

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>APPALACHIAN POWER COMPANY,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>WILLIAM W. NISSEN, II,</b>	)	<b>Case No.: 7:14-cv-00535-MFU</b>
	)	
<b>and</b>	)	
	)	
<b>LORA J. NISSEN,</b>	)	
	)	
<b>Defendants.</b>	)	

**APPALACHIAN POWER COMPANY'S MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

This Court should deny the Rule 12(b)(1) motion to dismiss of Defendants William W. Nissen, II and Lora J. Nissen because there is subject matter jurisdiction in this case. The Defendants' narrow interpretation of the relevant statute is unsupported by the language of the statute or by the case law cited by the Defendants. In fact, several of the cases cited by Defendants are lawsuits which were filed in, and litigated to conclusion in, the federal district courts, without dismissal for lack of subject matter jurisdiction. These other cases have facts and allegations quite similar to the ones in the case at hand.

This Court also should deny the Rule 12(b)(6) motion to dismiss because Appalachian Power Company (“Appalachian”) has plead sufficient facts to state its claims. At best, the arguments by Defendants in support of their motion go to the merits of an issue in this case - the interpretation of a certain flowage right and easement deed - instead of testing the sufficiency of the allegations in the Complaint. Because a Rule 12(b)(6) motion does not resolve the merits of

a claim, their arguments are misplaced here, and are insufficient grounds to dismiss the Complaint under Rule 12(b)(6).

I. APPALACHIAN HAS STATED VIABLE CAUSES OF ACTION, AND DEFENDANTS HAVE FAILED TO MEET THE LEGAL STANDARD TO REQUIRE DISMISSAL UNDER RULE 12(b)(1).

The controlling rules are well settled. A District Court should only grant a Rule 12(b)(1) motion to dismiss if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Richmond Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992). This is not a case that can be dismissed as a matter of law.

A. There Are Numerous Cases Just Like The Case At Hand That Have Been Litigated, And Are Still Being Litigated, In The Federal District Courts.

Defendants argue that 16 U.S.C. §825p is only for use by the Federal Energy Regulatory Commission ("FERC" or "the Commission") to bring an action against a licensee so there is no subject matter jurisdiction in this case. (Defendants' Memorandum at 6-7.) They argue §825p only creates a federal cause of action by the FERC against a licensee. (*Id.* at 6.) However, their interpretation of §825p is far too narrow. Defendants do not cite one case in which the FERC used §825p as a basis for jurisdiction to bring an action against a licensee.

In fact, in Part II of their Memorandum, which contains the heart of their argument on subject matter jurisdiction, the Defendants cited only case, *Tri-Dam v. Schediwy*, Case No. 1:11-cv-01141 (E.D. Cal. 2014). In *Schediwy*, which was decided by a federal court, the FERC licensee sought a permanent injunction and equitable relief against a shoreline property owner to remove a retaining wall which the property owner had constructed within the project boundary. The Court did not dismiss the licensee's complaint for lack of subject matter jurisdiction. Rather, after discussing the project's license order, the shoreline management plan, and the flowage

easements, the court issued an order requiring the property owner to remove the wall. *Schediwy*, 2014 WL 897337, at \*10-11. Obviously, the *Schediwy* case does not support Defendants' argument that this Court has no jurisdiction to hear this case.<sup>1</sup>

There are numerous other boat dock, boat ramp, or shoreline use cases involving subject matter jurisdiction under 16 U.S.C. §825p that have been initiated in, or removed to, federal district courts. For examples, see the following:

1. *Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 WL 2474692 (E.D.Cal. June 7, 2013)(action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted additions to boat dock at Tulloch reservoir);
2. *Tri-Dam v. Michael*, No. 1:11-CV-2138, 2014 WL 1285644 (E.D. Cal. Mar. 28, 2014)(action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted retaining wall and expansion to dock at Tulloch reservoir);
3. *Tri-Dam v. Yick*, No. 1:11-CV-01301, 2013 WL 2474689 (E.D. Cal. June 7, 2013) (action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted boat dock at Tulloch reservoir);
4. *Tri-Dam v. Matityahu*, No. 1:11-CV-01512 (E.D. Cal. 2011)(action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted boat ramp, personal watercraft ports, and dock at Tulloch reservoir);
5. *Tri-Dam v. Case*, No. 1:12-cv-00946 (E.D. Cal. 2012)(action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant to remove his unpermitted boat ramp at Tulloch reservoir);
6. *Union Elec. Co. v. Mowinski*, No. 05-4375-CV, 2006 WL 1696541 (W.D. Mo. June 13, 2006) (action brought by FERC licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant dock owner to remove his unpermitted boat dock at Lake of the Ozarks);
7. *Union Elec. Co. v. Devine*, No. 2:00-cv-04082, 2007 WL 4244989 (W.D. Mo. Nov. 29, 2007), *aff'd*, 334 F. App'x 37 (8th Cir. 2009)(action brought by FERC

