RECORD NUMBER: 16-1062

United States Court of Appeals

for the

Fourth Circuit

APPALACHIAN POWER COMPANY,

Plaintiff/Appellee,

– v. –

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

Defendants/Appellants.

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

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I. The Threshold Issue in this Appeal is the Issue of Lack of a Federal Question Jurisdiction and the District Court Erroneously Denied the Nissens' Rule 12(b)(1) Motion to Dismiss.

The District Court's ruling on Nissens' Motion to Dismiss for lack of subject matter jurisdiction must be reversed, and without jurisdiction, the subsequent rulings must be vacated. Appalachian Power Company ("APCO") dedicates a large portion of its brief to a discussion of its duty to obey Federal Energy Regulatory Commission's ("FERC") rules and its federal license. APCO's duty to obey FERC and its federal license is not at issue in this case and is not being challenged. The acquisition of private property rights is, however, essential to being able to regulate what is being conducted on a private individual's land. See also Tri-Dam v. Michael, 2014 U.S. Dist. LEXIS 42472, *9-10 (E.D. Cal. March 5, 2014). That is the linchpin of this case. Neither APCO's license nor federal law gives APCO any right to regulate activities on a private property owner's land. The flowage easement is APCO's only source of any rights over the Nissens' land. And contrary to the flowage easement deed in Timberline, on which case APCO heavily relies, the Nissens' flowage easement does not incorporate APCO's federal license as did the deed in Timberline. See VA Timberline, L.L.C. v. Appalachian Power Co., 343 Fed. Appx. 915, 916 (4th Cir. 2009)(stating that the quitclaim deed

was expressly made subject to the terms and conditions of the APCO's federal license).

A district court has federal question jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. The Court must examine the APCO's Complaint under the well-pleaded complaint rule to determine whether the action "arises under" federal law. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). The Court, in examining the complaint, must first discern whether federal or state law creates the cause of action. In this case, APCO, being the master of its complaint, engaged in artful pleading and attempted to create a federal cause of action. However, federal jurisdiction will not exist if there is no federal law which creates a cause of action. See generally, Ala. Power Co. v. Calhoun, 2012 U.S. Dist. LEXIS 182573, at *13 (N. D. Ala. Dec. 28, 2012)(granting motion to remand and holding that 16 U.S.C. §825p did not grant jurisdiction to this court and that the case did not seek to enforce any duty created by FERC License, it sought a declaration of each party's rights under a contract that was governed by state law despite Calhoun Power's argument that the FPA created federal jurisdiction).

Neither the Declaratory Judgment Act nor 16 U.S.C. §825p generates a cause of action in this case, which is required to maintain a suit in federal court.

16 U.S.C. §825p reads as follows:

> The District Courts of the Unites States, and the Unites States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of [the FPA] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. 16 U.S.C. §825p.

The question is whether the Complaint alleges a claim arising under federal law that the declaratory plaintiff could affirmatively bring against the declaratory judgment defendant. In Count I, Violation of Obligations under the FERC License Order and SMP, APCO cannot establish any duty on the part of the Nissens stemming from the Federal Power Act or the FERC Order to follow the FERC requirements. Only APCO, as a FERC licensee, is subject to FERC's authority. Each Article of APCO's FERC License Order contains the following language: "The licensee shall….." JA 70-96.

While APCO's allegations appear on their face to reference federal law, it is only the state contract and property law that may be cognizable as the source of any obligations and duties between APCO and the Nissens. To the extent that FERC requires APCO to regulate shoreline activities, APCO must establish that its flowage easement is a broad enough private property right for APCO to have the right to regulate the size and type of dock the Nissens may build or shoreline activities they may undertake. The Complaint is nothing more than a suit for

violation of the flowage easement, and thus the entire Complaint belongs in state court.

