

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

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

DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

COMES NOW, the defendants, William W. Nissen, II and Lora J. Nissen, individually (hereinafter collectively "Nissens") by counsel, and files this their answer, responsive pleading, and counter-claim for declaratory judgment to the Plaintiff's Complaint.

Defendants state as follows:

1. Denied.
2. Admitted.
3. Denied, insofar as venue in this matter is not proper under 16 U.S.C. § 825p.
4. Admitted.
5. Denied, insofar as only a portion of the Nissens' parcel located in Franklin County, Virginia is subject to a flowage easement of Appalachian.
6. Admitted.
7. Admitted.

8. Admitted.

9. Admitted.

10. Denied, insofar as the Nissens have no knowledge regarding the allegation that Project boundary at the parcel of land in question conforms to the contour elevation 800 FMSL and demand strict proof thereof. The Nissens further maintain that the FERC License Order speaks for itself.

11. Denied, insofar as the flowage rights only grant Plaintiff the right to submerge lands subject to the Project but does not authorize Plaintiff to regulate uses in the Project unless such uses are inconsistent with Plaintiff's flowage rights. Admitted as to Plaintiff's remaining allegations in paragraph 11.

12. Denied, insofar as the Nissens have no knowledge of the allegations contained in paragraph 12 and demand strict proof thereof.

13. Denied, insofar as FERC only has the regulatory authority over a licensee and can only administer and enforce the terms of the license through the licensee and the licensee's state property rights.

14. Denied, insofar as Article 415 does not grant Plaintiff authority beyond, or other than, the property rights it maintains under Virginia law. With regard to the remaining allegations contained in paragraph 14, the Nissens maintain that the FERC License Order speaks for itself.

15. Denied, insofar as the Nissens have no knowledge regarding the development process or goals of the SMP and demand strict proof thereof. The Nissens further deny the alleged comprehensiveness of the SMP. With regard to the remaining allegations contained in paragraph 15, the Nissens maintain that the SMP speaks for itself.

16. Denied, insofar as the SMP only pertains to Project lands that Plaintiff has acquired or retains a property interest in. With regard to the remaining allegations contained in paragraph 16, the Nissens maintain that the SMP speaks for itself.

17. Admitted.

18. Denied, insofar as the SMP only pertains to Project lands that Plaintiff has acquired or retains a property interest in. With regard to the remaining allegations contained in paragraph 18, the Nissens maintain that the SMP speaks for itself.

19. Denied, insofar as the SMP only pertains to Project lands that Plaintiff has acquired or retained an interest in. With regard to the remaining allegations contained in paragraph 19, the Nissens maintain that the SMP speaks for itself.

20. Denied, insofar as the SMP only pertains to Project lands that Plaintiff has acquired or retains a property interest in. With regard to the remaining allegations contained in paragraph 20, the Nissens maintain that the SMP speaks for itself.

21. Admitted.

22. Admitted.

23. The Nissens maintain that the Flowage Easement speaks for itself.

24. The Nissens maintain that the Flowage Easement speaks for itself.

25. The Nissens maintain that the Flowage Easement speaks for itself.

26. The Nissens maintain that the Flowage Easement speaks for itself.

27. Admitted, insofar as the Nissens did not obtain a permit from Plaintiff. Denied with regard to the remaining allegations in paragraph 27.

28. Admitted.

29. Denied, insofar as the trees and vegetation removed and the road constructed by the Nissens are not within the Project boundary.

30. Admitted.

31. Denied, insofar as the boat dock is not oversized and the removed vegetation, constructed road, and additional fill are not within the Project boundary. With regard to the remaining allegations in paragraph 31, the Nissens admit that they never obtained a permit from the Plaintiff and maintain that the FERC License Order and SMP speak for themselves.

32. The Nissens incorporate their responses to paragraphs 1 through 31 above.

33. Denied.

34. All allegations contained in paragraph 34 and its subparts are denied.

35. The Nissens incorporate their responses to paragraphs 1 through 34 above.

36. Denied.

37. Denied.

38. All allegations contained in paragraph 38 and its subparts are denied.

THE NISSENS' COUNTERCLAIM FOR DECLARATORY JUDGMENT

39. The Nissens incorporate their responses to paragraphs 1 through 38 above.

**THE NISSENS' FIRST REQUEST FOR DECLARATORY JUDGMENT –
FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION OVER MATTERS
BROUGHT UNDER 16 U.S.C § 825p INVOLVING STATE PROPERTY RIGHT
DISPUTES BETWEEN FERC LICENSEES AND THIRD-PARTY NON-LICENSEES.**

40. The Nissens incorporate their responses to paragraphs 1 through 39 above.

41. 16 U.S.C. § 825p authorizes FERC to bring claims against its licensees in federal district court.