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<sup>1</sup> The Court in *Schediwy* also cited to *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 (W.D.Va. 2008), a case involving a property owner's effort to build docks, which were in violation of the SMP and Appalachian's easements, at Leesville Lake in the Smith Mountain Project. The *VA Timberline* case was litigated in this federal district court, and was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit. 343 F. App'x 915 (4th Cir. 2009).

licensee under 28 U.S.C. § 1331 and 16 U.S.C. §825p for injunction requiring defendant dock owner to remove his unpermitted and dilapidated docks at Lake of the Ozarks);

8. *Union Electric Co v. Prewitt*, No. 2:08-4113-CV (W.D. Mo. 2008)(action brought by FERC licensee under 28 U.S.C. §1331 and 16 U.S.C. §825p seeking injunction requiring defendants to remove their unpermitted boat docks from the shoreline at Lake of the Ozarks);
9. *Otwell v. Alabama Power Company*, No. 6:11-cv-02139 (N.D. Ala. March 21, 2012)(property owner's damage claims against FERC licensee arising from licensee's use of shoreline at reservoir removed to federal court under 16 U.S.C. 825p);
10. *Appalachian Power Co. v. Longenecker*, No. 7:00CV00731 (W.D. Va. 2001) (action brought by FERC licensee to remove encroachments from within boundary of project, in which court stated "Consistent with its license, as amended by an order dated February 17, 1998, Appalachian maintains control over the use and occupancies of property within the project.")
11. *J.W. Holdings, Inc. v. Appalachian Power Co.*, No. 6:04CV00033 (W.D. Va. 2005) (case removed to federal court under 28 U.S.C. §1331 and 16 U.S.C. §825p in which property owner sought declaration that Appalachian had no rights to restrict his ability to build boat docks at Smith Mountain Project);
12. *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 (W.D.Va.. 2008), *aff'd*, 343 F. App'x 915 (4th Cir. 2009)(case removed to federal court under 28 U.S.C. §1331 and 16 U.S.C. §825p in which property owner contended Appalachian could not limit its ability to build docks at the Smith Mountain Project); and
13. *Appalachian Power Co. v. Arthur*, 2014 WL 3900618 (W.D. Va. 2014)(in action brought by FERC licensee, court orders defendants to remove their unpermitted docks and other structures from within project boundary).

A federal court has an independent obligation to assess its subject matter jurisdiction, and it will "raise a lack of subject matter jurisdiction on its own motion." *Constantine v. Rectors and Visitors*, 411 F.3d 474, 480 (4th Cir. 2005). The courts in these numerous cases, which are similar to the case at hand, did not dismiss any of them for lack of subject matter jurisdiction.<sup>2</sup>

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<sup>2</sup> Technically, in one case, after removal from state court to federal district court under 28 U.S.C. §1331 and 16 U.S.C. §825p, the court later dismissed the case on Appalachian's Rule 12(b)(1) motion because the property owner, which was simultaneously pursuing its alleged property rights to build docks by intervening in a then-pending matter before the FERC regarding the approval of the Shoreline Management Plan, had failed to exhaust its administrative remedies with the FERC before filing suit. *J.W. Holdings, Inc. v. Appalachian Power Co.*, No. 6:04CV00033 (W.D. Va. 2005).

B. There Is Subject Matter Jurisdiction In This Court Under 16 U.S.C. §825p Because Appalachian Is Suing In Equity To Enforce The Liabilities And Duties Created By The Federal Power Act And Certain Orders Issued Thereunder.

