RECORD NUMBER: 15-2348

United States Court of Appeals

for the

Fourth Circuit

RICHARD A. PRESSL and THERESA PRESSL,

Plaintiffs/Appellants,

– v. –

APPALACHIAN POWER COMPANY,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT ROANOKE

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I. The Threshold Issue in this Appeal is the Issue of Lack of a Federal Question Jurisdiction.

The threshold issue in this case is lack of a federal question jurisdiction. Without jurisdiction, the District Courts' order must be vacated with an order to remand the case to Franklin County Circuit Court.

Appalachian Power Company ("APCO") dedicates a large portion of its brief to a discussion of its duty to obey FERC's rules and its federal license. APCO's duty to obey FERC and its federal license is not at issue in this case. See Pressls' Complaint JA 18-61. Thus, those portions of its Brief that APCO devotes to this subject matter have no bearing on the Pressls' private property rights, as determined by the flowage easement deed.

Similarly, APCO is not correct when on page 1 of its Brief it states that this appeal involves proposed construction on the shoreline of the Project that is regulated by APCO and whether threatened construction within the federal project is consistent with requirements imposed by the governing federal license and federal law. The Pressls are not subject to any federal license. Only APCO is. The issues raised in their Complaint are not affected by the terms of any license between APCO and FERC or by any federal statute or regulations governing the relationship between APCO and FERC. The acquisition of private property rights is essential to being able to regulate what is being conducted on a private

individual's land. See also Tri-Dam v. Michael, 2014 U.S. Dist. LEXIS 42472, *9-10 (E.D. Cal. March 5, 2014). That is the linchpin of this case. Neither APCO's license nor federal law gives APCO any right to regulate activities on a private property owners' land. Throughout its entire 55-page brief, APCO fails to cite to any section of the Federal Power Act or its license that would give it such a right. There is none. On the contrary, there is federal law which clearly supports the conclusion that APCO must acquire sufficient property rights in order to be able to regulate certain activities on the Pressls' land.

The flowage easement is APCO's only source of any rights over the Pressls' land. And contrary to the flowage easement deed in Timberline, on which case APCO heavily relies, the Pressls' flowage easement does not incorporate APCO's federal license as did the deed in Timberline. See VA Timberline, L.L.C. v. Appalachian Power Co., 343 Fed. Appx. 915, 916 (4th Cir. 2009)(stating that the easement was expressly made subject to the terms and conditions of the APCO's federal license). APCO's federal license was not even issued when the parties executed the flowage easement. Further, the Fourth Circuit has not considered and ruled in Timberline on the issue of federal jurisdiction. However, the Fourth Circuit has considered and ruled on the issue of federal jurisdiction in Drain, vacating the order of the district court because of lack of jurisdiction and holding that the plaintiff's cause of action was a typical state action to enforce an easement.

Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999). Thus, consistent with Drain, the Pressls' cause of action is a typical state action to interpret an easement, and the District Court lacked jurisdiction.

On April 25, 1960, APCO was issued its federal license. JA 260. Under the terms of the license (Article 5), APCO was required to acquire title in fee or the right to use in perpetuity all lands necessary and appropriate for the construction, maintenance, and operation of the project. JA 322. A FERC order dated December 15, 2009, specifically stated that the issuance of the license to APCO did not convey any property rights in either real or personal property. Appalachian Power Company, 129 FERC ¶62,201, at *64610, 2009 LEXIS 2427 (2009).

The FPA also does not confer upon APCO the right to enter, use, or regulate private property without the consent of the owner. APCO's right to regulate is dependent on, and subject to, the flowage easement, which is solely a matter of state property law. FERC clearly interprets the FPA as not granting to the licensee any authority over private property beyond that which the licensee acquired and retained by private contract. City of Holyoke Gas and Electric Dept., 115 FERC ¶ 62,295 (2006)("Standard license article 5 requires licensees to retain title in fee to, or the right to use in perpetuity, project property sufficient to accomplish all project purposes. This reflects the requirement that the licensee have sufficient control over project lands and works to enable [FERC], through the licensee, to

carry out its regulatory responsibilities with respect to the project."); Alternative Energy Associates, 66 FERC ¶62,101 (1994); Public Utility District No. 1 of Chelan County, Washington, 15 FERC ¶62,168 (1981); Tri-Dam v. Michael, 2014 U.S. Dist. LEXIS 42472, *9-10 (E.D. Cal. March 5, 2014).