42. 16 U.S.C. § 825p does not provide a private cause of action for FERC licensees against third-party non-licensees in matters pertaining to property disputes.

43. FERC is not a party to this suit.

44. Plaintiff is a licensee of FERC, but the Nissens are not licensees of FERC.

45. The Nissens are, for the sake of this matter, third-party non-licensees.

46. The Nissens have not violated any order or statute issued under the FPA that would be subject them to direct liability to FERC.

47. FERC does not have jurisdiction over, or the authority to alter, property rights and obligations between licensees and third-party non-licensees.

48. Plaintiff's indirect regulatory authority under the FERC License Order fails to provide a sufficient basis for invoking federal question subject matter jurisdiction.

Furthermore, Plaintiff's responsibilities under the FERC License Order does not render a dispute between parties over property rights a federal question.

49. This matter involves purely a state claim easement issue that should be heard in state court.

50. This Court does not have subject matter jurisdiction over this matter.

WHEREFORE, the Nissens respectfully pray that this Court enter a declaratory judgment in its favor and against Plaintiffs, declaring as follows:

A. That federal court have no subject matter jurisdiction over matters brought under 16 U.S.C § 825p involving state property right disputes between FERC licensees and third-party non-licensees, such as the Nissens;

B. That this Court lacks the subject matter jurisdiction necessary in order to hear this case;

C. That this case be remanded to the proper Virginia circuit court;

D. That this Court award the Nissens their costs of suit including attorneys' fees and other associated costs; and

E. That this Court order such other relief as the Court deems equitable and just.

**THE NISSENS' SECOND REQUEST FOR DECLARATORY JUDGMENT –
ALTERNATIVELY, IF THIS COURT ASSERTS SUBJECT MATTER
JURISDICTION OVER MATTERS BROUGHT UNDER 16 U.S.C § 825p
INVOLVING STATE PROPERTY RIGHT DISPUTES BETWEEN FERC
LICENSEES AND THIRD-PARTY NON-LICENSEES, THAT THIS MATTER IS
NOT YET SUBJECT TO FEDERAL QUESTION JURISDICTION.**

51. The Nissens incorporate their responses to paragraphs 1 through 50 above.

52. Federal jurisdiction under 16 U.S.C § 825p cannot be triggered until it is determined that a legitimate violation has occurred.

53. It cannot be determined if the Nissens have violated obligations under the FERC License Order or SMP until it is determined if the Flowage Easement is subject to the FERC License Order and SMP.

54. Issues of property law are subject to the jurisdiction of state courts.

55. This court does not have jurisdiction in this matter until it can be determined definitely that the Flowage Easement is subject to the FERC License Order and SMP.

56. A state court must first determine that the Flowage Easement is subject to the FERC License Order and SMP before federal question jurisdiction is triggered under 16 U.S.C § 825p.

WHEREFORE, in the alternative, should this court assert subject matter jurisdiction over matters brought under 16 U.S.C. § 825p involving state property right disputes between

FERC licensees and third-party non-licensees, the Nissens respectfully pray that this Court enter a declaratory judgment in its favor and against Plaintiffs, declaring as follows:

A. That this Court does not have federal question subject matter jurisdiction over this matter until it is determined by a state court that the Flowage Easement is subject to the FERC License Order and SMP;

B. That this case be remanded to the proper Virginia circuit court;

C. That this Court award the Nissens their costs of suit including attorneys' fees and other associated costs; and

D. That this Court order such other relief as the Court deems equitable and just.

THE NISSENS' THIRD REQUEST FOR DECLARATORY JUDGMENT – ALTERNATIVELY, SHOULD THIS COURT ASSERT SUBJECT MATTER JURISDICTION OVER MATTERS BROUGHT UNDER 16 U.S.C. § 825p INVOLVING STATE PROPERTY RIGHT DISPUTES BETWEEN FERC LICENSEES AND THIRD-PARTY NON-LICENSEES, AND DETERMINE THAT IT MAY MAKE A DETERMINATION AS TO THE PROPERTY RIGHTS OF THE PARTIES IN THIS CASE, THAT THE FLOWAGE EASEMENT PROVIDES PLAINTIFF WITH INSUFFICIENT PROPERTY RIGHTS TO REGULATE THE NISSENS' PROPERTY UNDER THE FERC LICENSE ORDER AND SMP.

57. The Nissens incorporate their responses to paragraphs 1 through 56 above.

58. The Nissens own the real property at issue in this matter in fee simple, subject to the Flowage Easement executed in 1960.