For the district court to have federal jurisdiction, alternatively, state-law claims may "arise under" federal law if they "implicate significant federal issues". Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)(emphasis added). In this case, the interpretation of the scope of the flowage easement does not depend on the resolution of a substantial question of federal law. What the FERC License Orders or Shoreline Management Plan state is not disputed.[1] This is not a case of interpretation of federal statute or law. This is a case of interpretation of the flowage easement which states that it is complete in all of its terms and provisions and represents the parties' entire agreement. JA 313. The possibility of the court

[1] APCO on page 30 of its Brief argues that the Nissens in their defense of APCO's Motion for Summary Judgment argued that APCO was non-compliant with the current license and/or SMP and that this creates dispute over a federal issue giving rise to federal jurisdiction. The Nissens in the court below merely argued that if APCO now takes position that it has the shoreline regulatory rights it says it has, APCO did not enforce these rights over 40 years after the parties recorded the flowage easement, and that is a further evidence that APCO does not have the regulatory rights or that APCO was non-compliant with the FERC License Order. JA 1014. The non-enforcement, once factually established (this is not an issue of law), does not create dispute over interpretation of the FERC License Order, it is just one of the many factors which the state court may, or may not, consider in interpreting the scope of the flowage easement. In any event, the Unites States Supreme Court has firmly established that access to federal courts may not be established through a federal defense. Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

having to make a reference to APCO FERC License to interpret the terms of the flowage easement in determining the scope of the private property rights is insufficient, as a matter of law, to open the doors for a federal jurisdiction in this case. Grable, 545 U.S. at 312, 125 S. Ct. at 2367. And contrary to APCO's argument, federal interest is not "substantial" as that term is defined under the Supreme Court precedent. The federal government's ability to enforce the FPA against APCO is not affected by this litigation. The government is free to interpret the FPA or the FERC License Order as it sees fit. If the state court finds APCO's flowage easement rights insufficient to regulate the Nissens' shoreline activities, APCO can acquire more property rights, or obtain more property rights through condemnation. 16 U.S.C. § 814.

II. Under the Well-Pleaded Complaint Rule, APCO's Complaint Does Not Arise Under the Constitution, laws, or treaties of the United States.

A. The Cases Cited by APCO to Establish Federal Cause of Action Do Not Discuss or Rule on the Issue of Federal Cause of Action or Federal Jurisdiction and/or Can Readily Be Distinguished.

On pages 18 and 19 of its Brief, APCO cites to several district court cases in support of a federal cause of action under 28 U.S.C. §1331 and §16 U.S.C. §825p.

The cases cited, however, have no precedential value, can be distinguished, and many did not even discuss or rule upon the issue of federal cause of action or jurisdiction. For example, the Nissens' flowage easement does not incorporate

APCO's federal license as did the deed in Timberline. VA Timberline, L.L.C. v. Appalachian Power Co., 343 Fed. Appx. 915, 916 (4th Cir. 2009)(stating that the easement was expressly made subject to the terms and conditions of the APCO's federal license). VA Timberline is therefore readily distinguishable. The opinion cited also does not mention or analyze 16 U.S.C. §825p on which APCO's Complaint relies in this case to establish a federal cause of action.

APCO also relies on Tri-Dam v. Michael, 2014 U.S. Dist. LEXIS 42472 (E.D. Cal. March 28, 2014)(CV1:11-cv-02138). The PACER review of the procedural history in Michael however reveals that even though the complaint alleged federal jurisdiction under §825p, the answer simply admitted the jurisdictional allegations, and therefore, §825p was never made an issue. The court was in error not to consider the jurisdictional issue on its own accord, nevertheless, the court ruled that Tri-Dam did not have any right to enforce its Shoreline Management Plan based on the FERC license (it needed to prove violation of an easement) and denied Tri-Dam's motion for summary judgment. Id. at *10. Michael thus harms APCO's argument. Additionally, the parties in Michael entered into settlement agreement resolving the dispute in the end.

Union Elec. Co. v. Mowinski, 2006 U.S. Dist. LEXIS 58242 (W.D. Mo. Aug. 18, 2006)(2:05-cv-04375) also contains a procedural and factual history distinguishable from this case. The PACER review of Mowinski reveals that the

complaint alleged that Mowinski did apply for a permit and was issued a permit and that he did not comply with the permit issued. Id. ¶13 of the Union Elec. Co.'s Complaint. That is not the case here. The Nissens did not sign a permit which would subject them to the SMP and the FERC License Order. The Mowinski's answer admitted jurisdictional allegations. The opinion cited makes no reference to §825p, does not analyze federal jurisdiction, and it is merely a decision on a motion to enforce settlement.

