IN 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' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, TO CERTIFY INTERLOCUTORY ORDER

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Defendants William W. Nissen, II and Lora J. Nissen ("Nissens") submit this memorandum in support of their Motion for Reconsideration of this Court's February 2, 2015 Order (the "Order"), *Appalachian Power Co. v. Nissen*, NO. 7:14-cv-00535, 2015 U.S. Dist. LEXIS 11609 (W.D. Va. Feb. 2, 2015), denying the Nissens' motion to dismiss. In the alternative, the Nissens submit this memorandum in support of their Motion to Certify the Order for interlocutory appeal on the issues raised herein to the Fourth Circuit pursuant to 28 U.S.C. § 1292(b) and stay trial proceedings.

INTRODUCTION

In its Order denying the Nissens' motion to dismiss Plaintiff's complaint, this Court determined that it has subject matter jurisdiction over this case pursuant to 16 U.S.C. § 825p.

In this motion, the Nissens are not asking this Court to re-evaluate every issue addressed in its Order. As discussed herein, however, the Order did not address some significant aspects of the Nissens' claim that this Court lacks subject matter jurisdiction over this case. Additionally, in concluding that subject matter jurisdiction was proper under § 825p, the Order did nothing more but quote a portion of § 825p and then note that Plaintiff brought a suit in equity against the Nissens under the statute, without citing to any authority. Moreover, none of the cases cited in the Order as support for the conclusion that this Court has subject matter jurisdiction over this matter raised or spoke to the issue of subject matter jurisdiction. As such, this court's reliance on these cases to support its determination is improper. Furthermore, the Order failed to independently examine Plaintiff's standing in this case.

Accordingly, the Nissens move this Court to reconsider and revise its Order under Rule 54(b) to determine that § 825p does not provide federal courts with subject matter jurisdiction over matters involving property right disputes between FERC licensees and third-party non-licensees arising under state law. Should this Court determine that it has subject matter jurisdiction, the Nissens move this Court to reconsider and revise its Order under Rule 54(b) to reconsider and revise its Order to determine that Plaintiff lacks standing to bring this suit. Here, this Court's otherwise broad discretion to reconsider interlocutory orders is narrowed because issues of subject matter jurisdiction and standing go to the heart of this Court's ability to hear this case.

Alternatively, should this Court deny the Nissens' request that it reconsider and revise its Order, the Nissens request that this Court certify a direct interlocutory appeal to the Fourth Circuit pursuant to 28 U.S.C. § 1292(b) because interlocutory reversal at this juncture would

conserve judicial resources and economy, as well as discovery and party expenses related to litigating this case. Should this Court grant the Nissens' request for certification, they further request a stay in these proceedings.

STANDARD OF REVIEW

Rule 54(b) permits a court to revise any order that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b). Under this rule, parties may move a district court to reconsider and modify its interlocutory judgments at any time prior to the entry of a final judgment. *See Am. Canoe Ass'n v. Murphy Farms, Inc*., 326 F.3d 505, 514–15 (4th Cir. 2003); *Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462, 1470 (4th Cir. 1991); *Power Paragon, Inc. v. Precision Tech. USA, Inc*., No. 7:08-CV-00542, 2009 U.S. Dist. LEXIS 54692, at *4–5 (W.D. Va. June 25, 2009). An interlocutory judgment is one that "'does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 319 (4th Cir. 2003) (*quoting* BLACK'S LAW DICTIONARY 815 (6th ed. 1990)). A court's reconsideration of its interlocutory judgments is not subject to the heightened standards that apply to reconsideration of final judgments under Rule 60 or Rule 59. *Am. Canoe Ass'n*, 326 F.3d at 514–15; *Fayetteville Investors*, 936 F.2d at 1472.

A "district court's power to reconsider and modify its interlocutory judgments" is "committed to the discretion of the court." *Am. Canoe Ass'n*, 326 F.3d at 514–15 (*citing*

Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 (1983)). "[A] district court's otherwise broad discretion to reconsider interlocutory orders is narrowed in the context of motions to reconsider issues going to the court's Article III subject matter jurisdiction" and standing due to the particular importance of such issues. *Am. Canoe Ass'n*, 326 F.3d at 515 (*citing Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997); *CNF Constructors, Inc. v. Donohoe Const. Co.*, 57 F.3d 395, 397 n.1 (4th Cir. 1995)); *see Bd. of Trs. of Bay Med. Ctr. v. Humana Military Healthcare Servs.*, No. 5:03cv144/MCR, 2005 U.S. Dist. LEXIS 42012, *5-6 (N.D. Fla. July 1, 2005) (*citing Am. Canoe Ass'n* in determining that motions for reconsideration should be given particular consideration by courts when they raise "fundamental jurisdiction issue[s]"). This is particularly true when the decision by the district court that is requested to be reconsidered was "rendered early in litigation, before there had been much factual development, discovery, or opportunity for the defendants to consult experts." *Am. Canoe Ass'n*, 326 F.3d at 516; *see United States ex rel. Chyrissa v. Columbia/Hca Healthcare Corp.*, 587 F. Supp. 2d 757, 762 (W.D. Va. 2008) (denying a motion to reconsider because the case merely hinged on "multidistrict litigation" and the order that was requested for review was entered late in litigation after "discovery [was] complete"). Additionally, a motion for reconsideration may also be granted when "matters or decisions overlooked . . . 'might reasonably have altered the result reached.'" *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990) (*quoting New York Guardian Mortgage Corp. v. Cleland*, 473 F. Supp. 409, 420 (S.D.N.Y. 1979)). "The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Am. Canoe Ass'n*, 326 F.3d at 515; *see Netscape*

Communs. Corp. v. Valueclick, Inc., 704 F. Supp. 2d 544, 547 (E.D. Va. 2010) (holding that federal courts' responsibility to reach correct judgments of law should be given particular consideration when considering a motion for reconsideration).

Indeed, numerous federal district courts have granted motions to reconsider and reversed their initial rulings after a party has brought overlooked arguments, law, or dispositive facts contained in their original briefing to the attention of the court. *See, e.g.*, *Dyas v. City of Fairhope*, No. 08-0232-WS-N, 2009 U.S. Dist. LEXIS 119495 (S.D. Ala. Dec. 23, 2009); *Fischer v. Liberty Life Assur. Co.*, No. 05-C-3256, 2008 U.S. Dist. LEXIS 46528 (N.D. Ill. June 16, 2008); Republic W. Ins. Co. v. Williams, No. 9:04-0449-23, 2005 U.S. Dist. LEXIS 47706 (D.S.C. Nov. 30, 2005), *rev'd for other reasons in* 212 F. App'x 235 (4th Cir. 2007); *Esparaza v. Telerx Mktg.*, No. EP-04-CA-0241-FM, 2005 U.S. Dist. LEXIS 12328 (W.D. Tex. June 21, 2005); *Love v. Dual Drilling Co.*, No. 91-2276, 1993 U.S. Dist. LEXIS 6781 (E.D. La. May 10, 1993), at *1 (E.D. La. May 11, 1993).

ARGUMENT

I. THIS COURT SHOULD RECONSIDER AND REVISE ITS ORDER.

A. This Court should reconsider and revise its Order to determine that 16 U.S.C. § 825p does not provide federal courts with subject matter jurisdiction over matters involving property right disputes between FERC licensees and third-party non-licensees arising under state law.

As discussed in its Order, this Court denied the Nissens' motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. This Court determined that § 825p authorizes Federal Energy Regulation Commission ("FERC") licensees to assert claims against third-party non-licensees to enforce its liabilities and duties under the Federal Power Act ("FPA"). *Nissen*, 2015 U.S. Dist. LEXIS 11609, at *10-12. In doing so, the Court merely

quoted a portion of § 825p and then noted that Plaintiff brought a suit in equity against the Nissens to enforce its liabilities and duties under the FPA delegated by FERC by means of the license order and the shoreline management plan ("SMP"). *Id.* at 11-12.

However, this Court failed to cite any authority indicating that such indirect regulatory authority is sufficient to trigger federal question subject matter jurisdiction in matters pertaining to property right disputes between FERC licensees and third-party non-licensees arising under state law, and did nothing more but simply conclude that this case falls within the confines of § 825p. *See Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.*, No. 4:11CV3112, 2011 U.S. Dist. LEXIS 152634, at *10-13 (D. Neb. Nov. 23, 2011) (holding that the existence of indirect regulatory authority and liabilities delegated to a utility company by FERC via a licensing order and management plan is not sufficient legal authority to justify federal question subject matter jurisdiction under § 825p), *recommendation adopted in* No. 4:11CV31122012 U.S. Dist. LEXIS 11709 (D. Neb. Feb. 1, 2012); *see also Bashaw v. Bank of N.Y. Mellon Corp.*, No. CIV S-10-2869 KJM DAD, 2011 U.S. Dist. LEXIS 78108, at *7 (E.D. Cal. July 18, 2011) (stating that "merely invoking" the existence of a federal regulation fails to "present[] a substantial, disputed question of federal law"). FERC's delegation of "'indirect regulatory' authority" is, alone, insufficient to inject federal question subject matter jurisdiction into a claim brought by a FERC licensee against a non-licensee that was otherwise rooted in state law. *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 918-19 (8th Cir. 2009); *see Ass'n of Am. R.R. v. United States DOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) (holding that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity"), *overruled for other*

reasons in No. 13-1080, 2015 U.S. LEXIS 1763 (U.S. Mar. 9, 2015); *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013) (stating that governmental "delegations to non-governmental entities are different and may even be assumed to be improper absent an affirmative showing of congressional authorization"). A FERC licensee's responsibility "of policing use of . . . land" pursuant to a FERC license and management plan does not automatically trigger federal question subject matter jurisdiction in disputes that may arise absent "a specific provision of the FPA, its regulations, the [l]icense [issued], or the [m]anagement [p]lan which address the specific issues raised by the plaintiffs." *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, at *12-13.