Additionally, Article 415 of APCO's license (formerly Article 41), as amended by APCO's Shoreline Management Plan ("SMP), which is relied upon by APCO as a source of its authority to regulate the Pressls' dock construction, itself does not impose restrictions on the construction of docks by owners of vested private property rights. Rather, it merely regulates the conduct of APCO. Article 415 clearly presumes that APCO has acquired the property rights necessary for its permission to be required. Indeed, Article 415 must be read in conjunction with standard Article 5 of APCO's license, which provides that the licensee must acquire title in fee or the right to use the lands necessary or appropriate for the construction, maintenance and operation of the project. Appalachian Power Company, 129 FERC ¶62,201, at *64603, 2009 FERC LEXIS 2427 (2009).

Article 415, under which APCO seeks to regulate the property in question, presupposes that APCO has adequate private property rights not only to be able to regulate in the first place but also to be able to undertake the necessary actions against any non-complying uses which necessarily encompasses the right to enter upon the property and remove any non-complying structures.

A. APCO Concedes that Federal Law Does Not Create a Cause of Action in the Pressls' Complaint.

Most directly, a case arises under federal law when federal law creates the cause of action asserted." Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 3d 72 (2013). Such claims account for the vast bulk of suits that arise under federal law. Id.

In this case, federal law does not create a cause of action asserted in the Complaint and APCO does not dispute that.

B. Pressls' Complaint Does Not Implicate Significant Federal Issues.

If the Court does not find a federal question on the face of a well-pleaded complaint, it may consider whether there is a basis for federal jurisdiction under a much narrower Grable alternative doctrine. Pursuant to the Grable doctrine, state-law claims may "arise under" federal law if they "implicate significant federal issues." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). A significant federal issue is implicated if all four prongs of Gunn are satisfied and present. Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 3d 72 (2013). Federal jurisdiction over a state law claim will lie only if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Gunn v Minton, 133 S.

Ct. 1059, 1065, 185 L. Ed. 2d 72 (2013). Contrary to APCO's argument, APCO has failed to satisfy all four prongs of Gunn analysis.

a. The Pressls' Request for Declaratory Relief (I) Does Not Implicate a Significant Federal Issue.

1. Not Only that Reference to Federal License Is Not Necessary, the Court Is Not at Liberty to Make Reference to Federal License.

APCO argues that a significant federal issue is implicated by the prayer for relief (I), out of eleven pled, wherein the Pressls ask the state court to find that they be allowed to use their property in any manner not inconsistent with the maintenance of a dam and hydro-electric power generation plant operated by APCO at Smith Mountain. JA 35-36. APCO argues that this is a capstone request for relief and that this request for relief is sufficient to create a federal question jurisdiction. APCO's Brief p. 1. This specific prayer for relief does not implicate a significant federal issue for purposes of a federal question jurisdiction.

The Pressls' Complaint is one for declaratory judgment under Va. Code §8.01-185. The above prayer for relief must be read in the context of the entire Complaint and the cause of action pled by the Pressls which is summarized in ¶10 of the Complaint as follows:

> *That there is an actual case or controversy between the parties regarding the rights granted to the parties pursuant to the terms of the aforesaid flowage easement.* Specifically, your plaintiffs would allege and aver that the flowage easement does not give APCO the right to regulate any use which they may make of their property below the 800 feet contour. Furthermore, the flowage easement does not restrict

> how or by what means the plaintiffs may use their property to access the waters of Smith Mountain Lake for recreational purposes. JA 22. (emphasis added).