59. The Flowage Easement at issue in this matter only authorizes Plaintiff to submerge the portion of Nissens' property below the 800 foot contour elevation in connection with the construction and operation of a hydroelectric dam. (Pl.'s Exhibit C, at 1-2).

60. The Flowage Easement at issue grants the Nissens "the right to possess and use said premises [the property below the 800 foot contour level] in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to

cross said land to reach the impounded waters for *recreational purposes*.” (Pl.’s Exhibit C, at 2) (emphasis added).

61. The Nissens’ construction of the dock at issue in this matter is for recreational purposes and is not inconsistent with the Flowage Easement. Prior to constructing the dock at issue, the Nissens obtained proper permits from Franklin County authorizing its construction. A copy of this permit is attached as Exhibits B.

62. The Flowage Easement only limits the Nissens’ rights to the property insofar as they may not materially impact Plaintiff’s right to impound and flow waters up to the 800 foot contour level. (Pl.’s Exhibit C, at 1-2).

63. Plaintiff’s rights to the Nissens’ property is limited to the ability to impound and flow waters up to the 800 foot contour and ensure that such flow is not being so impeded as to disrupt Plaintiff’s operation of a hydroelectric dam. (Pl.’s Exhibit C, at 1-2).

64. Plaintiff’s initial license from the Federal Power Commission granted in 1960 did not authorize or require Plaintiff to regulate shorelines within the Project lands.

65. The aforementioned license granted in 1960 was amended in 1998 to require Plaintiff, as a licensee of FERC, to protect and enhance the scenic, recreational, and other environmental values of the Project boundary and develop a shoreline management plan (hereinafter the “SMP”).

66. Plaintiff developed a SMP in 2003.

67. The SMP was implemented by the FERC Order issued in 2005, and was approved as part of the 2008 FERC License Order (hereinafter the “FERC License Order”). (Pl.’s Exhibit A, at 44). A FERC Order modifying and approving an updated version of the SMP was approved on January 30, 2014.

68. The FERC License Order provides Plaintiff with the responsibility of ensuring that the uses of lands within the Project boundary in which it maintains a property right are consistent with federal law and policy. The FERC License Order defines the Project boundary as the area following “the 800.0-foot contour around the perimeter of Smith Mountain Lake, which is 5 feet above the normal operating level of 795.0 feet NGVD.” (Pl.’s Exhibit A, at 6).

69. Article 5 of the FERC License Order required Plaintiff to, within five years of the issuance of the License Order, “acquire title in fee or the right to use in perpetuity all lands . . . necessary or appropriate for the construction maintenance, and operation of the project.” (*Id.* at 65). Article 5 further requires Plaintiff, as a FERC licensee, to “retain the *possession* of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises *easements, water rights, and rights or occupancy and use.*” (*Id.* at 65) (emphasis added).

70. FERC does not grant nor could it grant licensees the necessary property rights to regulate private property within Project boundaries, nor does it grant licensees any powers that they do not already hold with existing property rights.

71. Likewise, the SMP is only applicable to lands within the Project boundary that Plaintiff has acquired or retains a property interest in. Plaintiff, as a licensee of FERC, “has no authority to regulate construction on privately owned lands, unless the property owner has given [Plaintiff] those rights.” (Defendants’ Exhibit A: FERC Chairman Cheryl A. LaFleur’s Letter to U.S. Congressman Robert Hurt, December 8th 2014).

72. Due to the implementation of the SMP into the FERC License Order, Plaintiff was obligated to obtain property rights to the SMP’s Project boundary in accordance with

Article 5 of said order. (*Id.* at 65). The SMP defines the Project boundary as the “elevation representing the 800 foot contour NGVD for Smith Mountain Lake.” (Pl.’s Exhibit B, at 8).

73. The Flowage Easement has not been modified since its execution in 1960 and makes no reference to Plaintiff’s FERC licenses or SMP.

74. The Flowage Easement grants the Nissens broad use of the property and does not limit their use to specific dimensions or purposes.

75. Plaintiff’s interest in the Nissens’ property is limited to the Flowage Easement, which specifically only allows Plaintiff to flood the property up to the 800 foot contour for the purposes of operation of a hydroelectric dam.

76. This limited property interest does not arise to the level of possession or rights to occupy or use the property encumbered by the Flowage Easement.

77. Plaintiff was required by Article 5 of the FERC License Order to acquire such rights within five years of 2008.

78. The Flowage Easement provides Plaintiff with insufficient property rights to regulate the Nissens’ property under the FERC License Order and SMP.