The Defendants somehow contend that 16 U.S.C. §825p only applies for the FERC to bring suit against a licensee when a licensee has violated the Federal Power Act (FPA), 16 U.S.C. §791a *et seq.* (Defendants' Memorandum at 7). However, §825p is much broader:

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act [16 U.S.C. §§ 791a *et seq.*] 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 Act or any rule, regulation, or order thereunder. .... Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. . . . No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

16 U.S.C. §825p (emphasis added).

This case is being brought by Appalachian in equity to enforce the liabilities and duties created by the FPA and certain orders issued thereunder by the FERC, such as the December 15, 2009 Order which issued Appalachian a new and amended license ("FERC License Order") for the Smith Mountain Hydroelectric Project ("the Project"), and the January 30, 2014 Order which approved the update to the Shoreline Management Plan, ("Order Approving SMP Update").

The FERC License Order contained the FERC's standard land use article, which was designated as Article 415. (FERC License Order, 129 FERC ¶62,201, at 60.) Under Article 415, Appalachian has the authority and responsibility to allow only those uses and occupancies of Project property which are consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the Project. (*Id.*). "Licensees have a responsibility to ensure that shoreline development activities that occur within project boundaries

are consistent with project license requirements, purposes, and operations." (Order Approving SMP Update, 146 FERC ¶ 62,803, at 14.)

The FERC delegated to Appalachian the authority to grant permission for certain types of non-Project uses and occupancies of Project lands and waters, and to convey certain interests in those lands or waters, without prior FERC approval. (FERC License Order, 129 FERC ¶62,201, at 60.) Article 415 also allows Appalachian to establish a permit program for issuing permits for specified types of non-project use and occupancy of Project lands and waters. (*Id.*)

The Shoreline Management Plan (SMP) sets forth regulations for the placement of docks on the shoreline of the Project. Among other things, the regulations address the location, length, height, and maximum size of docks. The FERC originally made the SMP a part of Appalachian's license by a FERC Order dated July 5, 2005. (FERC Order Modifying and Approving Shoreline Management Plan, 112 FERC ¶61,026, at 33.) When the FERC renewed Appalachian's license in 2009 in the FERC License Order, it stated that the SMP that had been filed with Appalachian's license application on March 27, 2008 was approved and made a part of the license. (FERC License Order, 129 FERC ¶62,201, at p. 44). Per the terms of the FERC License Order, the types of use and occupancy of Project lands and waters for which Appalachian may grant permission without prior FERC approval include "piers, landings, boat docks, or similar structures and facilities, as determined under the Commission-approved Shoreline Management Plan." (*Id.* at 61.) However, the FERC has ordered:

Appalachian has continuing responsibility under its license to supervise and control the use and occupancy for which it grants permission under the SMP, and to ensure the compliance with the conditions imposed under the SMP. If a permitted use and occupancy violates any applicable law or regulation, or any condition imposed by Appalachian in its permits, for the protection and enhancement of the project's scenic, recreational, or other environmental values, or if a condition of the conveyance is violated, Appalachian must take any action necessary to correct the violation (including, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities).

(July 5, 2005 FERC Order Modifying and Approving Shoreline Management Plan, 112 FERC ¶61,026, at ¶80.)

In 2009, the FERC required Appalachian to draft and file an update to the SMP. In the January 30, 2014 Order Approving SMP Update, the FERC approved the SMP Update which Appalachian had filed on January 3, 2011, and had thereafter supplemented. 146 FERC ¶ 62,083. The process of updating the SMP was long and contested. The FERC noted:

Much of the debate during this proceeding concerns the question of who controls the project lakes. Several adjacent landowners, local government organizations, and other stakeholders want more control over activities and regulations at the project. As the Commission has stated and as previously discussed in this order, the Smith Mountain Pumped Storage Project is a federally-licensed hydropower project that must be operated consistent with its license, granted under the public interest standards required by the Federal Power Act. The licensee is solely responsible to the Commission for complying with its license and maintaining and operating the project for its stated purposes, including, public recreation, public access, and preservation of environmental values. The licensee has the discretion to approve or deny the privilege of private access and docking facilities to individuals, subject to Commission review and approval. Although the Commission has required the licensee to consult various agencies, entities, and stakeholders in carrying out plans to more effectively manage the project, the licensee-not the consulted entities-is responsible for the operation and maintenance of the lands and waters within the project boundary, in accordance with its license conditions. It is important for the licensee's responsibilities to be clearly understood so that the licensee and consulted entities may better cooperate for shoreline management and other purposes in the future and for the remainder of the license term.

