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**

REBUTTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT BY APPALACHIAN POWER COMPANY

Defendants respectfully submit this Rebuttal Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Complaint filed, and in reply to Plaintiff Appalachian Power Company's Memorandum of Law in Opposition to Defendants' Motion to Dismiss. Federal Courts of strictly limited subject matter jurisdiction, and thus federal statutes must be read with exacting rigor with regard to jurisdiction they create in federal Courts. Plaintiff seeks to read into 16 U.S.C. § 825p language creating a federal cause of action against a non-licensee language that is not in the statute. Neither is there an indication cited by the Plaintiff in the legislative history of 16 U.S.C. § 825p that Congress contemplated the use of this statute for such a purpose when 16 U.S.C. § 825p was drafted and passed.

When there is not a clear federal cause of action, the Plaintiff has not met its burden for showing federal subject matter jurisdiction. Resolution of this question, which is one of how far the flowage easement rights of Plaintiff, a private party, extend below the 800 foot contour line

against other private parties such as these Defendants involves no federal question whatsoever. This dispute is purely a state law issue, does not involve any federal question between this Plaintiff and these Defendants, and does not involve analysis of any federal issues in order to reach a decision on the merits of the question between this Plaintiff and these Defendants.

As an additional point, Defendants contend Plaintiff simply does not possess the property rights to enforce the action that it seeks to take here. This point exists independent of any federal issue. The language of 16 U.S.C. § 825p is invoked by the Plaintiff solely to shoehorn this case into federal Court, and creates no cause of action for a private party against a non-licensee property owner for pursuit of a state law easement claim.

Plaintiff's alleged promises to other parties—no matter who they are—are not being litigated here, and they cannot be invoked to create a federal cause of action against the Defendants, or any cause of action at all pursuant to 16 U.S.C. § 825p. Nor can they create property rights where none exists. Plaintiff has one interpretation of the 1960 flowage easement under Virginia state property law, and Defendants have another one. No federal law is necessary to reach a conclusion on how far those state law easement rights extend. Plaintiff's claim is purely a state law issue that should be litigated in state Courts, if at all. Therefore, this Court has no federal subject matter jurisdiction over this case, and it should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Plaintiff's failure to meet its burden to show proper federal subject matter jurisdiction under Rule 12(b)(1) is by itself fatal to the Plaintiff's claim. Plaintiff's misapplication of a statute meant to run against licensees alone warrants immediate dismissal of this claim from federal courts. The Plaintiff has moreover been inconsistent and unreasonable in its application of the state law easement claims it suddenly asserts here, after years of taking a contrary position.

Therefore, the Plaintiff also fails to state a claim upon which relief can be granted under Federal Rule 12(b)(6), in addition to lacking 12(b)(1) subject matter jurisdiction.

I. Plaintiff Has Given No Thoroughly Reasoned Basis Supporting Federal Subject Matter Jurisdiction Here.

A. Federal Subject Matter Jurisdiction Scrutiny Is Strict, as Even Plaintiff's Cited Case Law Demonstrates. It Is the *Plaintiffs* Who Must Meet This Burden and Overcome the Presumption *against* Federal Subject Matter Jurisdiction.

It cannot be emphasized enough that *Plaintiff* has the burden of showing, through closely reasoned, rigorous legal analysis why federal Courts of strictly limited jurisdiction should have subject matter jurisdiction over the claims Plaintiff asserts. *United States ex. rel. Vuyyuru v. Jadhav,* 555 F.3d 337, 347-48 (4th Cir. 2008) ("'The burden of proving subject matter jurisdiction on a motion to dismiss is *on the plaintiff*, the party assertion jurisdiction.'") (quoting *Adams v. Bain*, 697 F.2d 1213, 1219) (4th Cir. 1982)). In the words of the U.S. Supreme Court, "It is to be presumed that a case lies outside this limited [federal court subject matter] jurisdiction . . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 395 (1991) (citing *Turner v. Bank of North America,* 4 U.S. 8 (1799); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)).