APCO also relies on APCO v. Arthur, 39 F. Supp. 3d 790 (W.D. Va. Aug. 11, 2014)(7:09-cv-00360). Even though the defendant filed an answer, it was a one page *pro-se* answer, and no Rule 12(b)(1) motion was filed challenging the federal jurisdiction of the court. The court was in error not to take up the issue of federal jurisdiction on its own.

Similarly, in Longenecker neither the federal jurisdiction nor private property rights were challenged in the same manner as they are in this case. See Appalachian Power Co. v. Longenecker, 2001 U.S. Dist. LEXIS 27185 (July 11, 2001).

APCO's reliance on Pressl v. Appalachian Power Co., 2015 U.S. Dist. LEXIS 136075 (W.D. Va. 2015) is also unconvincing for purposes of this case as Pressl is currently being appealed on the basis of the lack of federal jurisdiction. (4th Cir. Record No. 15-2348).

B. Contrary to APCO's Assertion, the Sufficiency of APCO's Property Rights in the Nissens' Land under the Flowage Easement Is Not a Matter of Fact and Is a Legal Issue for the State Court to Decide.

A legal dispute and justiciable issue exists as to the interpretation of the flowage easement deed and sufficiency of the rights granted to APCO to regulate the Nissens' shoreline activities. Generally, the rights and obligations under the parties' contract are governed by state law. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999)(vacating the order of the district court because the district court lacked jurisdiction and holding that the plaintiff's cause of action was a typical state action to enforce an easement).

Interpretation of deeds and contract is a matter of law, not a matter of fact. 24th Senatorial Dist. Republican Comm. v. Alcorn, 2016 U.S. App. LEXIS 7028, HN5 (Apr. 19, 2016). That however did not stop APCO from asserting in its Statement of Facts exactly the opposite. See APCO's Brief, Statement of Facts (B), p. 8 ("…., APCO Possesses Sufficient Property Rights to Operate the Project"); Statement of Facts, p. 9 ("the flowage easement gives APCO the ability to enforce obligations associated with operation of the project").

No matter how the ultimate issue of the sufficiency of private property rights is decided, that decision must originate from a state court as federal courts do not have jurisdiction over what is nothing more than a cause of action for violation of

the flowage easement. With respect to the Nissens, Count I, Violation of Obligations under the FERC License and SMP, is not a cause of action recognizable in law as the Nissens are not parties to the FERC License Order or SMP. APCO's duty to comply with its federal license does not provide a sufficient basis to invoke federal jurisdiction. Jeffrey Lake Dev. Cent. Neb. Pub. Power & Irrigation Dist., 2011 U.S. Dist. LEXIS 152634, at *9-10 (D. Neb. Nov. 23, 2011) (citing Central Iowa Power Coop. v. Midwest Independent Transmission System Operation, Inc., 561 F.3d 904, 919 (8th Cir. 2009)); Columbia Gas Transmission, LLC v. Singh, 707 F.3d 583, 591 (6th Cir. 2013).

APCO's response to the Nissens' argument that the FPA and the FERC License Order only regulate the licensees, not the property owners, and thus that there can be no federal cause of action under Count I, Violation of Obligations Under the FERC License Order and SMP, is that (1) the Nissens' land is partially located within the boundary of the federal Project and (2) that APCO has acquired sufficient property rights over the land to be able to regulate the use of the Nissens' land. APCO's Brief p. 22-23.

APCO's assertion that it had acquired sufficient property rights is a conclusory opinion, not a matter of fact. And, the property merely lying and being in the Project area is insufficient to create the right to regulate the property owned by others, and is insufficient to confer a federal question jurisdiction. To further