Here, the Order failed to cite any authority indicating that this case implicates federal subject matter jurisdiction. Furthermore, the FERC license and SMP at issue do not contain any provision triggering federal subject matter jurisdiction in matters involving property disputes such as the one at issue. Plaintiff's responsibility to police the project boundaries pursuant to its FERC license and the SMP does not automatically transform this dispute over property rights under a flowage easement into an issue of federal question. As such, the Order improperly determined that regulatory authority delegated to Plaintiff by FERC was sufficient to justify federal question subject matter jurisdiction pursuant to § 825p.

This case is strikingly similar to *Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.* 2011 U.S. Dist. LEXIS 152634. In *Jeffrey Lake Dev.*, the plaintiffs, who were third-parties who did not maintain FERC licenses, leased real property from a power company that held a FERC-issued license that incorporated a management plan similar to the SMP at issue here. *Id.* at *1-2. The management plan contained terms managing elevation

limits on construction of property, and such language was incorporated into the leases between the plaintiff and the power company. *Id.* at *3-5. The power company denied the plaintiffs' request to construct a septic sewer system, citing the elevation limits in the management plan and leases. *Id.* at *4. The plaintiffs filed suit in state court seeking declaratory judgment authorizing such construction. *Id.* at *5. The power company removed the case to federal district court, stating that the case implicated federal subject jurisdiction under § 825p. *Id.* at *5. The plaintiff moved the district court to remand the case back to state court. *Id.* at *5, at *17-18.

The power company argued that the district court's jurisdiction over the matter was authorized simply because the power company maintained a license granted by FERC, under the FPA, and a management plan. *Id.* at *9-11. The district court disagreed, stating that the power company "cited no authority holding . . . [that] indirect regulatory authority [delegated by FERC] provides a sufficient basis to invoke federal question subject matter jurisdiction." *Id.* at *11. The district court further noted that the power company "only argued for a broad application of federal law without addressing the specific elements of the plaintiffs' state law claim for breach of their respective leases." *Id.* at *14. The district court further concluded that the power company's "responsibility of policing the use of land" pursuant to a FERC license and management plan, with nothing more, was not sufficient to trigger federal question subject matter jurisdiction. *Id.* at *13. In further discussing the matter, the district court specifically stated that federal question subject matter jurisdiction pursuant to § 825p was not appropriate because "[t]he United States [was] not a party to [the] case, the plaintiff[s] [were] not seeking a judgment based on the FERC license itself, and the

plaintiff[s] [were] not asserting a right to judgment for [the power company's] alleged violation of specific provisions within the FPA, the License, or the Management Plan." *Id.* at *18; *see United States v. So. Cal. Edison Co.*, 413 F. Supp. 2d 1101, 1124 n.13 (E.D. Cal. 2006) ") (stating that "terms of [a] FERC license . . . are interpreted under federal law"). As a result, the district court remanded the case to state court. *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, at *20-21.

Here, the crux of this case is a property rights dispute involving a flowage easement. Plaintiff's complaint, similar the power company in *Jeffrey Lake Dev.*, merely alleges that subject matter jurisdiction before this Court is proper pursuant to § 825p because it maintains a FERC-issued license. (Pl.'s Compl., ¶ 1). However, Plaintiff's complaint cites no authority holding that the fact that it maintains a FERC-issued license under the FPA and a management plan invokes federal question subject matter jurisdiction. Rather, Plaintiff's allegation that this Court has subject matter jurisdiction over this case hinges on a broad application of § 825p. Furthermore, here, like in *Jeffrey Lake Dev.*, § 825p does not confer subject matter jurisdiction to this Court because the United States is not a party to the case, the Nissens are not seeking judgment on the FERC license itself, and the Nissens are not asserting a right of judgment for Plaintiff's alleged violation of a provision of the FPA, its FERC-issued license, or the SMP. Put simply, the FERC-issued license and SMP, which authorizes Plaintiff to police use of the land within the project boundary, is not sufficient to justify federal question subject matter jurisdiction pursuant to § 825p. Therefore, similarly to *Jeffrey Lake Dev.*, this Court does not have subject matter jurisdiction over this case. As

such, removal of this case to state court is proper because Plaintiff is unable to cite specific authority invoking federal question subject matter jurisdiction in this case.

