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June 28, 2017

The Honorable James J. Reynolds, Judge
401 Patton Street
Danville, VA 24543

RE: Appalachian Power Company v William W. Nissen, II and Lora J. Nissen
Franklin County Circuit Court Case No.: CL17-1605

Dear Judge Reynolds:

This letter follows the June 16, 2017 hearing on Appalachian Power Company's Motion for Summary Judgment in the above referenced matter. On that date, you ruled from the bench and granted Appalachian Power Company's Motion for Summary Judgment. The parties now disagree as to the content of the Final Order reflecting the Court's ruling. Thus, we are submitting to you two draft Final Orders. One Final Order reflects the Nissens' understanding of the Court's ruling, and the other reflects Appalachian Power Company's understanding of the Court's ruling.

The Final Order submitted on behalf of the Nissens is the three page order that states, among other things: ".... and for the reasons stated on the record by the Court, the Court does hereby grant APCO's Motion for Summary Judgment and enters judgment in favor of APCO and against the Nissens." The Nissens believe that this accurately reflects the Court's ruling.

The draft Final Order being submitted on behalf of Appalachian Power Company consists of four pages and contains eight specific conclusions. The Nissens would note that these specific conclusions were not articulated by the Court at the June 16, 2017 hearing.

Enclosed for your consideration are the pages from the June 16, 2017 hearing transcript reflecting the Court's ruling from the bench.

If you have any questions or comments, please advise me.

Very truly yours,

CASKIE & FROST

By: 

J. Frederick Watson

JFW/sjh

Enclosures

CC: Honorable Teresa J. Brown, Clerk
Franklin County Circuit Court
275 South Main Street, Suite 212
Rocky Mount, VA 24151

CC: William and Lora Nissen,
6553 Scruggs Rd.
Moneta, VA 24121

CC: Matthew P. Pritts, Esquire
Woods Rogers PLC
P.O. Box 14125
Roanoke, VA 24038-4125

VIRGINIA:

IN THE CIRCUIT COURT FOR FRANKLIN COUNTY

APPALACHIAN POWER COMPANY,)

Plaintiff,)

v.)

WILLIAM W. NISSEN, II,)

and)

LORA J. NISSEN,)

Defendants.)

Case No. CL17-1605

FINAL ORDER

On June 16, 2017, the parties appeared by counsel to be heard on Plaintiff Appalachian Power Company's ("APCO") Motion for Summary Judgment and its Motion for Protective Order, and on the Defendants' opposition thereto.

Upon consideration of the pleadings, responses to requests for admissions, Plaintiff's Motion for Summary Judgment, Plaintiff's Memorandum in Support of its Motion for Summary Judgment, Defendants' Response and Memorandum of Law in Opposition to Motion for Summary Judgment, Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment, APCO's Motion for Protective Order, the Defendants' Response in Opposition to the Motion for Protective Order, exhibits, and the arguments of counsel, and for the reasons stated on the record by the Court, the Court does hereby GRANT APCO's Motion for Summary Judgment and ENTERS judgment in favor of APCO and against the Nissens.

Given the ruling on APCO's Motion for Summary Judgment, APCO's Motion for Protective Order, which pertained to discovery requests that were not due to be responded to

until after the June 16, 2017 hearing date, is deemed to be moot.

The Court further ORDERS that, in light of the anticipated appeal of this ruling, the currently-unfinished Nissen dock is to be left in the condition it is as of the date of the June 16, 2017 hearing, with no further construction by the Nissens or their agents, or no removal or destruction by APCO or its agents, during the pendency of the appeal of this case.

AND IT IS SO ORDERED.

The Clerk of Court is directed to strike this matter from the docket and to furnish a copy of this Final Order to all counsel of record.

ENTERED this _____ of _____ 2017.

_____, Judge

I ask for this:

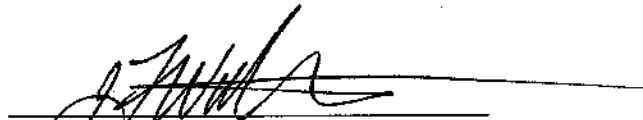


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Counsel for Plaintiff Appalachian Power Company

WOODS ROGERS PLC
ATTORNEYS AT LAW

Seen and objected to for the reasons argued *ore tenus*, for the reasons stated in the Defendants' Response and Memorandum of Law in Opposition to Motion for Summary Judgment, for the reason that the Court's ruling resulted from a misreading of the subject flowage easement, for the reason that there are genuine disputes as to material facts, and because the Court erred in ruling (1) that APCO's easement rights were tantamount to fee simple ownership rights, and (2) that the subject flowage easement granted APCO the absolute right to remove structures and to regulate the Defendants' property located below the 800 foot contour:



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Paulina B. Dirom, Esq.