Plaintiff must therefore overcome its burden to clearly show why its cause of action belongs in federal court at all. It has not done so here. *See Vuyyuru*, 555 F.3d at 347-48; *Adams v. Bain*, 697 F.2d at 1219. When, as here, Defendants vigorously challenge subject matter jurisdiction, *Plaintiff must show clearly why this federal subject matter jurisdiction exists*. *Id.*

Plaintiff Appalachian Power Company seeks to elide and parry this issue by ignoring the above well-settled case law that it has a heavy burden to show subject matter jurisdiction.

Plaintiff moreover asserts in the title of its section on this point that "Defendants have failed to meet the legal standard to require dismissal under Rule 12(b)(1)." Pl. Opp. Mem. at 2. It avoids mentioning that it is the *Plaintiff who has the burden here to show federal subject matter jurisdiction*, without which this case must be dismissed immediately. As the Fourth Circuit Court of Appeals has recently stated in its interpretation of U.S. Supreme Court precedent, "when a district court lacks subject matter jurisdiction over an action, the action must be dismissed." *Vuyyuru*, 555 F.3d at 347; *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action.") (emphasis added); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005) ("a federal court necessarily acts *ultra vires* when it considers the merits of a case over which it lacks subject-matter jurisdiction") (italics in original).

Even Plaintiff Appalachian Power Company's own cited case law emphasizes the burden that Plaintiffs must carry to show a federal cause of action exists here. *Evans v. B.F. Perkins Co.*, which was cited by the Plaintiff, leads its analysis with the statement that "[t]he *plaintiff has the burden* of proving subject matter jurisdiction exists." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)) (emphasis added). In the other case cited by the Plaintiff on the 12(b)(1) standard for federal subject matter jurisdiction, *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, the case also states in the beginning of its analysis that "the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond, Fredericksburg*, 945 F.2d at 768 (citing *Adams*, 697 F.2d at 1219).

B. The Plaintiff Seeks to Evade the Strict Scrutiny for Federal Subject Matter Jurisdiction by Raising Irrelevant Issues Unrelated to This Case.

The Plaintiff Appalachian Power Company seeks to elude this strict scrutiny of its purported federal claim here by implying that "the material jurisdictional facts" may be "in dispute." Pl. Opp. Mem. at 2. This is not true here, and thus, Plaintiff's mealy-mouthed enunciation masquerading as a 12(b)(1) federal subject matter jurisdiction standard does not pass muster and is irrelevant to this case. The analytical dispute between the parties on this point is *on the law* of whether federal subject matter jurisdiction applies to the statute asserted by the Plaintiff, 16 U.S.C. § 825p, as a basis for jurisdiction in the way that Plaintiff claims it does.

This will require reading the jurisdictional aspects of the text of the statute cited by Plaintiff closely and strictly with a strong initial presumption against federal subject matter jurisdiction. *Kokkonen*, 511 U.S. at 395. The Plaintiff contends that it has the power to sue the Defendants here, William W. Nissen II, and Lora J. Nissen, pursuant to 16 U.S.C. § 825p of the Federal Power Act even though the Defendants have no relationship whatsoever with the entity tasked with enforcing this provision. Plaintiff alleges that Defendants can be sued for violating the Federal Power Act under 16 U.S.C. § 825p, but the Plaintiff Appalachian Power Company does not logically explain how the Defendants, who are simply trying to build a dock, can possibly be violators of the Federal Power Act.

The provision upon which Plaintiff Appalachian Power Company seeks to sue the Defendant Nissens states that

> [t]he District Courts of the United States, the Supreme Court of the District of Columbia, 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, regulation, 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 criminal proceeding shall be brought in the district wherein any act or transaction constituting the

> violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this Act [16 U.S.C.S. §§ 791a et seq.] 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. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347) [28 U.S.C.S. §§ 1254, 1291, and 1292]. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this Act [16 U.S.C.S. §§ 791a et seq.].