this argument, on page 4 of its Brief, APCO misstates that the Project includes all lands enclosed by the Project boundary, citing to its 2009 FERC License, JA 67. The 2009 FERC License however provides that the Project consists of, all lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary. JA 67 (emphasis added). FERC clearly interprets the Federal Power Act as not granting to the licensee any authority over private property beyond that which the licensee acquired and retained by private contract. See City of Holyoke Gas and Electric Dept., 115 FERC ¶ 62,295 (2006)("Standard license article 5 requires licensees to retain title in fee to, or the right to use in perpetuity, project property sufficient to accomplish all project purposes. This reflects the requirement that the licensee have sufficient control over project lands and works to enable [FERC], through the licensee, to carry out its regulatory responsibilities with respect to the project."); Alternative Energy Associates, 66 FERC ¶62,101 (1994)(stating that a licensee "must have adequate property rights to the project lands and works to carry out its responsibilities under the license."); Public Utility District No. 1 of Chelan County, Washington, 15 FERC ¶62,168 (1981)(acknowledging that "[t]o the extent that [a licensee] is unable to control shoreline activities and uses that adversely affect project resources, it is due to the [licensee's] failure to acquire adequate property interests for project purposes, as required by Article 5 [of its license]."); Tri-Dam v. Michael, 2014 U.S. Dist.

LEXIS 42472, *9-10 (E.D. Cal. March 5, 2014)(holding that a FERC license does not create or confer property rights on the licensee). Thus no matter what APCO does in its attempt to manufacture a federal jurisdiction in this case, any analysis of any court taking up this issue necessarily circles back to the interpretation of private property rights, a matter of state law.

Furthermore, APCO's argument that it has acquired sufficient property rights is also not a federal jurisdictional fact. Sufficiency of private property rights is not a jurisdictional fact because, whether or not the flowage easement provides sufficient property rights, the only viable cause of action for enforcing the alleged breaches is through Count II, violation of the flowage easement, a matter of state law.

Nevertheless, to confuse the issues, APCO argues on page 22 of its Brief that this Court must assume the truthfulness of the Complaint's allegations. APCO argues that because it alleged in its Complaint that it acquired sufficient property rights, the Court must accept this as a "factual truth". As this Circuit ruled in 24th Senatorial Dist. Republican Comm. v. Alcorn, the interpretation of a written contract, like a flowage easement deed in this case, is a question of law. 24th Senatorial Dist. Republican Comm. v. Alcorn, 2016 U.S. App. LEXIS 7028 (Apr. 19, 2016). In Alcorn, this Circuit distinguished Kerns, on which APCO relies, holding that controlling jurisdictional fact in Kerns, whether an employee was

acting within the scope of her employment for purposes of the Federal Tort Claims Act, had no analog where the issue before the court was purely a legal question that could readily be resolved in the absence of discovery. Id. at *7-8; Kerns. v. United States, 585 F.3d 187 (4th Cir. 2009). APCO's Complaint incorporated the flowage easement deed that states that the deed represents the entire agreement between the parties. JA 311-315. Thus, not only that this Court does not have to take APCO's allegation as true, but even if the court found that APCO had sufficient property rights, which it does not, this finding would not invoke a cause of action arising under the federal law. Unlike the Federal Tort Claims Act cause of action in Kerns, there is no underlying federal cause of action in this case because neither the FPA nor APCO's Federal License impose any duties upon the Nissens. Any duty that the Nissens have towards APCO would arise from the flowage easement.

That is why this case is so similar to Singh. Columbia Gas Transmission, LLC v. Singh, 707 F.3d 583, 591 (6th Cir. 2013). The Sixth Circuit found that if the Singhs had a duty to Columbia, it would arise from the easement, not from the Natural Gas Act. Id. Therefore, the Sixth Circuit held that neither the Natural Gas Act nor federal common law was the source of Columbia's cause of action, and that Columbia's cause of action could only be understood as asserting a state-law claim for interference with an easement. Singh, 707 F.3d at 588-89, 591-92. Just

like APCO here, Columbia alleged federal jurisdiction under the Natural Gas Act, 15 U.S.C.S. §717u, which is parallel to §825p. Singh, 707 F.3d at 591-92. The Sixth Circuit found that §717u did not apply in the case because the dispute was over the easement. Id. Singh cited to Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County, 366 U.S. 656 (1961) where the Supreme Court clarified that exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. Id. 16 U.S.C. §825p is not a generator of jurisdiction and APCO's Complaint is nothing more than a state-law claim for interference with an easement.

