear the weight AmerenUE places on it. In *Hankins,* the State of Missouri defended a § 1983 suit brought in federal court by a prisoner who sought damages from a state employee. *Id.* at 854-55. At trial, the employee suffered an adverse judgment and was ordered to pay damages. The State agreed to indemnify its employee pursuant to the "State Legal Expense Fund," *see* Mo.Rev.Stat. § 105.711 (2000). Before it satisfied the judgment, the State sought to recoup the judgment amount by instituting proceedings in state court under the Missouri Incarceration Reimbursement Act, *see id.* §§ 217.825-841, which permits the Attorney General to institute a suit seeking reimbursement for up to ninety percent of the costs of a prisoner's confinement. *Hankins,* 964 F.2d at 854-55. After the state court appointed a receiver to hold the funds, the inmate's account was debited for the amount of the judgment plus interest and-that same day-the same amount was paid into the inmate's account in satisfaction of the judgment. *Id.* Thereafter, the inmate returned to federal court where he sought a writ of mandamus to stay the state court proceedings and a writ "to proceed in aid of execution on the judgment," whereupon the State asserted its Eleventh Amendment immunity from suit. *Id.* at 855. The District Court held that the State had waived its Eleventh Amendment immunity and enjoined the State from attaching the funds in the inmate's account. *Id.* The State appealed this decision and we affirmed. In our decision, we noted that the State was not a defendant in the underlying § 1983 suit and had not entered a general appearance therein, but we nevertheless concluded that the State had waived its Eleventh Amendment immunity with respect to actions in federal court arising from the State's at-

19

tempt to recover the amount paid into the inmate's account in satisfaction of the judgment in the § 1983 case. *Id.* at 858. In short, it was the State's voluntary act of paying the judgment, and then attempting to recoup the amount paid, that was the basis of the waiver. *Id.* at 857-58. *Hankins* thus is a special case of limited application and does not advance AmerenUE's waiver claim.

[4] The general rule regarding waiver, which was recently reiterated by the Supreme Court, is that when a State voluntarily invokes federal jurisdiction " 'and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.' " *Lapides v. Bd. of Regents,* 535 U.S. 613, 619, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) (quoting *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906)). Thus, a State's Eleventh Amendment immunity may be waived if a state actor with the power to bring suit in federal court invokes***660** federal jurisdiction in a *clear* and *voluntary* manner. *Id.* at 619-22, 122 S.Ct. 1640. In *Lapides,* these criteria were satisfied because the Georgia Attorney General was authorized by state statute " '[t]o represent the state in all civil actions tried in any court,' " *id.* at 621, 122 S.Ct. 1640 (quoting Ga.Code Ann. § 45-15-3(6) (1990)), and the invocation of federal jurisdiction was clear and voluntary because the Attorney General chose to remove the case from state court, where it originated. In contrast, the elements required to show clear and voluntary action constituting a waiver of Eleventh Amendment immunity by a State defendant are absent here.

[5] Regarding MDOC, AmerenUE has not demonstrated that MDOC has the power to bring suit in federal court. Having this power is, under *Lapides,* a prerequisite for a state actor to have the ability to waive the State's Eleventh Amendment immunity. Even if MDOC has this power, it is clear that MDOC, which is a defendant in this lawsuit, has not voluntarily invoked federal jurisdiction by entering a general appearance and defending against

AmerenUE's suit. *See, e.g., Fromm v. Comm'n of Veterans Affairs,* 220 F.3d 887, 888-90 (8th Cir.2000) (en banc) (holding that there was no waiver where attorney general appeared in federal court, answered a complaint, responded to discovery, and later moved to amend its answer to the complaint in order to raise State's Eleventh Amendment immunity). Moreover, MDOC did assert the State's Eleventh Amendment immunity in the dismissal proceedings and it has continued to press its claim of entitlement to such immunity. As for the Missouri Attorney General, state law authorizes him to "institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity ...." Mo.Rev.Stat. § 27.060 (2000); *see also* Mo. Const. art IV, § 12 (establishing office of Attorney General). With this power, the Attorney General *could* waive the State's Eleventh Amendment immunity if he invoked federal jurisdiction in a clear and voluntary manner. *Cf. Beatty v. Metro. St. Louis Sewer Dist.,* 914 S.W.2d 791, 796 (Mo.1995) (noting that State's sovereign immunity may be waived by voluntary appearance and submission to jurisdiction). As we already have noted, the State is a defendant and, consequently, has not voluntarily invoked this court's jurisdiction. AmerenUE's effort to cast the Attorney General's application to intervene in this case as a voluntary invocation of federal jurisdiction is fruitless: the State, because of AmerenUE's suit against MDOC and the individual State officials in their official capacity, was already a party-defendant, and the Attorney General's application to intervene does not change this fact. [FN3] Moreover, a stated aim of the application was to enable the Attorney General to argue for dismissal of the case on, *inter alia,* Eleventh Amendment grounds. We are thoroughly satisfied that no waiver of the State's Eleventh Amendment immunity occurred.