Jeffrey Lake Dev. is not a standalone case, and was cited with approval by the Seventh Circuit Court of Appeals in *Ne. Rural Elec. Mbrshp. Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883 (7th Cir. 2013). In *Ne. Rural Elec. Mbrshp. Corp.*, the plaintiff, a third party who did not maintain a FERC license, filed a claim for declaratory judgment arising out of a contract with the defendant that contained FERC regulated rates. *Id.* at 891. The Seventh Circuit determined that it lacked subject matter jurisdiction to hear the case under § 825p because the case was a challenge of the contract itself that was rooted in state law, and was not a challenge of the rates established by FERC. *Id.* Similarly, the case at hand hinges on a state property right claim—that is, the extent of Plaintiff's rights under a flowage easement—and does not challenge the FERC-license or SMP in and of itself. The fact that Plaintiff maintains a FERC-issued license and SMP, with nothing more, fails to establish federal question subject matter jurisdiction under § 825p in this case.

In its Order, this Court also determined that Plaintiff's reliance on *Tri-Dam v. Schediwy*, 1:11-cv-01141-AWI-MJS, 2014 U.S. Dist. LEXIS 29775 (E.D. Cal. Mar. 5, 2014) for the proposition that § 825p only authorizes federal subject matter jurisdiction in matters where FERC asserts a claim against a licensee, and not when a licensee asserts a claim against a private landowner, was misplaced because the court in that matter "heard the case" and "ruled in favor of the FERC licensee, ordering the defendant to comply with the shoreline management plan by destroying a non-compliant structure." *Nissen*, 2015 U.S. Dist. LEXIS 11609, at *10-11. What this Court overlooks in reaching this conclusion, is that

the defendants in *Schediwy*, unlike the Nissens, did not dispute the court's jurisdiction over the matter. *See* First Amended Answer at ¶ 1, *Tri-Dam v. Schediwy*, 1:11-cv-01141-AWI-MJS, 2014 (E.D. Cal. Mar. 5, 2014), ECF No. 38. Furthermore, this Court, in its Order, concluded that federal subject matter jurisdiction pursuant to § 825p is proper because "a litany . . . [of] federal district courts [have] adjudicated claims where FERC licensees sought to force private landowners to comply with the conditions of the FERC license." However, none of the cases cited by this Court in support of this proposition raised the issue of subject matter jurisdiction, nor did the district courts in those cases address the issue *sua sponte*. *See Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790 (W.D. Va. 2014); *VA Timberline, LLC v. Appalachian Power Co.*, No. 7:06-CV-40026, 2008 U.S. Dist. LEXIS 6394 (W.D. Va. Jan. 29, 2008); *Tri-Dam v. Michael*, No. 1:11-CV-2138, 2014 U.S. Dist. LEXIS 42472 (E.D. Cal. Mar. 28, 2014); *Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 U.S. Dist. LEXIS 80617 (E.D. Cal. June 7, 2013); *Tri-Dam v. Yick*, No. 1:11-CV-01301, 2013 U.S. Dist. LEXIS 80550 (E.D. Cal. June 7, 2013).

For this same reason, the court in *Jeffrey Lake Dev.* rejected the power company's argument that *VA Timberline* established precedent for federal subject matter jurisdiction based on indirect regulatory authority delegated by FERC to utility companies. *See* 2011 U.S. Dist. LEXIS 152634, at *11 (stating that "[w]hile *VA Timberline* is somewhat factually similar on its face, there is no indication that the issue of subject matter jurisdiction was ever presented to the court or that the court ever addressed the issue *sua sponte*," and determining that, as such, it did "not provide support for the defendant's contention that remand [to state court] [was] inappropriate"). Moreover, *VA Timberline* is distinguishable from the case at

hand because the property owners in *VA Timberline* disputed the terms and conditions of the FERC license itself, which were incorporated into the easement at issue in that matter. *See VA Timberline*, 2006 U.S. Dist. LEXIS 52156, at *3 (stating that the parties in that case disputed the landowners' property rights with regard to "the terms and conditions of [the utility company's FERC] license, which [were] incorporated by reference in the instrument conveying the easement"); *see also Bennett v. Bank of Am., N.A.*, No. 3:11-CV-003, 2011 U.S. Dist. LEXIS 51152, at *8 (E.D. Va. May 10, 2011) (noting that the dispute in *VA Timberline* hinged on the terms and conditions of the FERC license at issue). Here, the terms and conditions of Plaintiff's FERC license are not incorporated into the flowage easement at issue, and the Nissens are disputing the extent of Plaintiff's property rights pursuant to a flowage easement under state law, *not* the terms and conditions of Plaintiff's FERC license. *See Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.* 2011 U.S. Dist. LEXIS 152634, at *13 (holding that federal question subject matter jurisdiction pursuant to § 825p was not appropriate in a matter where landowners were "not seeking a judgment based on [a] FERC license itself). Therefore, this Court's reliance on the aforementioned cases to support its determination that it has subject matter jurisdiction over this case is improper.