The aforesaid prayer for relief must also be read in the context of the wording of the flowage easement which the Pressls are seeking to have the state court interpret.

The cardinal rule in the construction of the contracts is that the intention of the parties governs. Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 880 (1951). In arriving at the intention of the parties the court must bear in mind the situation of the parties, the subject matter of the contract and the purpose and intention of the parties in making it. Id. No use can be made of an easement different from that established when the easement was created, which imposes additional burdens on the servient estate. Shooting Point, L.L.C. v. Wescoat, 265 Va. 266; 576 S.E.2d 497, 503 (2003). It is the duty of the court to construe contracts as they are made by the parties thereto and give full force and effect to the language used when it is clear, plain, simple and unambiguous and the court is not at liberty to search for its meaning beyond the instrument itself. Dominion Sav. Bank F.S.B. v. Costello, 257 Va. 413, 416-17; 513 S.E.2d 564, 566 (1999). No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly. Haisfield v. Lape, 264 Va. 632, 637; 570 S.E.2d 794, 796

(2002). Where a particular purpose is sought by the contract, and the language pertaining is clear and certain, no general terms used therein will extend the meaning thereof beyond the intent and purpose so definitely expressed. Taylor v. Buffalo Collieries Co., 72 W.Va. 353, 356; 79 S.E. 27, 28 (1913).

The parties titled the deed "Flowage Right and Easement Deed" and that is the general purpose and intent of the deed, for APCO to have the right to raise the water level above the natural flow as needed during construction and operation of the dam and/or power station. The Virginia Supreme Court regards the title of the document relevant in determination of the rights granted under the contract. See McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 272, 716 S.E.2d 461, 464 (2011). [1]

This general purpose is reinforced throughout the flowage easement and in the following recital:

> WHEREAS, *Appalachian proposes to impound the waters* of said river and tributaries by constructing a dam across said river at Smith Mountain downstream from said premises and to construct *and operate at and in connection with such dam a hydroelectric power station including provision for pumping*, which dam is to be of such height and so designed that at such dam the elevation of the so impounded waters, except on very rare occasions, will not exceed 800 feet. JA 42.

[1] On page 14, APCO uses McCarthy Holdings L.L.C. for proposition that APCO's federal license would have to be interpreted to determine the extent of APCO's rights under the instrument. However, the Court in McCarthy Holdings L.L.C. did not interpret a flowage easement, it did not incorporate any document into the easement agreement before it, and it did not consider APCO's federal license at all.

Appalachian proposes in this paragraph to impound waters and operate "a power station", not to regulate shoreline activities. Significantly, at the time this flowage easement was executed, APCO had no obligation from FERC to control shoreline activities and APCO did not do so until after 1998 amendment adding Article 41 which delegated to APCO the authority to grant permission for certain uses which protect and enhance the scenic, recreational, and other environmental values of the Project. 82 FERC ¶62,109. This in itself defeats any argument that the parties intended to make the regulation of shoreline activities a subject matter of the easement.

Additionally, by the language of the flowage easement deed, APCO agreed that the deed represented the entire agreement. JA 44. The court is thus not at liberty to incorporate into the flowage easement the federal license and certainly not a version not even in existence until 1998.

Nevertheless, APCO in essence argues that the paragraph that follows the aforesaid recital gives APCO a blank check to impose a broad scheme of regulation on the uses of the Pressls' property. See APCO's Brief at p. 7. The rules of contract construction however do not allow for such a far-reaching interpretation. The word "affect" must be interpreted consistent with the aforesaid particular purpose. An argument that the word "affect" is general will not extend the meaning of the "flowage" easement beyond this particular purpose. To

interpret the word "affect" to allow for incorporation of a multi-page APCO's license (about 82 pages) and SMP (about 200 pages) would lead to an absurd result. The word "affect" does not give the court authority to re-write the terms of the flowage easement. The court is not at liberty to search for meaning of the terms beyond the instrument itself and add about 282 words for the parties that the parties did not use themselves. Am. Std. Homes Corp. v. Reinecke, 245 Va. 113, 425 S.E.2d 515 (1993). The Pressls' interpretation leads to a reasonable result consistent with the intent of the parties as discerned from the instrument itself.