> FN3. Our conclusion that the State was already a party to the action when the Attorney General moved to intervene necessarily means we reject AmerenUE's claim that MDOC is not an arm of the State of Missouri for Eleventh Amendment purposes.

We conclude that the District Court did not err when it dismissed this suit as barred by the

Eleventh Amendment. For the reasons stated, the judgment of the District Court dismissing this action is affirmed.

C.A.8 (Mo.),2004.
Union Elec. Co. v. Missouri Dept. of Conservation
366 F.3d 655

END OF DOCUMENT

AMENDMENTS

TO THE

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(Adopted December 15, 1791)

Amendment II

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

(Adopted December 15, 1791)

Amendment III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

(Adopted December 15, 1791)

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Adopted December 15, 1791)

(1974) Held seizure of marijuana was unreasonable search and seizure. See this case for in-depth discussion of "search and seizure". Kansas City v. Butters (Mo.App.W.D.), 507 S.W.2d 49.

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

(Adopted December 15, 1791)

(1973) Held that separate trials and convictions for successive robberies of two filling station attendants not double jeopardy. Moton v. Swenson (8th Cir.), 488 F.2d 1060.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

(Adopted December 15, 1791)

(1975) Held that admission of evidence through closed circuit television was proper in a prosecution for violation of a city ordinance. The question was raised under the provisions of the United States Constitution and was not questioned under Art. I, § 18(a), Constitution of Missouri. Kansas City v. McCoy (Mo.), 525 S.W.2d 336.

pointment of
proper, in the
, or in the heads
ial' e power to
happ... during the
ting commissions,
their next session.

ne to time, give to
state of the Union,
nsideration such
necessary and
dinary occasions,
them, and in case
with respect to the
ourn them to such
he shall receive
inisters; he shall
ully executed and
rs of the United

-President, and all
shall be removed
and conviction of
gh crimes and

m

er of the United
me Court, and in
s may from time
dges, both of the
hold their offices
at stated times,
ensation, which
r continuance in

shall extend to
sing under this
ted States, and
ade under their
ambassadors,
s; to all cases of
risdiction; to
States shall be
a two or more
ens of another
fferent states;

between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

States and Territories

Section 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

Section 3. New states may be admitted by the Congress into this Union; but no new states shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

Section 4. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

Amendments to Constitution

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states,

or b
one
proj
ame
one
any
the
state
equa

A
into
be a
cons
T
State
and
unde
the s
ever
the
cont
T
men
legis
offic
seve
affir
relig
quali
the U

T
state
this
the s

24

16 U.S.C. § 803 : US Code - Section 803: Conditions of license generally

Search 16 U.S.C. § 803 : US Code - Section 803: Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:
(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions
(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title (!1) if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.
(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:
(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by -
(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
(ii) the State in which the facility is or will be located.
(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of

(25)

the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.
(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.
(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.
(b) Alterations in project works
That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.
(c) Maintenance and repair of project works; liability of licensee for damages
That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.
(d) Amortization reserves
That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish

(26)

and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: Provided, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued

(27)

and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: Provided however, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 1/2 mills per kilowatt-hour for over 40 up to and

(28)

including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.
(3) The provisions of paragraph (2) shall apply with respect to -

(A) all licenses issued after October 16, 1986; and
(B) all licenses issued before October 16, 1986, which -
(i) did not fix a specific charge for the use of the Government dam or structure involved; and
(ii) did not specify that no charge would be fixed for the use of such dam or structure.
(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.
(f) Reimbursement by licensee of other licensees, etc.
That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title. Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.
(g) Conditions in discretion of commission
Such other conditions not inconsistent with the provisions of this chapter as the commission may require.
(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

29

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.
(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.
(i) Waiver of conditions
In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.
(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings
(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.
(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together

with a statement of the basis for each of the findings):
(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.
(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).
Subsection (i) of this section shall not apply to the conditions required under this subsection.