In summary, the specific issue of whether § 825p provides federal courts with subject matter jurisdiction over matters involving property right disputes between FERC licensees and third-party non-licensees arising under state law is a matter of first impression in the Fourth Circuit.

Therefore, this Court's determination in its Order that it has subject matter jurisdiction over this case pursuant to §825p should be reconsidered and revised per this

Motion for Reconsideration. Because this motion pertains to Article III subject matter jurisdiction, this Court's discretion as to whether to reconsider this issue is narrow. This is particularly true because the Order was rendered early in litigation, prior to extensive factual development and discovery. Furthermore, reconsideration and revision is justified because none of the cases cited by the Court to support its subject matter jurisdiction determination raised the issue of subject matter jurisdiction, and this Court overlooked pertinent case law determining that § 825p does not confer federal courts with subject matter jurisdiction over property right disputes between FERC licensees and third-party non-licensees. Because consideration of these issues might reasonably have altered this Court's decision, and because the ultimate responsibility of federal courts is to reach the correct judgment under law, Plaintiff's Motion for Reconsideration should be granted, and this Court's Order pertaining to the issue of subject matter jurisdiction should be reconsidered and revised pursuant to Rule 54(b).

B. Alternatively, should this Court determine that it has subject matter jurisdiction over this case pursuant to § 825p, this Court should reconsider and revise its Order to determine that Plaintiff lacks standing to bring this suit.

Assuming, *arguendo*, that subject matter jurisdiction over this case pursuant to § 825p is proper, this Court overlooked the fact that Plaintiff does not yet have standing to bring this suit before a federal court because a state court has not yet determined the extent of Plaintiff's property rights under the flowage easement at issue.

"To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision." *G & G Fire*

Sprinklers, Inc. v. Bradshaw, 156 F.3d 893, 899 (9th Cir. 1998) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). An alleged injury must also be "legally and judicially cognizable," as well as "'concrete and particularized'" *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (*quoting Lujan*, 504 U.S. at 560). To demonstrate an injury in matters involving property rights, a plaintiff must first clearly demonstrate his legal interest in the property that is or was allegedly injured. *See United States v. Phillips*, 185 F.3d 183, 187 (4th Cir. 1999) (finding that plaintiff did not suffer an injury in fact because he did not possess any rights in the property at issue); *Del Webb Conservation Holding Corp. v. Tolman*, 41 F. App'x 136, 138 (9th Cir. 2002) (holding that plaintiffs did not suffer an injury in fact because they "lack[ed] a cognizable right to the land" that was allegedly injured); *Suffolk Techs. LLC v. AOL Inc.*, 910 F. Supp. 2d 850, 855 (E.D. Va. 2012) (holding that, in patent infringement cases, an assignee of a patent may only bring suit if he can demonstrate that he has acquired "all substantial rights under the patent") (emphasis and quotation omitted); *Keepe v. Shell Oil Co.*, 220 Va. 587, 260 S.E.2d 722, 724 (Va. 1979) (holding that "[t]o have standing to sue for damages for tortious injury to property, a plaintiff must have an interest in the property injured"); *Zopfi v. Champlin City Council & Staff*, No. 04-5034, 2005 U.S. Dist. LEXIS 39826, at *8 (D. Minn. Dec. 2, 2005) (finding no injury in fact when a plaintiff did not hold sufficient interest in the property that was allegedly injured).

Assuming, *arguendo*, that Plaintiff can bring property right dispute claims arising under state law in federal courts against third-party non-licensees pursuant to § 825p, it does not yet having the standing to do so. Here, Plaintiff alleges its injury in fact is the inability to perform its duties under the SMP and its FERC license. (Pl.'s Compl., ¶ 33). However, this

assumes that the flowage easement at issue is subject to the FERC license and SMP. Because this case hinges on the extent of Plaintiff's property rights under the flowage easement, a state court must first establish the extent of these property rights before it can be determined whether this case may be brought before a federal court pursuant to § 825p.