79. Plaintiff has no authority to regulate the Nissens’ property in accordance with the FERC License Order and SMP.

80. The existence of the Flowage Easement is not sufficient to deprive the Nissens’ from exercising their rights of fee simple ownership that are unaffected by the Flowage Easement.

81. The FERC License Order authorizes Plaintiff “to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission

approval.” (Pl.’s Exhibit A, at 60). Such authority may only be exercised “if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project.” (*Id.*).

82. Plaintiff attempts to enforce this authority through the SMP, which sets forth regulations on a number of uses and activities.

83. The SMP also authorizes Plaintiff to require properties owners subject to the SMP to apply for permits for certain uses and activities, including but not limited to vegetation cover and dock construction. (Pl.’s Exhibit B, at §§ 2.5-3.6). Plaintiff makes the ultimate determination as to issuance of permits. (*Id.* at § 3.1).

84. Plaintiff also attempts to require those in possession of lands not subject to the FERC License Order and SMP to apply for permits for certain uses and activities.

85. Those who are granted permits are required to, among other things, agree to abide by the SMP and all current and future terms of Plaintiff’s federal licenses, agree to be considered a licensee of Plaintiff, and agree to be subject to Plaintiff’s authority to determine whether a permitted use or activity is no longer in the public interest.

86. Plaintiff utilizes the permits as a tool to acquire the authority to regulate activities and uses on properties that are not subject to the SMP.

87. Plaintiffs record permits authorizing construction of docks and other structures with Virginia circuit court clerk’s offices.

88. Upon information and belief, Plaintiff’s recordation of the permits with Virginia circuit court clerk’s offices indicates Plaintiff’s acknowledgment of its inability to regulate properties not subject to the SMP.

89. Plaintiff asserts that the Nissens were required to obtain a permit prior to constructing the dock and road and removing vegetation.

90. The Nissens did not apply for a permit prior to beginning construction on the dock and road and removing vegetation.

91. The Nissens are not required to apply for permits from Plaintiff to construct the dock and road and remove vegetation because their property is not subject to the FERC License Order and SMP.

92. Should the Nissens apply for a permit, they would be required to, among other things, agree to grant Plaintiff the authority to regulate his dock and associated works, agree to abide by the SMP, agree to abide by all current and future terms of Plaintiff's federal licenses, agree to Plaintiff's authority to determine if the dock or road is no longer in the public interest, agree to not assert any interests contrary to that held by Plaintiff with regard to the dock or road, and agree to be considered a licensee of Plaintiff. Copies of these permit applications are attached as Exhibits C through H.

93. Plaintiff seeks to grant itself the authority to regulate the Nissens' use of the Flowage Easement via the permit.

94. The Nissens are not required to seek permission or a permit from Plaintiff for such uses and activities because Plaintiff does not hold necessary or sufficient rights to the Nissens' property and, as such, the Nissens' property is not subject to the FERC License Order or SMP.

WHEREFORE, in the alternative, should this court assert subject matter jurisdiction over matters brought under 16 U.S.C. § 825p involving state property right disputes between FERC licensees and third-party non-licensees, and determine that it may make a

determination as to the property rights of the parties in this case, the Nissens respectfully pray that this Court enter a declaratory judgment in its favor and against Plaintiffs, declaring as follows:

A. That the Flowage Easement does not provide Plaintiff with sufficient authority to regulate the Nissens' property under the FERC License Order and SMP;

B. That Plaintiff is not authorized to regulate property within the Project boundary if its property interest in the land that is sought to be regulated does not arise to the requirements of Article 5 of the FERC License Order;

C. That the Nissens' construction of the dock, removal of vegetation, and construction of the road are not in breach of the Flowage Easement;

D. That the Nissens' construction of the dock, removal of vegetation, and construction of the road are authorized because their property is not subject to Plaintiff's FERC License Order or SMP;

E. That the Nissens are not required under law to cease construction of the dock or other structures, nor are they required under law to undertake re-vegetation of the area or remove the road and related fill;

F. That the Nissens are not required to obtain a permit from Plaintiff in order to construct their dock and road and remove vegetation;

G. That this Court award the Nissens their costs of suit including attorneys' fees and other associated costs; and

H. That this Court order such other relief as the Court deems equitable and just.

**THE NISSENS' FOURTH REQUEST FOR DECLARATORY JUDGMENT –
ALTERNATIVELY, IF THIS COURT ASSERTS SUBJECT MATTER
JURISDICTION OVER MATTERS BROUGHT UNDER 16 U.S.C § 825p
INVOLVING STATE PROPERTY RIGHT DISPUTES BETWEEN FERC
LICENSEES AND THIRD-PARTY NON-LICENSEES, AND FURTHER FINDS
THAT THE FLOWAGE EASEMENT MAY BE REGULATED UNDER THE FERC
LICENSE ORDER AND SMP, THAT THIS COURT MUST DETERMINE THE
EXTENT TO WHICH THE NISSENS' RETAINED PROPERTY RIGHTS UNDER
THE FLOWAGE EASEMENT ARE SUPERSEDED AND EXTINGUISHED BY
FEDERAL REGULATIONS IMPOSED BY PLAINTIFF, A PRIVATE
CORPORATION LICENSEE, UNDER THE FEDERAL POWER ACT.**