Also, if the conveyance paragraph gave APCO the broad regulatory powers over the Pressls' land as APCO argues, the paragraph which follows would be made superfluous and that is contrary to the established rules of the contract construction. The flowage easement deed further states:

> ALSO, for the above mentioned consideration, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. JA 43.

If the first paragraph was a blank check giving APCO the unfettered right to "affect" the property, there would be no need to add the language for APCO to have the right enter unto the property for the above purposes. It is also important to point out that the plain language in this paragraph does not, contrary to APCO's

argument, prohibit construction. Consistent with the purpose of the flowage easement, this paragraph allows APCO, prior to flooding, to clear the land to be submerged and in addition, to clear any objects that might thereafter interfere with the generation of the water power.

In order to make its case and somehow incorporate APCO's current federal license and SMP into the flowage easement and into the Complaint, APCO goes as far as actually re-writing the aforesaid prayer for relief. On pages 20 and 42 of APCO's brief, APCO substitutes the words actually used in the Complaint "dam and hydroelectric power generation plant" with the word "Project" in an apparent attempt to impermissibly broaden the scope of both the Complaint and the flowage easement. This underscores the weakness of APCO's argument.

Further, APCO's argument on pages 2 and 21 of its Brief that even if the Complaint merely stated a cause of action for interpretation of an easement, the state court would have to interpret the terms of APCO's license to determine the extent of the Pressls' and APCO's rights also fails. In the flowage easement, APCO agreed that the deed represented the entire agreement. It agreed that the inquiry be limited to the four corners of the deed. APCO's Federal License in any of its forms was not incorporated. Contrary to APCO's argument, what the Pressls can or cannot do is to be determined by the flowage easement and not by the federal license.

2. Even if the Court Had to Apply or Reference the Federal License, That Is Not Sufficient for Purposes of Federal Jurisdiction.

In any event, even if the court had to make a "reference" to APCO's license, which it does not, a mere "reference" to it would not be sufficient to confer federal subject matter jurisdiction. The exercise of federal question jurisdiction in the absence of a federal cause of action is extremely rare. The Supreme Court has identified cases which would warrant a finding that the state law claims present substantial federal issue. Those cases present "nearly pure issue of law" rather than cases which involve "fact-bound and situation-specific" claims. Empire Healthchoice Assurance, Inc. v. McVeigh, 574 U.S. 677, 699, 700-01, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006). Pure questions of law which would warrant this kind of jurisdiction would have to involve the construction and validity of a federal statute or the U.S. Constitution. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 310, 315 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005). In contrast, the Supreme Court has declined to exercise federal question jurisdiction over state law claims if the federal issue is not a pure question of law but is fact-bound and fact-specific. Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)(reviewing a reimbursement claim brought by an insurance carrier pursuant to a health care contract authorized by the Federal Employees Health Benefits Act). APCO mostly argues that

"reference" would be needed to APCO's license to interpret the flowage easement deed, however, on few occasions, APCO goes beyond that and argues that the court would have to "interpret" the terms of APCO's license in order to resolve the extent of Pressls' and APCO's property rights.

What FERC license states is not disputed. APCO uses the word "interpret" so that it could fit under the first line of the cases cited above which conferred federal jurisdiction. APCO has failed to effectively explain why the terms of APCO's license would need interpretation or construction. They do not. Appreciating this difficulty, APCO attempts to argue that federal jurisdiction is possible not only when the court must "construe" a federal law but also when it must "apply" federal law. APCO's Brief p. 28. APCO cites Grable for this proposition. Grable however does not support APCO's proposition. Grable, 545 U.S. at 312, 125 S. Ct. at 2367. This is a relevant portion of Grable on this point:

> The classic example is *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 65 L. Ed. 577, 41 S. Ct. 243 (1921)….., [A]lthough Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue. ***Smith* thus held, in a somewhat generous statement of the scope of the doctrine**, that a state-law claim could give rise to federal-question jurisdiction so long as it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]." *Id.*, at 199, 65 L. Ed. 577, 41 S. Ct. 243.
>
> **The *Smith* statement has been subject to some trimming** to fit earlier and later cases recognizing the vitality of the basic doctrine,

> **but shying away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the "arising under" door**. Id. (emphasis added).