A closer reading of § 825p confirms as much. Section 825p states: "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by . . . this chapter or any rule, regulation, or order thereunder." A FERC license or management plan does not automatically confer property rights. *Michael*, 2014 U.S. Dist. LEXIS 42472, at *10; *Schediwy*, 2014 U.S. Dist. LEXIS 29775, at *21; *Keller*, 2013 U.S. Dist. LEXIS 31837, at *11; *Yick*, 2013 U.S. Dist. LEXIS 27140, at *12. Issues pertaining to property rights disputes are governed by state courts.[1] *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Fulcher v. United States*, 696 F.2d 1073, 1076 (4th Cir. 1982). Virginia state courts preside

[1] This principle of law, particularly with regard to property disputes involving FERC licensees, has been explicitly acknowledged by FERC in its license orders. *See Appalachian Power Company*, 146 FERC ¶ 62,083, at ¶ 46, Project No. 2210-207, Order Modifying and Approving Updated Shoreline Management Plan (FERC 2014) (stating that disputes over deeds held by Plaintiff must be take[n] . . . up in [state] court"); *FirstLight Hydro Generating Company*, 142 FERC ¶ 62,256, at ¶ 16 & n.12, Project No. 2576-139, Order Modifying and Approving Shoreline Management Plan Pursuant To Article 407 (FERC 2013) (stating that "instruments of conveyance define the extent of [a FERC] licensee's rights," and explaining that "[a]ny disputes regarding property rights are not within the Commission's Jurisdiction; rather they are matters for state courts to resolve"); *Pacific Gas and Electric Company*, 130 FERC ¶ 62,033, at ¶ 19, Project No. 2687-148, Order Modifying and Approving Shoreline Management Plan Pursuant To Article 406 (FERC 2010) (stating that "[t]he Commission has regulatory authority only over the licensee and, thus, can administer and enforce the terms of the license only through the licensee and the licensee's property rights"); *Appalachian Power Company*, 112 FERC ¶ 61,026, at ¶ 80, Project No. 2210-090, Order Modifying and Approving Shoreline Management Plan (FERC 2010) (stating that "A licensee's property interests can range from fee simple to perpetual or renewable leases, easements, and rights-of-way. If there is a question concerning specific property rights, it will have to be resolved between the property owner and Appalachian in a property law action in a court of appropriate jurisdiction."); *see also* Letter from Cheryl A. LaFleur, FERC Chairman, to Robert Hurt, U.S. Representative for Virginia's 5th Congressional District (December 8, 2014) (on file with Robert Hurt) (stating that Plaintiff's "SMP applies only to those lands in the project boundary where [Plaintiff] has property rights," and noting that Plaintiff's status as a FERC licensee alone gives it "no authority to regulate construction on privately owned lands, unless the property owner has given the company those rights.").

over disputes pertaining to flowage easement. *See Anderson v. Delore*, 278 Va. 251, 258, 683 S.E.2d 307, 310 (2009) (determining the extent of one's access rights pursuant to a flowage easement); *Brown v. Haley*, 233 Va. 210, 355 S.E.2d 563, 568 (Va. 1987) (determining the extent of the privileges and rights expressed in a flowage easement).

Pursuant to the FERC license, Plaintiff was required to obtain fee title or "the right to use in perpetuity all lands" within the project boundary. *Appalachian Power Company*, 29 FERC ¶ 62,201, at 65, Project No. 2210-169, Order Issuing New License (FERC 2009). Plaintiff's FERC license and the SMP do not automatically grant it rights to the property within the project boundary. In this case, the Nissens dispute that the flowage easement at issue grants Plaintiff sufficient rights to regulated the property in accordance with the FERC license and SMP. Because this dispute has not been resolved, Plaintiff's right to enforce its duties created by the license and SMP in this case has not yet been realized. Only when a state court has determined the extent of Plaintiff's rights under the flowage easement can it be determine that an injury in fact has occurred; until then, Plaintiff does not yet have standing in this case, even if it is determined that federal courts have jurisdiction to hear suits brought by FERC licensees against third party non-licensees pursuant to § 825p.

Federal courts are required to independently examine issues of standing. *United States v. Hays*, 515 U.S. 737, 742 (1995); *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 771 (W.D. Va. 2002). Here, this Court failed to do. For this reason, even if this Court determines that it has federal subject matter jurisdiction over this case pursuant to § 825p, this Court should reconsider whether Plaintiff has standing to bring this suit. Because the Nissens' Motion pertains to Plaintiff's standing before the Court and the Order was rendered

early in litigation prior to extensive factual development and discovery, this Court's discretion as to whether to reconsider this issue is narrow. This Court's failure to independently examine the issue of standing in this case may have reasonably altered this Court's decision. Therefore, because the ultimate responsibility of federal courts is to reach the correct judgment under law, Plaintiff's Motion for Reconsideration should be granted, and, pursuant to Rule 54(b), this Court's Order should be reconsidered and revised to determine that Plaintiff lacks standing to bring this suit.

II. ALTERNATIVELY, CERTIFICATION OF THIS COURT'S ORDER FOR INTERLOCUTORY APPEAL TO THE FOURTH CIRCUIT COURT OF APPEALS UNDER 28 U.S.C. § 1292(B) IS WARRANTED.