[Notes]

« Prev
Information to accompany application for license; landowner notification

Up
Regulation of the development of water power and resources

Next »
Project works affecting navigable waters; requirements insertable in license

31

16 USC 824 - Sec. 824a-3. Cogeneration and small power production

U.S. Code - Title 16: Conservation

Linked as: http://us-code.vlex.com/vid/cogeneration-small-power-production-19238407

Text

(a) Cogeneration and small power production rules Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to - (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities (!1) and (2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments.

Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies.

Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale. (b) Rates for purchases by electric utilities The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase - (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy. (c) Rates for sales by utilities The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production

(32)

facility, the rates for such sale - (1) shall be just and reasonable and in the public interest, and (2) shall not discriminate against the qualifying cogenerators or qualifying small power producers. (d) "Incremental cost of alternative electric energy" defined For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source. (e) Exemptions (1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production. (2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.] and from State laws and regulations referred to in such paragraph (1). (3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from - (A) any State law or regulation in effect in a State pursuant to subsection (f) of this section, (B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or (C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement. (f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities (1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority. (2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule). (g) Judicial review and enforcement (1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies. (2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section.

Any such action shall be brought only in the manner, and under the requirements, as provided under

(33)

section 2633 of this title with respect to an action to which section 2633 of this title applies. (h) Commission enforcement (1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act. (2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility.

For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than - (i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section (!2) or (ii) an action under paragraph (1). (B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph.

If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate.

The Commission may intervene as a matter of right in any such action. (i) Federal contracts No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility.

Any provision in any such contract which has such effect shall be null and void. (j) New dams and diversions Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements: (1) No substantial adverse effects At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality.

Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project. (2) Protected rivers At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following: (A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system. (B) Any segment of a natural

(34)

watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development. (3) Fish and wildlife terms and conditions The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)]. (k) "New dam or diversion" defined For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices). (l) Definitions For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

References In Text

The Commission, referred to in subsecs. (a), (e)(1), (2), (f), (h), and (j)(1), (2), means the Federal Energy Regulatory Commission.

See section 2602(3) of this title.

The Secretary, referred to in subsec. (g)(2), means the Secretary of Energy.

See section 2602(14) of this title.

The Federal Power Act, referred to in subsecs. (e), (h), and (j)(1), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter (Sec. 791a et seq.). Part I of the Federal Power Act is classified generally to subchapter I (Sec. 791a et seq.) of this chapter.

Part II of the Federal Power Act is classified generally to this subchapter (Sec. 824 et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Public Utility Holding Company Act, referred to in subsec. (e), probably means the Public Utility Holding Company Act of 1935, act Aug. 26, 1935, ch. 687, title I, 49 Stat. 838, as amended, which is classified generally to chapter 2C (Sec. 79 et seq.) of Title 15, Commerce and Trade.

For complete classification of this Act to the Code, see section 79 of Title 15 and Tables.

The Electric Consumers Protection Act of 1986, referred to in subsec. (j)(1), is Pub. L. 99-495, Oct. 16, 1986, 100 Stat. 1243. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 791a of this title and Tables.

Codification

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

Amendments

1990 - Subsec. (e)(2). Pub. L. 101-575 inserted "(other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act)" after first reference to "facility". 1986 - Subsecs. (j) to (l). Pub. L. 99-495 added subsecs. (j) and (k) and redesignated former subsec. (j) as (l). 1980 - Subsec. (a). Pub. L. 96-294, Sec. 643(b)(1), inserted provisions relating to encouragement of geothermal small power production facilities.

Subsec. (e)(1). Pub. L. 96-294, Sec. 643(b)(2), inserted provisions relating to applicability to geothermal small power production facilities.