We have reviewed the licensee's SMP update, as well as the public and agency comments. The record indicates that, with the modifications discussed above, the SMP update provides a reasonable plan to identify allowable shoreline uses in the project boundary, provides rules governing those uses, and protects project resources. Further, implementation of the SMP will not interfere with project purposes, such as public safety, public recreation, and the protection of environmental values. The SMP update meets the requirements of license article 413 [requiring Appalachian to continue to implement the earlier version of the SMP] and is consistent with the statutory standards by which the Commission regulates hydropower projects. Accordingly, the licensee's SMP update is approved, as modified above.

(Order Approving SMP Update, 146 FERC ¶ 62,083, at 27-28.)

C. Defendants Challenge Appalachian's Authority To Limit Construction Of Docks Within The Project Boundary.

Appalachian has brought this suit because Defendants have commenced construction of a boat dock within the boundary of this federal hydroelectric project without first obtaining a permit from Appalachian under the SMP. Defendants' partially completed dock is not one which Appalachian would be allowed to permit under the FERC License Order and the SMP because, *inter alia*, it is too large, too long, too high, and is located too close to the neighboring property.<sup>3</sup>

Defendants contend that they can build and occupy the dock in question without obtaining any permission from Appalachian.<sup>4</sup> Defendants argue that Appalachian's permitting process is a "shadow permitting process", and that they only need a permit from the county. (Defendant's Memorandum at 3, 13.) Defendants argue that their proposed dock is allowable because it does not interfere with the operation of the federal hydropower project. (*Id.* at 16.)

These are questions for this federal court to decide. In Count I, Appalachian has alleged that Defendants' dock construction, vegetation removal, and road construction / unauthorized fill activity within the Project boundary, without the benefit of a permit from Appalachian, is in contravention of the FERC License Order and the SMP.<sup>5</sup> Appalachian contends that Defendants' actions constitute an occupancy and use of Project lands and waters without Appalachian's permission and accordingly, are actions undertaken notwithstanding Appalachian's authority and obligation under the FERC License Order to permit only those uses of Project lands which protect and enhance the scenic, recreational, and other environmental uses of the Project.<sup>6</sup> Appalachian seeks a declaratory judgment against Defendants, declaring:

- (1) That, under the FPA, the FERC License Order, and the SMP, Appalachian has the authority and responsibility to regulate uses and occupancies of the Project lands;

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<sup>3</sup> Under the SMP, the maximum size allowed for a dock on Defendants' narrow lot is 1,500 square feet, yet Defendants proposed dock would be approximately 3,520 square feet in size. Complaint at ¶¶ 18, 28, and 31.

<sup>4</sup> Complaint at ¶30.

<sup>5</sup> Complaint at ¶33.

<sup>6</sup> *Id.*



- (2) That Defendants have acted in contravention of Appalachian's obligations and authority under the FERC License Order and the SMP by, without permission, commencing construction of a dock, conducting illegal vegetation removal, and constructing a road causing unauthorized fill activity, which acts: (a) are uses and occupancies of the Project lands and waters that are inconsistent with the purpose of protecting and enhancing the scenic, recreational, and other environmental values and resources of the Project; (b) are not authorized by Appalachian under its authority and responsibility in the FERC License Order and SMP; and (c) are a use and occupancy of Project property in a manner inconsistent with the FERC License Order, including the SMP.<sup>7</sup>

Appalachian asks this Court to order Defendants to remove the dock should they fail to obtain a permit from Appalachian for a dock structure which would meet the requirements of the SMP, or if they should fail to construct the dock according to the terms and conditions of the permit they obtain from Appalachian.<sup>8</sup> It also requests that this Court issue an injunction against Defendants, requiring them to undertake re-vegetation of the area, and remove the road and related fill, from the portion of Defendants' property within the Project boundary.