16 U.S.C. § 825p.

Nowhere does this statute indicate that private parties such as Plaintiff Appalachian Power Company have the right to sue over a state law easement claim to prevent the Defendant Nissens from building a dock that it finds too large. To the extent that there is ambiguity in the reading of whether federal subject matter jurisdiction applies, Plaintiff has the burden, as noted above, of demonstrating clearly why it creates a federal cause of action. *See Vuyyuru*, 555 F.3d at 347-48; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1991) ("The party invoking federal jurisdiction bears the burden of establishing the elements . . . . [T]hey are not mere pleading requirements but rather an indispensable part of the plaintiff's case.").[1]

C. The Plaintiff Implicitly Admits in *Its Own Memorandum of Law* That Non-Licensees Are Not Responsible for a Licensee's Own Deficiencies.

In fact, language Plaintiff quotes in its *own Memorandum of Law* works against its logic here. Pl. Mem. Opp. at 7. Plaintiff quotes the January 30, 2014, Order from the Federal Energy Regulatory Commission ("FERC"), which states, "*The licensee* [that is, the Plaintiff Appalachian Power Company] *is solely responsible to the Commission* for complying with its license . . . ." *Id.* (quoting 146 FERC ¶ 62, 083, at 27-28) (emphasis added). Thus, by implication, *no*

[1] This point is restated by the District Court of the Western District of Virginia's *Pro Se Handbook*, which states, "A federal question is one that alleges a violation of federal law (either a federal statute or a provision of the United States Constitution)." UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA *PRO SE* HANDBOOK (Aug. 2013), available at http://www.vawd.uscourts.gov/media/3177/prose_hdbk.pdf. The Defendants have not violated any federal law or provision of the U.S. Constitution, further reinforcing the argument that there is no federal question.

responsibility for licensee compliance lies with non-licensees such as the Nissens, who simply seek to build a larger dock so that William Nissen can enter and exit it on a mechanized vehicle without aggravating his back problems. *See Tri-Dam v. Schediwy*, Case No. 1:11-cv-01141-AWI-MJS, at *21 & n.5, 2014 U.S. Dist. LEXIS 29775 (E.D. Cal. Mar. 6, 2014) ("16 U.S.C. § 825p creates jurisdiction in the federal courts to enforce FERC licenses against a FERC licensee.")[2] (citing *United States v. S. Cal. Edison*, 300 F. Supp. .2d 964, 985 (E.D. Cal. 2004), a case in which the federal government sued a licensee pursuant to 16 U.S.C. § 825p for breach of federal FERC license). It is thus FERC's or the federal government's right to sue the licensee for non-compliance, not for the licensee to sue non-licensees such as the Nissens. *Id.* Yet, FERC is not a party to this case, nor does FERC have any licensing arrangement with the Defendant Nissens.

The Plaintiff's above quote from page 7 of its Memorandum of Law begs the question: If the "licensee"—that is, the Plaintiff Appalachian Power Company—*is "solely responsible to the Commission,"* then what gives the Plaintiff licensee the right to sue the Nissen *non-licensees* in this case? *See* Pl. Mem. Opp. at 7 (quoting 146 FERC ¶ 62, 083, at 27-28). The implication is that the *Nissens*, who are *not licensees*, are *not responsible to the Commission*. Yet, that is what Plaintiff is attempting to effectuate here by digressing at length in Count I of its Complaint and in its Memorandum of Law about its purported licensing duties, which are irrelevant to the Nissens because they are not licensees.

Here again, this point undercuts subject matter jurisdiction because whatever duties exist between the licensee and FERC rest with the licensee. The statute does not confer on the licensee the ability to drag others into problems of the Plaintiff licensee's own making. Those

[2] The PACER record of *Tri-Dam v. Schediwy* indicates that the Defendants did not raise the argument of lack of 12(b)(1) subject matter jurisdiction in their motion to dismiss. CM/ECF Civil Docket for Case #:1:11-cv-01141-AWI-SMS (Dkts. No. 20 and 21).

issues are just not relevant to this case's central dispute of *how far the state law easement between this Plaintiff and these Defendants extends.* This is strictly a matter of a local and state real estate law applying to a private property purchase between two private parties.

