

2. The Defendants did not violate the Federal Power Act and cannot have violated it under the facts asserted by Plaintiff. Therefore, Count I fails, both as an attempted method by Defendants of manufacturing federal jurisdiction and as a matter of law to state a claim upon which relief can be granted. This point standing alone is sufficient to have the Plaintiff's Complaint dismissed with prejudice in its entirety because Count II alleges solely a state law cause of action, which is the disputed extent of an easement between private property owners, Plaintiff Appalachian Power Company and the Defendants.

3. Count II in the Defendants' Complaint for alleged "violation of the flowage easement" between Plaintiff and Defendants is purely a state law cause of action between two private property owners involving no federal right. Therefore, there is no jurisdiction to hear this claim in any federal Court because of the failure of Count I to adequately show a federal cause of action.

4. Even if the Court were to have a federal jurisdiction basis to hear Count II—which it does not—Plaintiff has asserted an inaccurate and overly broad interpretation of the terms of the flowage easement between Plaintiff and Defendants. Plaintiff seeks to unlawfully expand its easement, which was for the purposes of flooding only, to create a "shadow permitting" process through its company officials in which it seeks to invoke property rights it does not have. Plaintiff's flowage easement was created and until recent years enforced solely as a basis to support mechanical operation of the hydropower dam, and the easement enforcement must be consistent with the promotion of "recreational uses." Plaintiff unlawfully seeks absolute control over all activity contrary below the 800 foot waterline to the terms and original use of the flowage easement, which is intended to allow for periodic flooding periodically necessary for the operation of the dam. The terms of the 1960 easement at issue in this case,

along with the original use and enforcement of the easement, do not support interpretation taken in recent years by Plaintiff, including the position taken in this Complaint.

5. To the extent there is a dispute between Plaintiff and Defendants pertaining to Count II pertaining to a dispute over the meaning of an easement between two private parties, there is no federal question here. Plaintiff's original motivation for purchasing easement rights in dispute is irrelevant to the dispute pertaining to the extent of that easement between private parties here, which are the Plaintiff Appalachian Power Company and the Defendants, William J. Nissen II and Lora Nissen. FERC is not a party to this case, and is not suing its licensee here, which would be the proper application of 16 U.S.C. § 825p. The Nissens are not a FERC licensee, and therefore there is no federal question because Plaintiff cannot sue them under this provision upon these facts.

6. This case belongs in state Court, if at all, and not federal Court, because there is no federal question or other subject matter jurisdiction under 16 U.S.C. § 825p, the Federal Power Act, or any other federal law provision.

A Proposed Order is also attached for the Court's consideration.

Date: November 7, 2014

Respectfully submitted,

By: 

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

APPALACHIAN POWER COMPANY,

Plaintiff,

v.

WILLIAM W. NISSEN, II, and
LORA J. NISSEN,

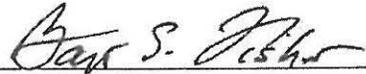
Defendants.

CASE No.:

No 7:14-cv-00535-MFU

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2014, service of the Defendants' Motion to Dismiss Plaintiff Appalachian Power Company's complaint in the above-captioned case was provided electronically by ECF filing to Matthew P. Pritts and C. Carter Lee of Woods Rogers PLC, counsel for Plaintiff.



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