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Counsel for Defendants William W. Nissen, II, and Lora J. Nissen

VIRGINIA:

IN THE CIRCUIT COURT FOR FRANKLIN COUNTY

APPALACHIAN POWER COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM W. NISSEN, II,) Case No. CL17-1605
)
 and)
)
 LORA J. NISSEN,)
)
 Defendants.)

FINAL ORDER

On June 16, 2017, the parties appeared by counsel to be heard on Defendant Appalachian Power Company's ("APCO") Motion for Summary Judgment and its Motion for Protective Order. After reviewing the pleadings, responses to requests for admissions, exhibits, and other written submissions of the parties, and after hearing the arguments of counsel, the Court reached the following conclusions:

1. The language of the September 19, 1960 Flowage Right and Easement Deed ("Flowage Easement"), which the Defendants William W. Nissen, II, and Lora J. Nissen (collectively, the "Nissens") agree applies to their property on Smith Mountain Lake, is plain and unambiguous;
2. The Flowage Easement grants APCO the right to enter onto the Nissens' property at any time from time to time and, at its discretion, to cut, burn, and/or remove therefrom any and all structures and objects located below the 800-foot elevation contour.

3. The Nissens have constructed a dock on the portion of their property that is located below the 800-foot elevation contour;

4. The Nissens have refused APCO's request that they remove the dock or allow APCO to enter and remove the dock;

5. APCO's rights under the Flowage Easement include the right to enter and cut, burn and/or remove the dock constructed on the Nissens' property below the 800-foot elevation contour;

6. APCO's rights, including the power to remove any and all structures and other things below the 800-foot elevation contour on the Nissens' property, includes the power to regulate the construction of and occupancy of the premises by any and all structures, including docks, on that portion of the property;

7. The Nissens' reserved right under the Flowage Easement to cross the portion of their property below the 800-foot elevation contour to reach the water of Smith Mountain Lake for recreational purposes does not include the right to construct any structures, including docks, on that portion.

8. There is no genuine issue of material fact in dispute between the parties.

Based on the foregoing and the other reasons stated on the record during the hearing, the Court GRANTS APCO's Motion for Summary Judgment and ENTERS judgment in favor of APCO and against the Nissens.

Given these conclusions and the ruling from the bench on June 16, 2017, the Motion for Protective Order, which pertained to discovery requests that were not due to be responded to until after the June 16, 2017 hearing date, is deemed to be moot.

The Court further ORDERS that, in light of the anticipated appeal of this ruling, the currently- unfinished Nissen dock is to be left in the condition it is as of the date of the June 16, 2017 hearing, with no further construction by the Nissens or their agents, or no removal or destruction by APCO or its agents, during the pendency of the appeal of this case.

AND IT IS SO ORDERED.

The Clerk of Court is directed to strike this matter from the docket and to furnish a copy of this Final Order to all counsel of record.

ENTERED this _____ of _____ 2017.

Circuit Judge

WE ASK FOR THIS:



Matthew P. Pritts (VSB No. 34628)

Justin Simmons (VSB No. 77319)

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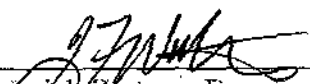
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Counsel for Plaintiff Appalachian Power Company

SEEN AND OBJECTED TO ON THE FOLLOWING GROUNDS: This Order does not accurately reflect the Court's June 16, 2017 ruling from the bench. Further object for the reasons stated and argued at the 6/16/17 hearing, for the reasons stated in Defendants' Response and Memorandum of Law in opposition to Motion for Summary Judgment, for the reason that the Court's ruling resulted from a misreading of the subject flowage easement deed, for the reason that there are genuine disputes as to material facts, and because the Court erred in ruling (1) that APCO's easement rights were tantamount to fee simple ownership rights, and (2) that the subject flowage easement deed granted APCO the absolute right to remove structures and to regulate the Defendants' property located below the 800 foot contour.