Based on all of the foregoing, APCO cannot satisfy the first prong of Gunn as no federal issue is necessarily raised.

3. APCO Has Not Satisfied Any of Gunn Prongs.

APCO argues that there is a dispute over the extent to which the federal license issued by FERC applies to and effects the rights of the parties. APCO however cannot manufacture a dispute where none exist. The federal license is a license which governs APCO's duties. What the federal license says is not disputed. APCO did not point and cannot point to anything in federal law which would make the Pressls parties to the federal license. The only way APCO can assert any rights over the Pressls is through a private contract. APCO has not satisfied the second Gunn prong.

APCO has also not shown that the federal issues allegedly raised in the Complaint are substantial in order to satisfy the third prong of Gunn. On page 28, APCO argues that the Complaint invites the court to essentially nullify or alter FERC orders and ignore the requirements set forth in APCO's federal license and that such ruling could severely hamper FERC's ability to regulate its licenses. FERC however regulates projects by regulating its licensee, such as APCO, not by regulating the property owners. Furthermore, FERC concedes that it does not get

involved in property rights disputes. If APCO is found by a state court not to have sufficient property rights in this case, FERC may direct APCO to get them. There is no FERC order on record deciding the Pressls' property rights. Contrary to APCO's argument, the entire system would not come to a halt because of this Court remanding the case to a state court. The complete scheme actually anticipates a possibility that a licensee may not have sufficient property rights to carry out its federal license and in that case the federal law directs the licensee to acquire them. The complete scheme anticipates that there will be disputes over property rights and FERC directs that those disputes be resolved in courts, not through an administrative process.

On page 30, APCO argues that the issues raised in the Pressls' Complaint are of significant importance to the federal system as a whole citing Timberline. APCO also solely relies on Timberline to demonstrate that it satisfied the fourth prong of Gunn that the federal issues raised are capable of resolution in a federal court without disrupting the federal-state balance. As discussed earlier, Timberline is easily distinguishable because the Timberline opinion was predicated on the fact that the terms and conditions of the federal license were expressly incorporated into and made part of the deed by the parties to that particular quitclaim deed. VA Timberline, LLC v. Appalachian Power Co., 2006 U.S. Dist. LEXIS 52156 (2006). Contrary to APCO's argument, the issues in Timberline were not similar to this

case and the reasoning employed in Timberline does not apply in this case. Based on all of the foregoing, APCO has failed to show how the third and fourth Gunn prongs are satisfied in this case.

b. The Inclusion of a Sample Dock Permit as an Exhibit to the Complaint and the Pressls' Request for Relief (D) Also Do Not Implicate a Significant Federal Issue.

On page 14 and 23 of its Brief, APCO also argues that a significant federal issue is raised because the Complaint attached as an exhibit a sample dock permit which dock permit in turn references APCO's license. According to APCO, this means that the Complaint incorporates a clear statement that the federal license is the source of APCO's "authority and responsibility" to regulate activities within the project and that makes interpretation of federal license an issue. APCO's Brief p. 14. That is incorrect. As stated earlier, APCO's federal license does not give APCO authority to regulate the activities or property of private individuals. On the contrary, it requires APCO to acquire sufficient private property rights. Further, any disputes regarding property rights are matter for the state courts to resolve. See FirstLight Hydro Generating Company, 142 FERC ¶ 62,256, FN12 (2014). A license cannot change property rights. Id. at 142 FERC ¶62,256, 64716 (holding that whatever rights an entity has in lands within the project boundary, whether conferred by deed, lease, easement, or other conveyance, will not be altered by FERC action regarding the SMP, if the licensee does not have the adequate rights

to do so, the Commission could require the licensee to obtain these additional rights).