This case seeks to use a law running solely from the federal government to licensees as a subterfuge and a lever to take property rights from the Defendant Nissens without paying for them—that is, their state law-based easement rights underneath their dock below the 800 foot lake contour flowage line. This is a state law issue rooted in a state law dispute that belongs in state court. *Tri-Dam v. Keller*, Case No. 1:11-CV-01304-AWI-SAB, at **13-14, 2013 U.S. Dist. LEXIS 80617 (E.D. Cal. Jun. 7, 2013) ("To resolve property disputes, such as the issue of the interpretation of an easement, state law is generally followed.").

Again, this was acknowledged by a FERC spokeswoman who publicly stated last month in an October 17, 2014, published report that "FERC has no jurisdiction over property rights and *those issues are typically matters of state law*." Zach Crizer, *Appalachian Power's regulation of lakefront property draws ire at Smith Mountain Lake*, THE ROANOKE TIMES (Oct. 17, 2014), available at http://www.roanoke.com/business/news/bedford_county/appalachian-power-s-regulation-of-lakefront-property-draws-ire-at/article_3202039a-9046-5e20-bec6-735aebb6585a.html (also attached as Exhibit A to Plaintiff Original Motion to Dismiss) (emphasis added). FERC again officially restated this point last March in an Order, when it stated, "Any disputes regarding property rights" between licensees and non-federal landowners "are not within the Commission's [FERC]'s Jurisdiction; ***rather they are matters for the state courts to resolve***." FERC Order, 142 FERC ¶ 62,256, at *16 n.12, 2013 FERC LEXIS 524 (Mar. 27, 2013) (emphasis added). FERC has thus stated repeatedly that these state law real

estate property disputes are for state law courts to decide, contrary to the Plaintiff's attempts to escape this fact.

Whatever duties Plaintiff Appalachian Power Company has as to FERC or the federal government are outside the pale of relevance to this case. The Defendant Nissens never made any such licensing arrangements, and are not licensees, in spite of Plaintiff's attempt here to shift Plaintiff's costs of being one upon the Defendants through this lawsuit. Plaintiff Appalachian Power Company laments that its purported duty as a licensee to another party not in this case remains unfulfilled so long as it does not sue the Nissens for building a larger dock to accommodate his ailing back. This is a problem resting with Plaintiff Appalachian Power Company that is far outside the merits of this case.

There is no "material jurisdictional facts" inquiry needed to make such a legal determination as to the specific legal point of whether 16 U.S.C. § 825p creates a federal cause of action against non-licensees such as the Nissens, contrary to what the Plaintiff implicitly asserts on page 2 of its Memorandum of Law. Plaintiff does not assert that the Defendants signed any contract with FERC, which along with the federal government is responsible for enforcing 16 U.S.C. § 825p, and neither do Defendants. Plaintiff simply seeks through this action to use the mantle of a provision that actually only runs against the Plaintiff to manufacture a federal cause of action against Defendants when none exists.

The simple fact is that the heart of this case involves a state law dispute. Plaintiff has one interpretation of how far the 1960 common law contract for flowage easement property extends with the Defendants, and Defendants have another interpretation. The answer as to who is right lies within the language of the easement within the context of Virginia state law, and the circumstances surrounding the contract when it was consummated. No federal law analysis need

apply to resolve this dispute between these specific parties litigating this case here. In fact, such analysis is completely irrelevant to the claims at issue between these specific parties.

The Plaintiff never asserted that the Defendant Nissens signed a contract with FERC or anyone else in the federal government. There may be a dispute between the parties here *about the extent of a state law flowage easement* between Plaintiff Appalachian Power Company and the Defendants William and Lora Nissen, but *not* about issues underlying whether there is federal subject matter jurisdiction in this specific case between this Plaintiff and these Defendants. Plaintiff's reasoning for seeking to buy a state law easement right in the first instance does not impact the extent of the property rights between the parties, which is the sole issue in dispute here. This is not a federal law dispute, and federal law has no bearing in resolving it.