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Counsel for Defendants William W. Nissen, II, and Lora J. Nissen

1 Shoreline Management Plan gets reviewed.
2 It is on a five-year review. I think it's
3 set to be three or four years from now, I'm
4 now sure. That's the time where you can
5 bring that up.

6 So, Your Honor, I have nothing
7 further on the motion for summary judgment.
8 If you want to hear argument on the motion
9 for protective order?

10 THE COURT: No, not right now.

11 It's obvious that this is -- whatever
12 I decide today is not going to be the last
13 say. The Pressl case is on appeal to the
14 Supreme Court. I expect whatever I decide
15 today is going to be on appeal to the
16 Supreme Court. And they have ultimately
17 got to decide whether or not my
18 interpretation of the flowage easement in
19 the Pressl case is accurate.

20 But as I read the flowage easement,
21 it is almost indecipherable to figure out
22 any way it could be different in any
23 meaningful way than a fee simple.

24 I mean, it gives Appalachian so much

1 authority. The way I read the modifier "at
2 Appalachian's discretion" modifies the
3 following clause. Not the prior clause,
4 but the following clause. At Appalachian's
5 discretion, cut, burn and/or remove
6 therefrom any and all buildings,
7 structures, improvements, trees, bushes,
8 driftwood, and other objects or debris of
9 any and every kind or description.

10 Now -- and it doesn't say until the
11 pond is full. It doesn't say for 20 years.
12 It doesn't say anything other than at any
13 time and from time to time. And if they
14 have as broad a right as that language to
15 this Court implies, then they absolutely
16 have the right to destroy the Nissens' dock
17 for whatever reason they want. It's
18 stupid. It is -- but, you know, people can
19 make foolish contracts. And perhaps at the
20 time that this was done there was an
21 expectation that there really wasn't going
22 to be any limitation on what was done, and
23 I suspect for the first 30 or so years
24 there wasn't any limitation. But times

1 change and situations change, and
2 Appalachian has now essentially been pushed
3 into limiting things.

4 Now, I don't for the purposes of
5 considering summary judgment consider the
6 Shoreline Management Plan. I'm only
7 considering the flowage easement and the
8 breadth to which it governs the rights of
9 the parties before the Court.

10 But I don't see how I can read it
11 reasonably in any way other than to
12 grant -- that grants Appalachian the power
13 to destroy that which is below the 800-foot
14 level. And I think Judge Moon's language,
15 and I know it's not binding on me, but it's
16 certainly persuasive, that the power to
17 destroy includes the power to regulate.

18 I'm going to grant summary judgement
19 in favor of Appalachian. However, I'm
20 going to direct that at this point nothing
21 be done with respect to this dock. It's
22 not to be improved in any way, it's not to
23 be destroyed in any way until such time as
24 Virginia Supreme Court has had an

1 opportunity to consider this, whether it be
2 through direct appeal of this Court's
3 decision on this case or whether it be
4 through the Pressl case, because I think
5 the issue is the same.

6 I don't think there's any point in
7 allowing discovery at this point because if
8 the Court's decision to uphold summary
9 judgment is granted, then discovery won't
10 do anything other than waste a lot of
11 money.

12 Does either side have any questions
13 about that?

14 MR. PRITTS: Your Honor, I don't know
15 if the dock is capable of use at the
16 moment. It shouldn't be improved, it
17 shouldn't be destroyed. Every day that
18 someone sits there and uses it for a year
19 and a half while the case is on appeal,
20 people go by on a boat and they say, well,
21 they are using a big dock, why are you --

22 THE COURT: Well, I'm not going to
23 enjoin the Nissens from using their
24 property. I don't think that's --

1 MR. PRITTS: I just wanted to clarify
2 and see what your ruling would be with
3 regard to use.

4 THE COURT: If it's usable, they can
5 use it. They can't add anything more to
6 it, they can't -- but you're not taking
7 anything away from it, either.

8 MR. PRITTS: Fair enough. Thank you,
9 Your Honor.

10 THE COURT: Just going to freeze it
11 as a status quo.

12 Any questions?

13 MR. WATSON: No, Your Honor.

14 THE COURT: Okay. That will be the
15 judgment of the Court.

16 MR. PRITTS: Thank you, Your Honor.

17 (The hearing was concluded at 3:31
18 p.m.)
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