Therefore, in this action, Appalachian is seeking to enforce the liabilities and duties created by the FPA, and the specific orders issued thereunder, as set out above. This suit falls squarely within the provisions of 16 U.S.C. § 825p.<sup>9</sup>

In *Tri-Dam v. Schediwy*, a dock enforcement case in federal court that was not dismissed, the court noted that the FERC license order at issue in that case, like the license order at issue in this case, put "a duty on the licensee to ensure that lands within the project boundary are not put to a use that violates the FERC license." 2014 WL 891337 at \*8. The *Schediwy* court did not take exception with the licensee's pursuit of that relief in the federal court, and neither should this Court.<sup>10</sup>

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<sup>7</sup> *Id.* at 12-13.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> The last line of 16 U.S.C. §825p state that " No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter." (emphasis added) This also disproves Defendants' argument that §825p is only for actions brought by the Commission against licensees.

<sup>10</sup> Rather than cite any additional legal authority than *Schediwy*, Defendants attempt to rely upon hearsay statements which appear in a Roanoke Times newspaper article, which is further hearsay. (Defendants' Memorandum at 1-2.)

D. There Also Is Subject Matter Jurisdiction In This Court Under 28 U.S.C. §1331 Because Of The Substantial Federal Questions Raised Under The Federal Power Act And Certain Orders Issued Thereunder.

Defendants argue that they are not bound by the FPA or the terms of the SMP. However, the land in question where they attempt to build their oversized dock, is land that is located below the 800 foot elevation contour, which is within the boundary of this federal hydroelectric project.<sup>11</sup> Congress enacted the FPA to provide “a complete scheme of national regulation, [to] promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180 (1946). In the FPA, Congress gave FERC the authority to issue licenses for the development and operation of hydroelectric projects:

for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient ... for the development, transmission and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States ...

16 U.S.C. § 797(e). Smith Mountain Lake was, from its very inception, a creature of the license issued to Appalachian by the Federal Power Commission for a proposed hydroelectric development on April 25, 1960. Two large dams were constructed by Appalachian that created Smith Mountain Lake and Leesville Lake. The Project is an integral part of American Electric Power’s electric grid and contributes over 625 megawatts of power to the interstate transmission system. The Project includes 23,000 acres of water surface and over 500 miles of shoreline. The Project provides not only electric power to the nation, but also a recreational resource for the general public and thousands of persons who reside adjacent to the Project boundary.

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This type of inadmissible evidence is hardly the basis for dismissing a complaint in federal court for lack of subject matter jurisdiction.

<sup>11</sup> Complaint at ¶¶ 10, 21.

This case involves Appalachian's authority to grant or deny permission for Defendants to occupy the lands within a federally licensed hydroelectric project, which involves the resolution of a substantial federal question. It requires this Court to interpret the federal scheme of regulation under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, and Appalachian's license issued thereunder.

In that scheme, the FERC requires its licensee Appalachian to acquire and retain fee title or easements giving it the right to use in perpetuity, all property necessary or appropriate to construct, maintain, or operate the Project including Project reservoirs. (FERC License Order, 129 FERC ¶¶62,201, at 65.) Accordingly, Appalachian has obtained property rights to the lands upon which the Project was constructed. Appalachian either owns the land within the Project boundary in fee, or it owns flowage rights and easement deeds which grant it the right to submerge affected land and regulate use thereof lying within the Project boundary. (Complaint at ¶11; *see also J.W. Holdings, Inc. v. Appalachian Power Co.*, No. 6:04CV00033, Memorandum Opinion at 2 (W.D. Va. 2005)). FERC retains ultimate control, however, over the hydroelectric projects it licenses. Because a reservoir impounded by a project dam is part of the project and is a licensed project work, FERC “has not only the authority, but the obligation to insure that any uses of the reservoir will be consistent with the beneficial public purposes for which a license has been issued.” *Union Electric Company*, 90 FERC ¶ 61,249, 2000 WL 280769 (FERC 2000).

FERC’s licenses for hydroelectric power projects contain conditions under which the Project property, including the reservoir, may be made available for non-project uses, such as recreation. Permission for these uses may be withheld if the uses would interfere with other Project purposes, contrary to public interest. *Id.* As is most relevant to this controversy, FERC has the power to approve or reject development plans for boat docks constructed on Project lands and waters. *Coalition for Fair and Equitable Regulation of Docks v. FERC*, 297 F.3d 771, 778

(8th Cir. 2002), *cert. denied*, 538 U.S. 960 (2003)(rejecting property owners' argument that FPA does not confer on the FERC the power to regulate the use of project lands by anyone other than the licensee).