The Plaintiff instead recites at length its motivations for acquiring easement rights that *are of no relevance at all as to how far those easement rights extend, which is the sole issue in dispute here between these specific parties*. Plaintiff seeks to make this claim more complicated than it actually is in order to push this issue into federal Court. No analysis of federal law whatsoever is required to resolve this dispute. The question here is: *Does Plaintiff Appalachian Power Company have the easement rights derived from state law that it claims it does over the Defendants' property?* One must look to the 1960 deed and the terms of purchase to resolve this matter. Plaintiff claims that it purchased such rights from the Defendants, and the Defendants dispute how far that purchase extends. That state and local law-based disagreement is the entire case between these parties litigating here. Federal law plays no part in the outcome on the merits.

There is no need to inquire into federal law or federal issues here to resolve this case, contrary to the Plaintiff's series of *non sequiturs*, aimlessly wandering and irrelevant discussion of Plaintiff's own problems apart from the merits of this case, sophistry, and logical contortions. Attempts by the Plaintiff to assert a federal question here in this dispute between these two parties merely serve to inject an irrelevant red herring issue into this discussion, distract the Court, and cloud the issues.

The lack of subject matter jurisdiction alone for Plaintiff's claim requires immediate dismissal of the case. If there is no federal subject matter jurisdiction, all further analysis of the case is moot. The Plaintiff asserts no valid federal claim against the Defendant Nissens because the licensee cannot sue non-licensees for its own failure to fulfil its duties under the Plaintiff's license under the statute Plaintiff cites. The statute does not grant such a cause of action, and Plaintiff's misreading of the text of the statute does not alter that crucial fact.

II. The Plaintiff Appalachian Power Company Does Not State a Claim upon which Relief Can Be Granted in Federal Court under Rule 12(b)(6), in Addition to Having No Federal Rule 12(b)(1) Subject Matter Jurisdiction.

A. The Plaintiff's Complaint and Claims Do Not Meet the 12(b)(6) Standard.

In addition to lacking subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), Plaintiff also fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Federal Rule 12(b)(6) analysis should be rendered unnecessary because of Plaintiff's failure to meet 12(b)(1) standards for federal subject matter jurisdiction, but the complaint by Appalachian Power Company also does not survive 12(b)(6) scrutiny. As stated by *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), a court is not required to accept "legal conclusions" as "true" from the face of the complaint. The Plaintiff here brazenly asserts the legal conclusion that the Defendant Nissens somehow violated the Federal Power Act, under 16

U.S.C. § 825p, even though they are not power plant licensees with obligations under that statute. Compl. ¶ 1. This contention, for the reasons discussed above at length, has no merit.

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2006)). There must be, the Supreme Court has noted, "enough facts to state a claim for relief on its face." *Twombly*, 550 U.S. at 570. The assertions stated here by the Plaintiff do not qualify for a federal claim, and therefore do not qualify for relief against these Defendants. The facts stated by the Plaintiff moreover do not support its legal conclusions. This provides yet another reason for immediate dismissal of the Plaintiff's case.

This claims asserted by the Plaintiff do not pass the *Iqbal* and *Twombly* tests either. Plaintiff blames the Defendant Nissens for "violations of orders" that were in fact "issued" to Appalachian Power Company, not the Nissens. Compl. ¶¶ 1, 17, 18, 33. This assertion is utterly nonsensical. The Plaintiff Appalachian Power Company, because it wants a license to operate a power plant that will generate profits for itself, has cast the Nissens as enablers of Plaintiff's perpetuation of its own professed licensing shortcomings for seeking to build "an oversized dock" that is of a certain size and shape to alleviate William Nissen's back problems. *Id.* at ¶ 31. Plaintiff thus accuses the Defendants of being "detrimental to Appalachian's responsibilities" to another party entirely irrelevant to the dispute at issue between this Plaintiff, Appalachian Power Company, and these Defendants, William and Lora Nissen, who have a disagreement over how far their state-law based easement extends. *Id.* at ¶ 33.