(35)

Subsec. (e)(2). Pub. L. 96-294, Sec. 643(b)(3), inserted provisions respecting a qualifying small power production facility using geothermal energy as the primary energy source.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 8(b) of Pub. L. 99-495 provided that: "(1) Subsection (j) of section 210 of the Public Utility Regulatory Policies Act of 1978 (as amended by subsection (a) of this section) [16 U.S.C. 824a-3(j)] shall apply to any project for which benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 are sought and for which a license or exemption is issued by the Federal Energy Regulatory Commission after the enactment of this Act [Oct. 16, 1986], except as otherwise provided in paragraph (2), (3) or (4) of this subsection. "(2) Subsection (j) shall not apply to the project if the application for license or exemption for the project was filed, and accepted for filing by the Commission, before the enactment of this Act [Oct. 16, 1986]. "(3) Paragraphs (1) and (3) of such subsection (j) shall not apply if the application for the license or exemption for the project was filed before the enactment of this Act [Oct. 16, 1986] and accepted for filing by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to the requirement for environmental consultation) within 3 years after such enactment. "(4)(A) Paragraph (3) of subsection (j) shall not apply for projects where the license or exemption application was filed after enactment of this Act [Oct. 16, 1986] if, based on a petition filed by the applicant for such project within 18 months after such enactment, the Commission determines (after public notice and opportunity for public comment of at least 45 days) that the applicant has demonstrated that he had committed (prior to the enactment of this Act) substantial monetary resources directly related to the development of the project and to the diligent and timely completion of all requirements of the Commission for filing an acceptable application for license or exemption.

Such petition shall be publicly available and shall be filed in such form as the Commission shall require by rule issued within 120 days after the enactment of this Act. The public notice required under this subparagraph shall include written notice by the petitioner to affected Federal and State agencies. "(B) In the case of any petition referred to in subparagraph (A), if the applicant had a preliminary permit and had completed environmental consultations (required by Commission regulations and procedures in effect on January 1, 1986) prior to enactment, there shall be a rebuttable presumption that such applicant had committed substantial monetary resources prior to enactment. "(C) The applicant for a license or exemption for a project described in subparagraph (A) may petition the Commission for an initial determination under paragraph (1) of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a-3(j)(1)] prior to the time the license or exemption is issued.

If the Commission initially finds that the project will have substantial adverse effects on the environment within the meaning of such paragraph (1), prior to making a final finding under that paragraph the Commission shall afford the applicant a reasonable opportunity to provide for mitigation of such adverse effects.

The Commission shall make a final finding under such paragraph (1) at the time the license or exemption is issued.

If the Federal Energy Regulatory Commission has notified the State of its initial finding and the State has not taken any action described in paragraph (2) of section 210(j) before such final finding, the failure to take such action shall be the basis for a rebuttable presumption that there is not a substantial adverse effect on the environment related to natural, recreational, cultural, or scenic attributes for purposes of such finding. "(D) If a petition under subparagraph (A) is denied, all provisions of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a-3(j)] shall apply to the project regardless of when the license or exemption is issued." Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

CALCULATION OF AVOIDED COST Pub. L. 102-486, title XIII, Sec. 1335, Oct. 24, 1992, 106 Stat. 2984, provided that: "Nothing in section 210 of the Public Utility Regulatory Policies Act of 1978 (Public Law 95-617) [16 U.S.C. 824a-3] requires a State regulatory authority or nonregulated electric utility to treat a cost reasonably identified to be incurred or to have been incurred in the construction or operation of a facility or a project which has been selected by the Department of Energy and provided Federal funding pursuant to the Clean Coal Program authorized by Public Law 98-473 [see Tables for classification] as an incremental cost of alternative electric energy." APPLICABILITY OF 1980 AMENDMENT TO FACILITIES USING SOLAR ENERGY AS PRIMARY ENERGY SOURCE Pub. L. 100-202, Sec. 101(d) [title III, Sec. 310], Dec. 22, 1987, 101 Stat. 1329-104, 1329-126, provided that: "(a) The amendments made by section 643(b) of the Energy Security Act (Public Law 96-294) [amending this section] and any regulations issued to implement such amendment shall apply to qualifying small power production facilities (as such term is defined in the Federal Power Act [16 U.S.C. 791a et seq.]) using solar energy as the primary energy source to the same extent such amendments and regulations apply to qualifying small power production facilities using geothermal energy as the primary energy source.