Should this Court decline to reconsider its Order, the Nissens request that the Court stay trial court proceedings and, pursuant to 28 U.S.C. § 1292(b), certify a direct interlocutory appeal to the Fourth Circuit Court of Appeals. Section 1292(b) of Title 28 of the United States Code, which addresses interlocutory decisions such as this Order, states in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order.

In short, "[a] district court shall certify an order for interlocutory appeal if the court concludes that: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) immediate appeal may materially advance the ultimate termination of the litigation." *Terry v. June*, 368 F. Supp. 2d 538, 539 (W.D. Va.

2005); *see Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741, 742 (4th Cir. 1963). "The decision whether to certify a non-final order for interlocutory appeal lies within the discretion of the district court." *Terry*, 368 F. Supp. 2d at 539 (*citing Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)). Here, this Court's Order is an interlocutory order that meets the requirements for certification.

A. This Court's Order involved the issue of subject matter jurisdiction, which is an issue of controlling law.

"For the purposes of [28 U.S.C. § 1292(b)], a question is controlling if it is dispositive of the case or if a reversal would save time and expense." *Terry*, 368 F. Supp. 2d at 539; *see APCC Servs. v. Sprint Communs. Co.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003) (stating that "[c]ontrolling questions of law include issues that would terminate an action if the district court's order were reversed"). A question of law is controlling if it involves subject matter jurisdiction or standing. *Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 24 (2d Cir. 1990); *United States ex rel. Wis. v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *David v. Alphin*, No. 3:07-cv-11-RJC-DLH; 2009 U.S. Dist. LEXIS 108413, at *11 (W.D.N.C. Oct. 30, 2009); *Segni v. Commercial Office of Spain*, 650 F. Supp. 1045, 1047 (N.D. Ill. 1987). Here, the issue at hand in this Court's Order is a controlling question of law because it is dispositive and pertains to this Court's subject matter jurisdiction over this matter.

B. There is a substantial difference of opinion amongst courts regarding whether § 825p grants federal courts subject matter jurisdiction over cases involving property right disputes between FERC licensees and third-party non-licensees.

A substantial ground for dispute exists when a court's determination "conflicts with decisions" of other courts. *APCC Servs.*, 297 F. Supp. 2d at 97-98 (*citing Pub. Interest Research Group v. Hercules, Inc.*, 830 F. Supp. 1549, 1556 (D. N.J. 1993)). "'The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion.'" *APCC Servs.*, 297 F. Supp. 2d at 98 (*quoting In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 17412, at *20 (D.D.C. Nov. 22, 2000)). "Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute." *Id.* "Where 'proceedings that threaten to endure for several years depend on an initial question of jurisdiction . . . or the like,' certification may be justified even if there is a relatively low level of uncertainty." *APCC Servs.*, 297 F. Supp. 2d at 98 (*quoting* 16 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 3930 at 422 (1996)). Certification is justifiable even in the face unanimous case law, even if it is binding, if a matter is particularly novel or complex. *See Ohio Valley Envtl. Coalition v. Elk Run Coal Co.*, No. 3:12-0785, 2014 U.S. Dist. LEXIS 130123, at *9-10 (S.D. W. Va. Sept. 17, 2014) (finding that certification was justified when a matter was novel and complex despite unanimous binding and persuasive case law on an issue).

Here, as discussed in Section I.A. of this memorandum, this Court's determination that it has subject matter jurisdiction over the action brought by Plaintiff is in conflict with

determinations in other courts. The fact alone that cases exist that are at odds with this Court's determination regarding subject matter jurisdiction in its Order clearly demonstrates that a substantial ground of dispute exists. Even if the level of certainty regarding the existence of a substantial ground of dispute is low, certification is justified here because the proceedings in this matter before this Court are dependent on a question of jurisdiction. Additionally, the issue of § 825p confers federal courts with subject matter jurisdiction in cases involving property right disputes between FERC licensees and third-party non-licensees is both novel and complex. Moreover, as explained in Section I.A. of this memorandum, is a matter of first impression in this circuit. *See Jaffe v. Samsung Elecs. Co. (In re Qimonda AG)*, 470 B.R. 374, 385 (E.D. Va. 2012) (determining that "the presence of a legal question of first impression requires certification" (*citing Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-205 (1996)). As such, a substantial ground of dispute exists in this matter.

C. An immediate appeal materially advances the ultimate termination of litigation because further proceedings would be unnecessary should this Order be reversed.