As another case from this year notes, "Tri-Dam's [the licensee in that case] FERC license imposes upon Tri-Dam a duty to comply with and enforce the terms of the FERC license—including creation and enforcement of a SMP—but it does not grant Tri-Dam the property rights

to do so . . . . The mere inclusion of lands within a project boundary will not restrict landowner uses." *Tri-Dam v. Michael*, Case No. 1:11-cv-2138-AWI-SMS, at *10, 2014 U.S. Dist. LEXIS 42472 (E.D. Cal. Mar. 28, 2014) (denying Plaintiff licensee motion for summary judgment). Thus, the terms of the license *have nothing to do with the extent of the state law-based property rights that the Plaintiff possesses.* Therefore, federal law has no bearing on the outcome or merits of this case and there is no claim here upon which relief can be granted or subject matter jurisdiction either.

If Plaintiff wants more property rights from the Defendant Nissens, it can buy them at a price at which the Nissens are willing to sell, like any other real estate purchaser. Whatever Plaintiff needs to do to fulfill its license does not through 16 U.S.C. § 825p give it any more state law property rights over the Nissens than it has already purchased. Nothing in the text of that provision supports Plaintiff's aggressive and expansive interpretation of its terms. Here Plaintiff seeks to usurp state law-based property rights of the Defendants without paying for them through this meritless litigation and other lawsuits like it. Plaintiff seems to believe it has a better chance of doing so in federal rather than state courts, and that is likely why Plaintiff Appalachian Power Company is bringing its jurisdictionally manufactured action here.

If the Plaintiff Appalachian Power Company does not like the Nissens' dock size or its contours, Plaintiff can either buy the necessary property rights pursuant to Virginia state contract law, or sue them in state court on a state law claim if it thinks it already possesses such rights. If Plaintiff Appalachian Power Company is unhappy that statutory law does not confer federal subject matter jurisdiction upon such cases, it can petition the government to seek an alteration of the law. What is not permissible is for the Plaintiff to argue there is a federal cause of action where none exists as the text of the statute now reads.

B. The Plaintiff Distorts the 1960 State Law-Based Easement Terms at Issue between Plaintiff and Defendants.

Moreover, the assertions that Plaintiff Appalachian Power Company makes about the easement terms between the power company and the Nissens from 1960 are implausible on their face. The Plaintiff utterly distorts and takes out of context language from the easement so as to portray itself as having absolute power over whatever exists below the 800 foot contour line of Smith Mountain Lake. Pl. Mem. Opp. at 15. This is a blatant contradiction of the words on the face of the easement terms referenced by the Plaintiff.

The text of the 1960 flowage easement between the Plaintiff and the Defendants straightforwardly states that the flowage easement at issue grants Plaintiff the right to enter Defendants property "for the above mentioned considerations" related to the "construction existence and/or maintenance of the aforesaid dam and/or power station"—and subject to the "right" of "[g]rantors" (i.e., lakeshore property owners on Smith Mountain Lake holding such an easement) to cross the area "for recreational purposes." Pl. Mem. of Law in Support of Motion to Dismiss, Exhibit C at 1-2. Plaintiff omits these qualifications in its depiction of the easement.

Now, Plaintiff Appalachian Power Company is seeking to use language it quotes out of context from the 1960 flowage easement agreed to and interpreted under state law to invoke absolute power over what lies below the 800 foot contour line. Plaintiff's assertions and insinuations that the Nissens are in violation of the 1960 easement on page 15 of its Opposition Memorandum of Law to this Motion to Dismiss should not be accepted by the Court. They are cherry-picked and selectively plucked by Plaintiff apart from other qualifying language in the 1960 easement discussed in this Rebuttal Memorandum of Law and in the original Motion to Dismiss. The Plaintiff's statements about the easement are thus framed in their totality so as to

create a misperception of a different meaning from what the easement actually says and what it was meant to accomplish when the deal was struck between private parties in 1960.