For purposes of federal jurisdiction, most directly, a case arises under federal law when federal law creates the cause of action asserted. Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 3d 72 (2013). APCO inserted Count I into the Complaint for this purpose; however, federal law does not create a cognizable cause of action against the Nissens. Singh and Tri-Dam v. Michael, 2014 U.S. Dist. LEXIS 42472, *9-10 (E.D. Cal. March 5, 2014), provide this Court with a well-reasoned basis for dismissal of Count I, Violation of Obligations under the FERC License Order and SMP, for failure to state a claim. Without Count I, APCO has no cause of arising under federal law. In comparison, to sustain Count I and thus a cause of action under federal law, APCO merely cites to several district court cases, analyzed and distinguished in part A of this brief, where the source of

duty violated to sustain a federal cause of action was not even discussed or put at issue.

APCO argues that the Nissens' heavy reliance on Singh is misplaced because APCO's Complaint did not rely solely on 16 U.S.C. §825p for jurisdiction but also relied upon 28 U.S.C. §1331. APCO's Brief page 36. APCO's reasoning is flawed. Just like 16 U.S.C. §825p, 28 U.S.C. §1331 also does not generate federal jurisdiction or provide a federal cause of action. 28 U.S.C. §1331 merely sets forth when federal jurisdiction will arise, if the cause of action arises under the laws of the United States. APCO in its Complaint alleged that for purposes of 28 U.S.C. §1331, the federal cause of action arises under the Federal Power Act, specifically §825p. JA 12. For the reasons set forth above, §825p is not applicable, and there is no other federally created right of action that would allow APCO to proceed against the Nissens.

III. Count II, Violation of Flowage Easement, Does Not Implicate Significant Federal Issues.

Alternatively, state-law claims may "arise under" federal law if they "implicate significant federal issues". Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). These claims constitute a "special and small category" of federal "arising under" jurisdiction. Empire Healthchoice Assurance, Inc. v. McVeigh, 574 U.S. 677, 699,

126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006). A significant federal issue is implicated if all four prongs of Gunn are satisfied and present. Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 3d 72 (2013). Federal jurisdiction over a state law claim will lie only if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Gunn v Minton, 133 S. Ct. 1059, 1065, 185 L. Ed. 2d 72 (2013). Contrary to APCO's argument, APCO has failed to satisfy all four prongs of Gunn analysis.

The Complaint in this case does not belong to this special and small category of cases. APCO makes a similar argument to that rejected by the Sixth Circuit in Singh. Singh, 707 F.3d at 589. The argument in Singh went as follows: the Singhs use of property must be limited in accordance with federal regulations imposing duties upon Columbia in order for Columbia to comply with federal regulations and in doing so a court must look to federal law. The Sixth Circuit however declined to follow this line of reasoning to find a federal subject matter jurisdiction. Id. (citing Columbia Gas Transmission Corp. v. Drain, 131 F.3d 552 (4th Cir. 1999) and several Ohio state courts which resolved disputes over the scope of easement between Columbia Gas and private property owners). APCO argues on page 25 of its Brief: "[t]he District court also properly ruled that reference to the Federal License would be required to determine the outer limits of some of the

broad rights granted to APCO in the Flowage Easement." (emphasis added). However, under the Supreme Court's interpretation of federal jurisdiction, mere reference to the SMP or APCO's Federal License is not sufficient to open the arising under door. This is a relevant portion of Grable on this point:

> The classic example is *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 65 L. Ed. 577, 41 S. Ct. 243 (1921)….., [A]lthough Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue. ***Smith* thus held, in a somewhat generous statement of the scope of the doctrine**, that a state-law claim could give rise to federal-question jurisdiction so long as it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]." *Id.*, at 199, 65 L. Ed. 577, 41 S. Ct. 243.
>
> **The *Smith* statement has been subject to some trimming** to fit earlier and later cases recognizing the vitality of the basic doctrine, **but shying away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the "arising under" door**. Id. (emphasis added).