95. The Nissens incorporate their responses to paragraphs 1 through 94 above.

96. Should this Court determine that FERC has the authority to alter property rights and obligations between licensees and third-party non-licensees, then this Court must determine what property rights were originally held by the Nissens with regard to the Flowage Easement, and what said rights were superseded or extinguished by the FERC License Order and SMP.

97. If FERC has the authority to alter property rights and obligations between licensees and third-party non-licensees and the Nissens' original property rights held in the Flowage Easement were superseded or extinguished by the FERC License Order and SMP, this Court must determine if there has been a taking of rights or condemnation of rights.

98. If a taking or rights or condemnation of rights has occurred, the Nissens are entitled to just compensation.

99. Issues of property law are subject to the jurisdiction of state courts.

100. The valuation of the Nissens' property cannot be determined by this Court.

WHEREFORE, in the alternative, should this court determine it has subject matter jurisdiction over matters brought under 16 U.S.C. § 825p involving state property right disputes between FERC licensees and third-party non-licensees, and further finds that the

Flowage Easement may be regulated under the FERC License Order and SMP, the Nissens respectfully pray that this Court enter a declaratory judgment in its favor and against Plaintiffs, declaring as follows:

- A. That extinguishment or supersession of the Nissens' pre-existing property rights held under the Flowage Easement has occurred in consequence to subordination of said Flowage Easement to the FERC License Order and SMP;
- B. That valuation of the Nissens' property rights cannot be determined by this court;
- C. That this case be remanded to the proper Virginia circuit court to determine loss of value curative of this taking and condemnation of rights;
- D. That this Court award the Nissens their costs of suit including attorneys' fees and other associated costs; and
- E. That this Court order such other relief as the Court deems equitable and just.

**THE NISSENS' FIFTH REQUEST FOR DECLARATORY JUDGMENT –
ALTERNATIVELY, IF THIS COURT ASSERTS SUBJECT MATTER
JURISDICTION OVER MATTERS BROUGHT UNDER 16 U.S.C § 825p
INVOLVING STATE PROPERTY RIGHT DISPUTES BETWEEN FERC
LICENSEES AND THIRD-PARTY NON-LICENSEES, THAT PLAINTIFF MUST
SATISFY ITS OBLIGATIONS UNDER THE FERC LICENSE ORDER BY
INTEGRATING AND COORDINATING WITH LOCAL, STATE AND FEDERAL
REGULATORY AUTHORITIES WITHOUT THE DEPRIVATION OF THE RIGHTS
RETAINED BY THE NISSENS' UNDER THE FLOWAGE EASEMENT.**

- 101. The Nissens incorporate their responses to paragraphs 1 through 100 above.
- 102. Plaintiff has the means to integrate and coordinate with and rely upon other existing and comprehensive local, state, and federal regulatory authorities to satisfy its obligations under FERC Order issued in 2005, approved as part of the FERC License Order.

103. Plaintiff's coordination and integration with and reliance upon other existing and comprehensive local, state, and federal regulatory authorities is a much less adversarial and more appropriate and cost efficient manner of satisfying its obligations under the FERC License Order than the deprivation of the Nissens' property rights under the Flowage Easement.

WHEREFORE, in the alternative, should this court determine it has subject matter jurisdiction over matters brought under 16 U.S.C. § 825p involving state property right disputes between FERC licensees and third-party non-licensees, the Nissens respectfully pray that this Court enter a declaratory judgment in its favor and against Plaintiffs, declaring as follows:

A. That the Plaintiff has the means to integrate with and rely upon other existing and comprehensive local, state and federal regulatory authorities to satisfy its obligations under FERC License Order without taking property rights as enunciated under the current SMP;

B. That no impairment of title to property shall take place under the terms of part A immediately above;

C. That curative steps are required to correct land title records affecting the Nissens' rights under the flowage easement at the expense of the Plaintiff;

D. That this case be remanded to the proper Virginia circuit court to determine the means by which curative steps be taken;

E. That this Court award the Nissens their costs of suit including attorneys' fees and other associated costs; and

F. That this Court order such other relief as the Court deems equitable and just.

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