(36)

except that nothing in this Act [see Tables for classification] shall preclude the Federal Energy Regulatory Commission from revising its regulations to limit the availability of exemptions authorized under this Act as it determines to be required in the public interest and consistent with its obligations and duties under section 210 of the Public Utility Regulatory Policies Act of 1978 [this section]. "(b) The provisions of subsection (a) shall apply to a facility using solar energy as the primary energy source only if either of the following is submitted to the Federal Energy Regulatory Commission during the two-year period beginning on the date of enactment of this Act [Dec. 22, 1987]: "(1) An application for certification of the facility as a qualifying small power production facility. "(2) Notice that the facility meets the requirements for qualification." STUDY AND REPORT TO CONGRESSIONAL COMMITTEES ON APPLICATION OF PROVISIONS RELATING TO COGENERATION, SMALL POWER PRODUCTION, AND INTERCONNECTION AUTHORITY TO HYDROELECTRIC POWER FACILITIES Section 8(d) of Pub. L. 99-495 provided that: "(1) The Commission shall conduct a study (in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332 (2)(C)]) of whether the benefits of section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a-3] and section 210 of the Federal Power Act [16 U.S.C. 824i] should be applied to hydroelectric power facilities utilizing new dams or diversions (within the meaning of section 210(k) of the Public Utility Regulatory Policies Act of 1978). "(2) The study under this subsection shall take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without the application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act [16 U.S.C. 797, 803, 823a] and section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a-3]), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact of such section 210 on the rates paid by electric power consumers. "(3) The study under this subsection shall be initiated within 3 months after enactment of this Act [Oct. 16, 1986] and completed as promptly as practicable. "(4) A report containing the results of the study conducted under this subsection shall be submitted to the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate while both Houses are in session. "(5) The report submitted under paragraph (4) shall include a determination (and the basis thereof) by the Commission, based on the study and a public hearing and subject to review under section 313(b) of the Federal Power Act [16 U.S.C. 825l(b)], whether any of the benefits referred to in paragraph (1) should be available for such facilities and whether applications for preliminary permits (or licenses where no preliminary permit has been issued) for such small power production facilities utilizing new dams or diversions should be accepted by the Commission after the moratorium period specified in subsection (e). The report shall include such other administrative and legislative recommendations as the Commission deems appropriate. "(6) If the study under this subsection has not been completed within 18 months after its initiation, the Commission shall notify the Committees referred to in paragraph (4) of the reasons for the delay and specify a date when it will be completed and a report submitted." MORATORIUM ON APPLICATION OF THIS SECTION TO NEW DAMS Section 8(e) of Pub. L. 99-495 provided that: "Notwithstanding the amendments made by subsection (a) of this section [amending section 824a-3 of this title], in the case of a project for which a license or exemption is issued after the enactment of this Act [Oct. 16, 1986], section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a-3] shall not apply during the moratorium period if the project utilizes a new dam or diversion (as defined in section 210(k) of such Act) unless the project is either - "(1) a project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, or "(2) a project described in paragraphs (2), (3), or (4) of subsection (b) [set out as a note above]. For purposes of this subsection, the term 'moratorium period' means the period beginning on the date of the enactment of this Act and ending at the expiration of the first full session of Congress after the session during which the report under subsection (d) [set out as a note above] has been submitted to the Congress."

Section Referred To In Other Sections

This section is referred to in title 26 section 136; title 42 section 6807.

(!1) So in original.

Probably should be followed by a comma.

(!2) So in original.

Probably should be followed by a comma.

37

This document cites

- U.S. Code - Title 15: Commerce and Trade - 15 USC 79 - Sec. 79. Short title of chapter
- U.S. Code - Title 16: Conservation - 16 USC 825 - Sec. 825. Accounts and records
- U.S. Code - Title 16: Conservation - 16 USC 824 - Sec. 824. Declaration of policy; application of subchapter
- U.S. Code - Title 16: Conservation - 16 USC 823 - Sec. 823. Repeal of inconsistent laws
- U.S. Code - Title 16: Conservation - 16 USC 803 - Sec. 803. Conditions of license generally

See all quotations

See other documents that cite the same legislation

Related documents

- more results about "16 usc sec 803 c federal cases" in vLex United States
- more results about "16 usc sec 803 c federal cases" in Todo vLex

Related searches

38

- domestic production activities in puerto rico sec. 312
- nuclear power pros and cons
- separation of powers checks and balances
- Small and medium industries
- small and medium industries development
- small and medium industries development corporation
- small and medium industries development corporation smidec
- small and medium industries in malaysia
- small and medium industries in sri lanka
- Small and medium-sized enterprises

39

THE FAIR DEBT COLLECTION PRACTICES ACT

As amended by Pub. L. 109-351, §§ 801-02, 120 Stat. 1966 (2006)

As a public service, the staff of the Federal Trade Commission (FTC) has prepared the following complete text of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

Please note that the format of the text differs in minor ways from the U.S. Code and West's U.S. Code Annotated. For example, this version uses FDCPA section numbers in the headings. In addition, the relevant U.S. Code citation is included with each section heading. Although the staff has made every effort to transcribe the statutory material accurately, this compendium is intended as a convenience for the public and not a substitute for the text in the U.S. Code.