The authority to regulate is predicated on acquisition of sufficient private property rights. And that is also the underpinning of a dock permit. APCO ignores pertinent language in the sample form permit acknowledging that the permit is "limited to [APCO's] authority under its [FERC license] and to its land rights to the property." JA 50. This recognizes that APCO's requirement to comply with its FERC license as to private property below 800-feet contour line can only arise from the property rights it acquired pursuant to the terms of the flowage easement, which the Pressls asked the state court to interpret. APCO mistakes its duty to comply with the FERC license with a grant of the property rights necessary to enforce its license.

On page 24, APCO also argues that a reference to its federal license would be necessary for a state court to rule with respect to the Pressls' request for relief (D) "that APCO lacks authority to require the plaintiffs to enter into a revocable license agreement as a condition for accessing the waters of Smith Mountain Lake for recreational purposes." JA 34. The state court however does not need to reference APCO's federal license, it only needs to consider whether APCO's property rights under the flowage easement provide it with sufficient authority to require the Pressls to obtain APCO's permission to construct a dock.

The flowage agreement is devoid of any agreement to execute a dock permit. Yet, the flowage easement in at least two places sets forth various agreements between the parties. If the parties wanted to make such an agreement, they would have put that in the flowage easement. The courts are not at liberty to make agreements for the parties. In any event, in 1960 APCO had no duty to regulate shoreline activities and did not have authority to grant permits.

Not only that the flowage easement does not contain language requiring the Pressls to obtain a permit to access the waters for recreational purposes, the easement expressly states that the grantors have the right to access the waters of Smith Mountain Lake for recreational purposes. JA 43. That is the same right APCO is denying to the Pressls by its overbroad interpretation of the easement.

Based on all of the foregoing, not only does the court does not have to interpret APCO's federal license in order to grant relief (D), given the language of the flowage easement, it is not at liberty to look to APCO's federal license. Thus, a federal issue is not necessarily raised to satisfy the first prong of Gunn. With respect to why the second, third and fourth prongs are not satisfied, reference is made to section I(B)(a)(3).

c. Contrary to APCO's Argument, the Coercive Action Doctrine Does Not Supply Federal Question Jurisdiction in this Case.

On page 33, APCO incorrectly argues that mirror image of the Pressls' Complaint is a cause of action by APCO "to enforce the duties and responsibilities that it has under the FPA, which include a duty to ensure that the lands within the Project boundary comply with the SMP." The Pressls are not subject to the FPA. All that is required in this case to grant a relief is to interpret a simple deed. A hypothetical coercive suit would seek determination of whether or not the flowage easement was broad enough for APCO to control the use of the Pressls' land. Such suit would have to independently meet the federal jurisdiction requirements and it does not.

Furthermore, APCO's argument that it has filed several coercive suits in the Western District of Virginia Federal District Court to enforce its rights and obligations under its federal license is unconvincing for purposes of this case. The district court opinion in Nissen is being appealed. Nissen v. Appalachian Power Company, Case No. 16-1062 (appeal filed Jan. 14, 2016). In Arthur, defendants proceeded *pro se*, did not file an answer to APCO's motion for summary judgment and the court noted that the defendants offered no argument that APCO's property rights were insufficient to entitle it to the relief requested, which was removal of several structures. Appalachian Power Co. v. Arthur, 39 F. Supp. 3d 790 (Aug. 11, 2014). The defendants in Arthur did not challenge the court's federal jurisdiction

and private property rights were not put at issue in the same manner as they are put at issue in this case. Similarly, in Longenecker neither federal jurisdiction nor private property rights were challenged in the same manner as they are in this case. See Appalachian Power Co. v. Longenecker, 2001 U.S. Dist. LEXIS 27185 (July 11, 2001). The only issue in Longenecker as in Arthur, was limited to the issue of removal of certain structures from area below the 800 feet contour line. However, even these cases could have and should have been brought in a state court. Interpretation of an easement is a matter of a state law. The same error with respect to federal jurisdiction occurred in Tri-Dam v. Keller. See Tri-Dam v. Keller, 2013 U.S. Dist. LEXIS 80617 (2013). Nevertheless the Keller court denied motion for summary judgment, holding that it was not clear that the Keller's dock constituted an interference with Tri-Dam's easement rights.