Additionally, federal question, substantial or otherwise, is not necessarily raised. Whether the dock, removal of vegetation, the path to the dock, or the alleged fill activity interfere with the maintenance, existence or operation of the dam and/or power station, or are in breach of other provision of the flowage easement, can be determined without reference to the APCO's License Order. If the contract is complete on its face and plain and unambiguous in its terms, the courts do not search for its meaning beyond the instrument itself. 24th Senatorial

Dist. Republican Comm. v. Alcorn, 2016 U.S. App. LEXIS 7028, HN7 (Apr. 19, 2016). As the Fourth Circuit has recognized, a plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when every legal theory supporting the claim requires the resolution of a federal issue." Flying Pigs, LLC v. RRAJ Franchising, LLC, 757 F.3d 177, **14 (4th Cir. 2014). The District Court, in its Memorandum Opinion dated April 24, 2015, where it ruled on the Nissens' Counterclaim, held that the easement was unambiguous and that the rights of the parties had to be ascertained from the words of the deed and the extent of the easement could not be determined from any other source. JA 817-818. A federal issue is thus not necessarily raised.

On page 36 of its Brief, APCO argues that in Singh it was not clear from the complaint that a federal issue was disputed. Singh, at 589. A federal issue having to be disputed is one of the Gunn prongs. APCO however failed to give effect to the entire sentence in the opinion because the Sixth Circuit also noted that it was clear from the briefing that there was no dispute over the interpretation of the federal law regulating natural gas carriers or pipelines. Id. The Singhs do not argue that the regulation is invalid. Id. That is also the case here. There is no dispute over what FERC License Order requires of its licensee, APCO, or the FERC License Order's validity.

The Supreme Court has identified cases which would warrant a finding that the state law claims present substantial federal issue. Those cases present "nearly pure issue of law" rather than cases which involve "fact-bound and situation-specific" claims. Empire Healthchoice Assurance, Inc. v. McVeigh, 574 U.S. 677, 699, 700-01, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006). Pure questions of law which would warrant this kind of jurisdiction would have to involve the construction and validity of a federal statute or the U.S. Constitution. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 310, 315 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). In contrast, the Supreme Court has declined to exercise federal question jurisdiction over state law claims if the federal issue is not a pure question of law but is fact-bound and fact-specific. Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)(reviewing a reimbursement claim brought by an insurance carrier pursuant to a health care contract authorized by the Federal Employees Health Benefits Act). As the Sixth Circuit observed in Singh, the proper resolution of the scope of the pipeline easement is a fact-bound inquiry that looks at the specific context of the land. Singh, at 590. Whether the Nissens' dock or activities are in violation of the APCO's flowage easement rights requires a fact-bound inquiry.

Additionally, contrary to APCO's argument on page 30 of its Brief, question of which of APCO's FERC Licenses, the current one or APCO's 1960 License,

should be consulted when interpreting the language in the flowage easement, if any license will be consulted at all, does not create dispute over interpretation of federal law. Provided that the state court will search for meaning beyond the instrument itself, as it does not have to, which license it will refer to would turn on Virginia law, specifically, Flippo v. Csc Assocs. Iii, 262 Va. 48, 63; 547 S.E.2d 216, 226 (2001)(the facts surrounding the parties when they made the contract and the purposes for which it was made are to be taken into consideration as an aid in interpretation of the words or clauses used) and Pizzarelle v. Dempsey, 259 Va. 521; 526 S.E.2d 260 (2000)(use of easement must be restricted to the terms and purposes on which the grant was based). In any event, under Grable, mere reference to the APCO's Federal license, if needed, would not be sufficient to open door to a federal jurisdiction.

Additionally, substantial does not mean large or significant. As the court in Dominion Pathology held, just asserting a national importance of a federal act does not make every issue touching on such federal act "an important federal issue". Dominion Pathology Labs., PC v. Anthem Health Plans of Va., Inc., 2015 U.S. Dist. LEXIS 8002, *12 (E.D. Va. June 19, 2015). APCO's reliance on First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n, 328 U.S. 152, 172 (1946), is misplaced. In First Iowa, the State of Iowa intervened in the First Iowa's application for a license arguing that First Iowa should not be issued an application

because it failed to obtain a permit from the State of Iowa for the construction of the dam. Id. This was not a case of a dispute over private property rights but a decision explaining the extent of protection given by Congress in the enactment of the FPA to the rights of the States to control the licensees. The Court held that to require a state permit to secure federal license would vest a state with veto power over federal project which could easily destroy the effectiveness of the FPA. Id. Nothing of such dimension is at stake in this case. And, in comparison, FERC itself has expressly recognized that the resolution of private property disputes between APCO and the landowners are appropriate for the state court in the first place. See FirstLight Hydro Generating Company, 142 FERC ¶ 62,256, FN12 (2013) (stating that any disputes regarding property rights are matters for the state courts to resolve).