As noted, Plaintiff has lately attempted to reinterpret selected words from the 1960 easement at issue to create a "shadow permitting" process over the residents of Smith Mountain Lake, backed with the persistent threat of federal litigation, after decades of operating under a completely separate interpretation of the easement. Defendants have reasonably decided, pursuant to the proper reading of this state law-based flowage easement, that that they wanted no part of the "shadow permitting" apparatus spawned by Plaintiff's unreasonable reading of the 1960 flowage easement language typically affecting Smith Mountain Lake property owners such as the Defendants. The Nissens applied for all the proper easement permits from local and county officials, see Pl. Mem. of Law in Support of Motion to Dismiss at Exhibit B, and now the Plaintiff Appalachian Power Company is punishing them to set an example of what may happen to those lakeshore property owners on Smith Mountain Lake and elsewhere who step out of line and do not follow Plaintiff's orders.

Plaintiff Appalachian Power Company now seeks to use cherry-picked easement language quoted out of context to convert its flowage easement into power to dictate without qualification what the Nissens can and cannot do below the 800 foot contour line, even though Plaintiff does not possess the requisite property rights to accomplish this end. This abusive and tortured application of the terms of the contract are clearly on their face not what was intended by the original 1960 flowage easement. It was created because Smith Mountain Lake needed to be flooded and entered from time to time for the purpose of assisting mechanical operation of the dam, not for the purpose of dictating dock sizes.

Plaintiff Appalachian Power Company made a flowage easement deal in 1960, and now it does not like that deal. Yet, instead of using its vast resources to pay the Defendants and other lakeshore property owners for the property rights that Appalachian Power Company seeks, Plaintiff pours these resources into crushing lakeshore owners like the Nissens one by one with spurious lawsuits in federal court that have no proper rooting in federal law, or in the law at all. This is a wholly improper and abusive use of federal courts pursuant to a statute that does not even confer upon the licensee, or anyone else, the right to sue the Nissens under the allegations stated in the Complaint. It is, moreover, pressed pursuant to a wholly unreasonable reading of the 1960 easement with the Defendant Nissens.

Again, it should be stated that this dispute over a state law easement claim is at bottom a question of state law. *Tri-Dam v. Keller*, Case No. 1:11-cv-01304-AWI-SAV, 2013 U.S. Dist. LEXIS 80617, at **12-13 (quoting *Pasadena v. California—Michigan Land & Water Co.*, 17 Cal. 2d 576, 579 (1941)) ("To resolve property disputes, such as the interpretation of an easement, state law is generally followed . . . 'The general rule is clearly established that the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement.'").

The Plaintiff, Appalachian Power Company, appears to be bending over backwards to avoid litigating this garden variety state law easement claim in state court. Perhaps it is an indication that the Plaintiff Appalachian Power Company lacks confidence in the state law basis for the issues that are at the heart of this dispute. Plaintiff instead seeks the familiar shelter of a bogus federal claim that is meant to be used by the federal government against the Plaintiff itself as a power company licensee, not Defendants such as the Nissens.

Plaintiff has sought to convert this 16 U.S.C. § 825p provision into a legal bludgeon against defenseless Smith Mountain Lake property owners like the Defendants here, some of whom have back issues, disabilities, and infirmities that lead them to build docks of different sizes and shapes than those that suit the whims of Plaintiff Appalachian Power Company.

Plaintiff has cited no apposite text or legislative history from when 16 U.S.C. § 825p was drafted to support its interpretation of this statute, nor is its selective quotation of the easement language from 1960 persuasive as a basis for its misuse of those provisions today. Plaintiff Appalachian Power Company's reading of both the statute's text and the easement language is on its face illogical, inapposite, and unsupportive of legal conclusions constituting a claim upon which relief can be granted. There is thus no federal question here under 28 U.S.C. § 1331, contrary to the Plaintiff's assertions, and there is no claim here upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Defendants respectfully renew their request that the Court dismiss the complaint in its entirety and with prejudice for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Date: November 25, 2014

Respectfully submitted,

By:_____

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