FERC's grant of rights and responsibilities to Appalachian, with regard to the management of non-Project uses and occupancies of Project lands and waters, has been recognized by this Court and by the General Assembly of Virginia. *See Appalachian Power Co. v. Richard L. Longenecker*, No. 7:00CV00731, Memorandum Opinion at 1-2 (W.D. Va. 2001) ("Consistent with its license, as amended by an order dated February 17, 1998, Appalachian maintains control over the use and occupancies of property within the project."); *J.W. Holdings, Inc. v. Appalachian Power Co.*, No. 6:04CV00033, Memorandum Opinion at 2-3 (W.D. Va. 2005) (finding that Appalachian has authority and responsibility to manage uses and occupancies of Project land, as described in the provisions of the license from FERC); *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 (W.D. Va. 2008), *aff'd.*, 343 F. App'x 915 (4th Cir. 2009)(granting Appalachian's motion for summary judgment); *Appalachian Power Co. v. Arthur*, 2014 WL 3900618 (W.D. Va. 2014)(ordering defendants to remove docks and other structures from within project boundary); Va. Code Ann. § 15.2-1226 (establishing that certain counties may by ordinance regulate the land below the Project boundary on Smith Mountain Lake concerning the location, size and length of docks, provided those ordinances do not conflict with the rights and responsibilities of Appalachian under its federal license for the Project).<sup>12</sup>

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<sup>12</sup> Defendants contend that they obtained all proper permits from the local and county authorities to build their dock, and attach as Exhibit B to their Memorandum a copy of a County residential building permit. (Defendants' Memorandum at 3.) This limited permit, however, states that it "makes no representation of approval on behalf of AEP". The county building permit cannot operate to displace any rights or responsibilities of Appalachian with regard to the location, size and length of the proposed dock because, under Virginia law, any county ordinance regulating the land below the Project boundary on Smith Mountain Lake concerning the location, size and length of docks cannot conflict with the rights and responsibilities of Appalachian under its federal license for the Project. Va. Code Ann. § 15.2-1226.

Appalachian's authority to regulate non-Project use and occupancy of Project land: (a) is established by federal law in the FPA, the FERC License Order, and the Order Approving The SMP Update; (b) has been recognized by this Court; (c) has been recognized by the Virginia General Assembly. Yet, Defendants will ask the Court to declare that Appalachian has no right to regulate Defendants' dock construction activities on Project land. Determining whether Appalachian has a right to regulate uses of Project land involves the resolution of a substantial federal question, which is an additional basis for jurisdiction in this Court.

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT APPALACHIAN HAS FAILED TO STATE A CLAIM, SO THE MOTION TO DISMISS UNDER RULE 12(b)(6) SHOULD BE DENIED.

Dismissals under Rule 12 motions are disfavored. *Baker v. Cuomo*, 58 F.3d 814, 818 (2nd Cir. 1995). Furthermore, the Court should accept plaintiff's factual allegations as true when deciding Rule 12(b)(6) motions. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In making this determination, a court must draw all reasonable inferences in favor of the plaintiff and construe the allegations of the complaint in the light most favorable to the plaintiff. *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 448 (4th Cir. 2011); *McKay Consulting, Inc. v. Rockingham Memorial Hosp.*, 665 F. Supp. 2d 626, 629 (W.D. Va. 2009).

Without question, Appalachian has pled factual allegations sufficient to support its claims for relief, and Defendants' Motion to Dismiss should be denied, in its entirety. Defendants have not demonstrated how Appalachian has failed to allege facts sufficient to support its claims for relief. Instead, Defendants repeatedly argue the merits of one issue in the case, namely what is the proper interpretation of the Flowage Right and Easement Deed.

Specifically, Defendants argue that Appalachian "has asserted an inaccurate and overly broad interpretation of the terms of the flowage easement." (Defendants' Memorandum at 13.) Defendants also argue that Appalachian's interpretation of the flowage easement differs from how Appalachian had previously enforced the flowage easement. (*Id.* at 14.) Defendants claim that such an interpretation, without Appalachian purchasing additional easement rights, "in essence amounts to property theft by [Appalachian]. This creates an additional basis for federal Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted." (*Id.* at 14.)