On page 33, APCO further argues that this case involves substantial issue of federal law considering obvious concerns of federal government and FERC in controlling projects licensed by FERC. APCO cites to Pressl, 2015 U.S. Dist. LEXIS 136075 (W.D. Va. 2015)(currently on appeal, 4th Cir. Record no. 15-2348), where the District Court held that the case involved a substantial issue of federal law because of FERC's goal to administer a uniform oversight of its licensees. While there may be federal interest in controlling the licensees, like APCO, the federal government has limited or no interest in private contract litigation. The

federal government's ability to enforce the FPA against APCO is not affected by this litigation. The government is free to interpret the FPA or the FERC License Order as it sees fit. If the state court finds APCO's flowage easement rights insufficient to regulate the Nissens' shoreline activities, APCO can acquire more property rights, or obtain more rights through condemnation. 16 U.S.C. §814. Federal interest is therefore not "substantial" as that term is defined under the Supreme Court precedent. If a case could be deemed to "arise under" federal law, and thereby invoke jurisdiction any time the litigation involves the FERC licensee or reference to FERC license, than these precedents, particularly Grable, would be meaningless insofar as they attempt to define a federal interest.

On page 32, APCO cites to several South Carolina district court cases to establish that this case involves "substantial" federal question. Snyder v. S.C. Elec. & Gas Co., 2016 U.S. Dist. LEXIS 54032 (D.S.C. 206); Soles v. S.C. Elec. & Gas Co., 2016 U.S. Dist. LEXIS 52744 (D.S.C. 2016). In both of these cases, the plaintiffs, Soles and Snyder, were guilty of exactly the opposite of what APCO is trying to do in this case: artful pleading to avoid federal jurisdiction. Snyder and Soles were suing for damages on account of flooding in state court alleging negligence stemming from licensee's mismanagement of water levels at the dam. The court ruled that the only ascertainable source of duty of care for plaintiffs' negligence claim against SCE&G stemmed from its status as a licensed FERC

project, thereby subjecting SCE&G to the rules and regulations of the FPA and FERC. Id. The federal court therefore had an interest in the uniform application of legal duties imposed upon the licensees of federal hydroelectric projects. The South Carolina plaintiffs sought to establish liability flowing from the breach of duties imposed by the FPA on licensee against the licensee. Snyder and Soles and Bausinger v. S.C. Elec. & Gas. Co., 2016 U.S. Dist. LEXIS 51943 (D.S.C. 2016), are therefore distinguishable.

Furthermore, the Nissens, unlike defendants in Timberline or Essar Steel Minn. did not expressly, knowingly and voluntarily agree to be subject to the FERC License Order. On page 35 of its Brief, APCO cites to Timberline and Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC, 103 F. Supp. 3d 1000 (D. Minn. 2015). In both of the cases, the contract expressly incorporated and was made subject to FERC orders. Essar Steel Minn., 103 F. Supp. 3d at 1006. Citing to Essar Steel Minn., APCO makes a broad statement that "the fact that the FPA includes 16 U.S.C. §825p shows that Congress expressly provided for a federal forum for the cases like the one at bar." Essar Steel Minn. does not stand for such a broad statement and is limited to a situation where the contract is expressly made subject to and incorporates FERC order, which is not the case in Nissen. Id. at 1022, fn4 ("if a plaintiff merely invokes that federal statute or a federal tariff, then a federal court does not necessarily have jurisdiction if the

parties do not dispute a substantial question about the statute or the tariff); Id. at 1013 (§717u, analog to §825p, does not create a cause of action, "exclusiveness" is a consequence of having jurisdiction, not the generator of jurisdiction).

Neither of the four prongs of Gunn are satisfied. Federal question jurisdiction will not lie.