An immediate appeal materially advances the ultimate termination of litigation when a reversal of a court's previous order renders further proceedings unnecessary. *APCC Servs.*, 297 F. Supp. 2d at 100; *Ohio Valley Envtl. Coalition*, 2014 U.S. Dist. LEXIS 130123, at *10. In making such a determination, courts consider whether "[a]n immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed." *APCC Servs.*, 297 F. Supp. 2d at 100. An immediate appeal materially advances the ultimate termination of litigation when "it would

conclusively resolve important legal issues that are completely separate from the merits of the actions," thus rendering issues "effectively unreviewable following trial because of the enormous expense and time involved." *Id.*; *see GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F. Supp. 2d 313, 316 (D. D.C. 1999) ("[T]o reach final judgment the parties will probably undergo voluminous and burdensome discovery and possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment").

Here, the reversal of the Order would render further proceedings in this case unnecessary because it would deprive this Court of subject matter jurisdiction. Moreover, an immediate appeal would allow the parties here to conserve judicial resources and avoid needless expenses and months of discovery and preparation for trial should the Order be reversed. Even if an immediate appeal would result in delay, it would be more beneficial to the parties to have the issues of subject matter jurisdiction and standing resolved now rather than sometime in the distant future, particularly if it is determined that subject matter jurisdiction or standing was lacking in the first place. *See APCC Servs.*, 297 F. Supp. 2d at 100 (determining that an immediate appeal materially advanced the ultimate termination of litigation even though it prejudiced the opposing party with further delays because it was in the interest of judicial economy and spared the parties from needless costs and discovery should the court's previous order be reversed). As such, an immediate appeal of this Order materially advances the ultimate termination of litigation.

Therefore, certification of this Court's Order for interlocutory appeal on the issues raised herein to the Fourth Circuit Court of Appeals under 28 U.S.C. § 1292(b) is warranted.

This Court's Order involves issues of subject matter jurisdiction and standing, which are controlling issues of law. Furthermore, there is a substantial difference of opinion amongst courts regarding whether § 825p confers federal courts with subject matter jurisdiction in cases involving property right disputes between FERC licensees regarding the issue of federal question subject matter jurisdiction in matters brought by FERC licensees and third-party non-licensees is. Finally, an immediate appeal materially advances the ultimate termination of litigation because further proceedings would be unnecessary should the Order be reversed because this Court would be deprived of jurisdiction over this case. As such, should this Court deny the Nissens' Motion for Reconsideration, the Nissens request that, pursuant to 28 U.S.C. § 1292(b), this Court certify a direct interlocutory appeal of the issues raised herein to the Fourth Circuit Court of Appeals and stay these proceedings.

CONCLUSION

Defendants William W. Nissen, II and Lora J. Nissen respectfully request that this Court grant their Motion for Reconsideration, and reconsider and revise its February 2, 2015 Order to determine that it lacks subject matter jurisdiction in this matter. Defendants William W. Nissen, II and Lora J. Nissen also respectfully request that, alternatively, this Court grant their Motion for Reconsideration, and reconsider and revise its February 2, 2015 Order to determine that Plaintiff lacks standing to bring this suit before this Court. Alternatively, should this Court deny Defendants William W. Nissen, II and Lora J. Nissen's Motion for Reconsideration, they ask the Court to certify its February 2, 2015 Order for interlocutory appeal on the issues raised herein to the Fourth Circuit Court of Appeals and stay the proceedings currently before this Court.

Respectfully,

WILLIAM W. NISSEN, II and LORA J. NISSEN

By: /s/ Ryan Walsh
Of Counsel

Mark D. Kidd (VSB # 24149)
Compton M. Biddle (Va. Bar #46187)
Ryan M. Walsh (VSB # 85887)
OPN Law
3140 Chaparral Drive, Suite 200-C
Roanoke, VA 24018
Telephone: 540-989-0000
Facsimile: 540-772-0126
Email: mkidd@opnlaw.com
cbiddle@opnlaw.com
rwalsh@opnlaw.com
Counsel for Defendants William W. Nissen, II and Lora J. Nissen

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following individuals:

Matthew P. Pritts, Esq. (VSB #34628)
WOODS ROGERS PLC
Wells Fargo Tower, Suite 1400
10 South Jefferson Street
P. O. Box 14125
Roanoke, VA 24038-4125
Telephone: (540) 983-7600
Facsimile: (540) 983-7711
E-mail: pritts@woodsrogers.com
Counsel for Plaintiff Appalachian Power Company

C. Carter Lee, Esq. (VSB # 78731)
WOODS ROGERS PLC

Wells Fargo Tower, Suite 1400
10 South Jefferson Street
P. O. Box 14125
Roanoke, VA 24038-4125
Telephone: (540) 983-7600
Facsimile: (540) 983-7711
E-mail: clee@woodsrogers.com
Counsel for Plaintiff Appalachian Power Company

/s/ Ryan Walsh
Of Counsel