Not only does this argument improperly fail to accept Appalachian's factual allegations as true for the purpose of the pending Rule 12(b)(6) motion, it cites absolutely no authority to support the wild accusation that Appalachian's interpretation of the easement would be independent grounds for dismissal under Rule 12(b)(6). Even if their argument had some authority supporting it, the purpose of a Rule 12(b)(6) motion is to decide the adequacy of the complaint, not to determine the merits of the case. *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses") (internal citation omitted); *E.I. du Pont de Nemours & Co.*, 637 F.3d at 449-50 (citing *Twombly*, 550 U.S. at 570); *McKay Consulting*, 665 F. Supp. 2d at 629.

Defendants also argue that Appalachian's interpretation of the Flowage Right and Easement Deed "is an unreasonable interpretation of this easement." (Defendants' Memorandum at 14.) Again, this is simply argument on the merits, and it is not proper basis for a Rule 12(b)(6) motion to dismiss. *Martin*, 980 F. 2d at 952.<sup>13</sup>

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<sup>13</sup> Defendants' description of Appalachian's interpretation of the Flowage Right and Easement Deed as "grasping and imperialistic" on page 14 of their memorandum is certainly colorful, but this description alone does not provide any basis for dismissal under Rule 12(b)(6).

Defendants further argue that Defendants' attempted use of the easement at issue is very reasonable, and again that Appalachian's interpretation of the easement is unreasonable.

(Defendants' Memorandum at 15.) Again, these arguments, at best, go to the merits of the case. They are not any basis for dismissal under Rule 12(b)(6).

In addition to the allegations from Count I of the Complaint, which are referenced in Part I of this memorandum above, this Court should consider the following allegations in Count II as true for purposes of the Rule 12(b)(6) motion:

- Appalachian has obtained flowage easement rights over Defendants' property pursuant to a Flowage Right and Easement Deed dated September 12, 1960. (Complaint at ¶ 22.)
- The Flowage Right and Easement Deed grants Appalachian the right to enter upon the 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 below the elevation contour of 800 feet. (*Id.* at ¶ 24.)
- The Flowage Right and Easement Deed also prohibits Defendants from causing or permitting any contaminating matter to be cast, drained or discharged below the 800 foot contour. (*Id.* at ¶ 26.)
- Defendants have commenced construction of a dock, have removed vegetation, and have also constructed a road, all on the portion of Defendants' property located within the Project boundary (within the 800 foot contour), without a permit from Appalachian. (*Id.* at ¶ 27.) These activities are inconsistent with the estates rights and privileges granted to Appalachian in the Flowage Right and Easement Deed (*Id.* at ¶ 36.), and are in violation of the Flowage Right and Easement Deed. (*Id.* at ¶ 37.)

While the Defendants may have a different interpretation of the meaning of the Flowage Right and Easement Deed's terms, they have not demonstrated how the allegations above, and the allegations in the Count I of the Complaint as set forth in Part I above, fail to state a claim that would entitle Appalachian to relief in this case. Therefore, this Court should deny Plaintiff's Motion to Dismiss under Rule 12(b)(6).

## CONCLUSION

In fulfilling its responsibility to the FERC, Appalachian has developed a comprehensive Shoreline Management Plan to regulate non-Project uses and occupancies of Project land. The FERC approved this plan and incorporated it into the terms of Article 415 of Appalachian's license, stating that it "provides a reasonable plan to identify allowable shoreline uses in the project boundary, provides rules governing those uses, and protects project resources." 146 FERC ¶62,083 at 27-28. Because the FERC and Appalachian must balance all of the interests served by the hydroelectric project, not everyone is always going to be happy with enforcement of the SMP. Defendants, for example, apparently want to build a boat dock without a permit from Appalachian, and the proposed dock is almost two and a half times larger than what would be allowed on their narrow lot under the SMP. Appalachian has the responsibility and duty under the FERC License Order, the Order Approving SMP Update, and the SMP, to permit only those non-Project uses of Project lands which protect and enhance the scenic recreational and other environmental uses of the Project as set forth in the SMP. Appalachian seeks to enforce its obligations and duties under those Orders, specifically with respect to Defendants' proposed dock. Appalachian's claims properly belong in federal court and this Court should eventually enjoin the Defendants, requiring them to: (a) obtain a permit from Appalachian for a dock structure which would meet the requirements of the SMP; (b) re-vegetate the area; and (c) remove the road and related fill, from within the Project boundary.



Respectfully submitted,

APPALACHIAN POWER COMPANY

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of November, 2014, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such to the following:

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