TABLE OF CONTENTS

(40)

U.S. Supreme Court

HENRY FORD & SON v. LITTLE FALLS FIBRE CO., 280 U.S. 369 (1930)

280 U.S. 369 74 L.Ed. 4839

HENRY FORD & SON, Inc.,
v.
LITTLE FALLS FIBRE CO., et al.
No. 47.

Argued Dec. 4, 1929.
Decided Jan. 6, 1930.

[280 U.S. 369, 370] Messrs. Charles E. Nichols, Jr., and Robert E. Whalen, both of Albany, N. Y., and Clifford B. Longley and Wallace R. Middleton, both of Detroit, Mich., for petitioner.

[280 U.S. 369, 372] Messrs. Thomas O'Connor, George E. O'Connor, and Gerald W. O'Connor, all of Waterford, N. Y., for respondents.

[280 U.S. 369, 374]

Mr. Justice STONE delivered the opinion of the Court.

This case comes here on writ of certiorari to review a determination of the Court of Appeals of New York (249 N. Y. 495, 164 N. E. 558), upon which a judgment was entered in the state Supreme Court, awarding damages and an injunction restraining petitioner from maintaining flashboards on the crest of the 'Federal Dam,' constructed in the Hudson River near Troy, N. Y., under acts of Congress. Act of June 25, 1910, c. 382, 36 Stat. 630; Act March 4, 1913, c. 144, 37 Stat. 801,

Respondents, it is stipulated, are riparian owners on the Mohawk river, above its confluence with the Hudson, where at a point about three miles above the federal dam they own a dam and water power which they maintain for the development of power for use in their factories on adjacent land. The petitioner, a private business corporation, has procured from the Federal Power Commission a license for a hydroelectric power project, purporting to be granted under the Federal Water Power Act of June 10, 1920, 41 Stat. 1063 (U. S. Code, title 16, c. 12 [16 USCA 792-823]). The license granted permission to use surplus water from the federal dam for the development of power at a plant to be constructed and maintained by petitioner for that purpose, on government land. As the license also per- [280 U.S. 369, 375] mits, but does not require, petitioner has placed flashboards on the crest of the dam which, under normal conditions, raise the level of the water in the pool above the dam approximately two feet. Electric power developed by the project is used in the business of an affiliated private manufacturing corporation. The maintenance of the water at the new level has resulted in materially raising the water at the tailraces of respondents' power plants, with a corresponding reduction of the head of water and of the power developed at their dam.

As the court below held, the acts complained of constitute, under local law, an actionable wrong, entitling respondents to an injunction and to damages. Hammond v. Fuller, 1 Paige (N. Y.) 197; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Hall v. Augsbury, 46 N. Y. 622, 625, 626; Rothery v. New York Rubber Co., 24 Hun, 172, affirmed 90 N. Y. 30; American Woolen Co. v. State, 195 App. Div. 698, 705, 187 N. Y. S. 341. To avoid this liability petitioner relies on the federal right or immunity specially set up by its answer, that the Hudson and Mohawk are navigable rivers; that all of the acts complained of were done under the license and authority of the Federal Power Commission and under regulations of the Secretary of War, authorized by the Water Power Act; that the license and the acts of petitioner authorized by it were found by the Commission to be desirable and justified in the public interest for the purpose of improving and developing the Hudson river for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the federal government, in the exercise of its power to regulate commerce and navigation.

(41)

It is contended that the navigable capacity of the Hudson and the Mohawk is subject to the regulation and control of Congress, under clause 3 of section 8, art. 1, of the Constitution, Gibbons v. Ogden, 9 Wheat. 1; Gilman v. Philadelphia, 3 Wall. 713, 724; United States v. Chandler [280 U.S. 369, 376] Dunbar Co., 229 U.S. 53, 63 , 33 S. Ct. 667; New Jersey v. Sargent, 269 U.S. 328, 337 , 46 S. Ct. 122, which may constitutionally be delegated to the Power Commission, cf. Wisconsin v. Illinois, 278 U.S. 367, 415 , 49 S. Ct. 163; that even if the finding of the Commission that the licensed project is in aid of commerce and navigation is not conclusive, as petitioner asserts it is, and even though some of the power developed by petitioner is used for private purposes, the raising of the level of the water by the use of flashboards is shown by the evidence to be beneficial to navigation, and it was therefore within the competency of the Commission to determine whether the project should be authorized. It appears that the petitioner is required by the license and its acceptance of it to supply from the licensed project power in specified amounts for the lighting and operation of the existing government lock and a second projected lock at the federal dam, which are instrumentalities of navigation.