IV. APCO's Rights in the Nissens' Land Are Not as Broad as APCO Asserts.

On page 4 of its Brief, APCO states that the Project includes all lands enclosed by the Project boundary, citing to its 2009 FERC License, JA 67. The 2009 FERC License, however, provides that the Project consists of all lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary. JA 67. This is significant because, contrary to what APCO might argue, APCO does not own fee simple interest in the Nissens' land below the contour the elevation of which is 800 feet. See p. 45-46 of APCO's Brief. Nevertheless, APCO goes that far on pages 45-46, twisting the language of the flowage easement, making an argument that it in essence obtained fee simple interest in the Nissens' land below contour the elevation of which is 800 feet and that it was the landowners who merely "reserved" easement for their own benefit, "right to cross" said premises to reach impounded waters for recreational purposes.

On pages 45-46 of its Brief, APCO cites to five cases to support its argument that since the Nissens are, in effect, mere easement holders, which they are not,

they do not have the right to build within that easement. APCO's argument and position has no basis in law or facts. Reservation occurs upon grant of fee simple rights. Not only that the Nissens have not granted fee simple interest to APCO but the word "reserve" is also nowhere to be found in the flowage easement deed. APCO has via flowage easement deed taken several sticks out of the Nissens' bundle of rights that comprise their estate in fee. APCO was not granted a fee simple. If the first granting paragraph of the flowage easement deed was a blank check giving APCO the unfettered right to "affect" the property, or even a fee simple as APCO now argues, there would be no need to add the language for APCO to have the right enter unto the property for the following purposes in the subsequent paragraph:

> ALSO, for the above mentioned consideration, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. JA 43.

Furthermore, the five cases cited by APCO stand for proposition that APCO, the easement holder, is not allowed to misuse, abuse and add additional burdens upon the Nissens' parcel not contemplated in the original grant. The Nissens did obtain a permit from the local authorities, Franklin County, to construct this particular dock. JA 607. The outer limit of APCO's discretion in the flowage

easement is therefore the original intent of the parties. It is the Nissens' position that the original intent, as discerned from the language of the flowage easement, did not encompass the Shoreline Management Plan. The language of the FERC License Order, be it the 1960 version or the current version, is just one of the factors which the state court may, or may not, use in aid of interpretation of the scope of the flowage easement. If the word "affect" was to be found ambiguous, applying the rules of construction, the court would first look to the rest of the deed, which concerns the right to overflow to construct and operate the dam and the power station, to determine its meaning. The 1960 FERC License Order or 16 U.S.C. §803(c) was not expressly or implicitly incorporated into the flowage easement, thus the argument by APCO on pages 41-42 of its Brief that the 1960 license, by incorporating into the 1960 license 16 U.S.C. 803(c), contemplated that APCO, if directed, by the Commission, might institute a wide variety of shoreline protections and regulations, is unpersuasive. Article 41, which delegated to APCO the authority to grant permission for certain uses which protect and enhance the scenic, recreational, and other environmental values of the Project, was not added until 1998. 82 FERC ¶62,109.

As argued by the Nissens in their Opening Brief, APCO was limited to flooding and/or affecting a portion of the Nissens' land for the purpose of construction, existence, operation and/or maintenance of the dam and/or power

station. Accordingly, in order for APCO to prove a violation of its easement, APCO must adduce evidence that the encroachments complained of interfere with one of the aforementioned items. This does not involve the interpretation or construction of federal law, but application of facts to the language of the easement.

APCO's broad interpretation of its right "to remove" and "to affect" is an argument of ownership and to regulate all uses of the easement. In any event, the flowage easement granted APCO limited rights. The determination of the extent of which rights is subject to the state court's jurisdiction.

It is likewise incorrect when APCO on page 5 states, as a matter of fact, that the flowage easement gave it the right "to regulate land within the Project boundary." There is no such language in the flowage easement.

CONCLUSION

For the reasons set forth above, the District Court's ruling on Nissens' Motion to Dismiss for lack of subject matter jurisdiction must be reversed and the subsequent rulings must be vacated.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1062 **Caption:** Appalachian Power Co. v. William W. Nissen, II, et al.

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Dated: 6/14/2016

CERTIFICATE OF SERVICE

I certify that on 6/14/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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