It is argued that Congress, by the Federal Water Power Act, has authorized the Commission to develop navigation and for that purpose to establish obstructions in navigable waters, and, subject only to the constitutional requirement of compensation for property taken, its power when so exercised is supreme; that the present exercise of that power does not amount to a taking of the respondents' property, for the reason that it does not appear that the obstruction has so raised the water as to flood the respondents' land, and any right of theirs recognized by the state and asserted here, to have the river flow in its natural manner without obstruction, is subordinate to the power of the national government exerted by the Commission through its licensee, whose action, so far as it affects respondents' water power, is damnum absque injuria. United States v. Chandler-Dunbar Co., 229 U.S. 53 , 33 S. Ct. 667; Gibson v. United States, 166 U.S. 269, 271 , 17 S. Ct. 578; Scranton v. Wheeler, 179 U.S. 141, 162 , 163 S., 21 S. Ct. 48; Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 , 33 S. Ct. 679; see Fox River [280 U.S. 369, 377] Paper Co. v. Railway Commission of Wisconsin, 274 U.S. 651 , 47 S. Ct. 669; Chase-Hibbard Co. v. City of Elmira, 207 N. Y. 460, 101 N. E. 158, 47 L. R. A. (N. S.) 470; compare United States v. Cress, 243 U.S. 316 , 37 S. Ct. 380.

The respondents insist, as the court below found, that the federal dam was designed to be sufficient for purposes of navigation without the flashboards and it was unnecessary to use them for purposes of navigation; that the petitioner had installed them for the development of power for its own private use; that the effect upon navigation of the power plant and flashboards is negligible, hence the licensed project was not one authorized under the Federal Water Power Act. In any case, it is urged that the injury and damage complained of amount to a taking of respondents' property without compensation, and, further, that the Federal Water Power Act, by its terms, does not authorize the granting of licenses which would enable the licensee to destroy or affect the rights of riparian owners.

But, in the view we take of the application of the Federal Water Power Act to the present case, it is unnecessary to decide all the issues thus sharply raised. Whether the Commission acted within or without its jurisdiction in granting the license, and even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation. Even though not immune from such destruction, they are, nevertheless, an appropriate subject for legislative protection. See United States v. Realty Company, 163 U.S. 427 , 16 S. Ct. 1120; Guthrie National Bank v. Guthrie, 173 U.S. 528, 535 , 19 S. Ct. 513; Joslin Co. v. Providence, 262 U.S. 668, 675 , 676 S., 43 S. Ct. 684; Otis Co. v. Ludlow Co., 201 U.S. 140, 152 , 26 S. Ct. 353; Oswego & Syracuse R. R. v. State, 226 N. Y. 351, 356, 124 N. E. 8. Especially is there reason for such protection where, as here, their sacrifice may be involved [280 U.S. 369, 378] in the grant of a valuable privilege to a licensee. We think that the provisions of the act are quite sufficient in themselves to save respondents from any such appropriation of their water power.

Section 10(c), Federal Water Power Act (title 16, U. S. Code, 803(c), 16 USCA 803(c), provides that licensees 'shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation' of the licensed project, and by section 27 of the act (title 16, U. S. Code, 821 (16 USCA 821)) it is provided: 'Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, ... or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' By section 21 of the act (title 16, U. S. Code, 814 (16 USCA 814)), licensees are given the power of eminent domain and authorized to conduct condemnation proceedings in district or state courts for the acquisition 'or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam ... (or) ... diversion structure ...' in connection with an authorized project which they are unable to acquire by contract. By section 6 of act (title 16, U. S. Code, 799 (16 USCA 799)), all licenses are required to be 'conditioned upon acceptance by the licensee of all the terms and conditions of this Act.'

While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the

(42)

national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by [280 U.S. 369, 379] the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws, and so is one expressly saved by section 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner, by acceptance of the license under the provisions of section 6, must be deemed to have agreed to recognize and protect. Whether section 21, giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us.

Affirmed.

43 of 43