The Declaratory Judgment Act, 28 U.S.C. §2201, does not confer jurisdiction upon federal courts and APCO cannot rely on it as means to obtain jurisdiction. Household Bank, F.S.B. v. Allen, 2001 U.S. Dist. LEXIS 8799, *18 (S.D. Miss. May 25, 2001). A suit pursuant to 16 U.S.C. §825p by APCO to enforce its duties and responsibilities under the FPA is not the reverse of the Pressls' suit. The FPA does not confer upon APCO the right to enter, use, or regulate private property without the consent of the owner and without the acquisition of private property rights. This case is similar to the appeal in

Columbia Gas Transmission, LLC v. Singh on which the Pressls relied on in their Opening Brief. Columbia Gas Transmission, LLC v. Singh, 707 F.3d 583, 591 (6th Cir. 2013). Columbia alleged federal jurisdiction under the Natural Gas Act, 15 U.S.C.S. §717u, which is parallel to §825p. Singh, 707 F.3d at 591-92. The Sixth Circuit found that §717u did not apply in the case because the dispute was over an easement. Id. The Sixth Circuit found that if the Singhs had a duty to Columbia, if any, it would arise from the easement, not from the Natural Gas Act. Id. Therefore, the Sixth Circuit held neither the Natural Gas Act nor federal common law was the source of Columbia's cause of action, and Columbia's cause of action could only be understood as asserting a state-law claim for interference with an easement. Singh, at 588-89, 591-92. Singh cited to Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County, 366 U.S. 656 (1961) where the Supreme Court clarified that exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. Id. The source of any duty that the Pressls might have toward APCO arises out of the flowage easement. 16 U.S.C. §825p is not a generator of jurisdiction and a hypothetical coercive action that APCO might assert in this case is nothing more than a state-law claim for interference with an easement. APCO has not addressed or challenged these holdings in its Brief. Yet on page 39-40, APCO argues that §825p provides a federal court a forum to litigate state law

causes of action, like interpretation of private contracts between licensees and private property owners. The reason APCO gives for this conclusion? §825p provides federal courts with "exclusive jurisdiction" over cases involving violations of the FPA. The inference is contrary to the established precedent as set forth above.

APCO is also incorrect when it argues on pages 35-40 that the hypothetical coercive action would satisfy all four prongs of Gunn. APCO makes similar erroneous arguments as it made with respect to its argument that the Pressls' Complaint raises significant federal issues. In this section of its brief, APCO also cites to Tri-Dam v. Schediwy. In Schediwy, the court rejected Tri-Dam's blanket argument that FERC regulatory authority over the project boundary granted Tri-Dam the right to enforce the terms of the SMP. Tri-Dam v. Schediwy, 2014 U.S. Dist. LEXIS 29775, *24 (E. D. Cal. March 15, 2014). The court found that Tri-Dam had mistaken its duty to comply with and enforce its FERC license with a grant of the property rights necessary to enforce the license against the private property owners. Id. This is the same mistake APCO is making in their matter. Further, Schediwy can be distinguished. It relies on and cites to Timberline where the deed at issue expressly incorporated the federal license. That is not the case here.

Additionally, defendants in Schediwy obtained a permit and thus they submitted to the permit procedure, but their contractor failed to build the structure correctly. Id. at *39.

II. It Is Unnecessary for the Pressls to Ask FERC to Adjudicate Their Property Rights, Thus the Pressls Did Not Fail to Exhaust Administrative Remedies.

On page 40, APCO argues that the Pressls should have sought the remedies set forth under the FPA and file a petition with FERC. Private property rights were never intended to be part of the FPA. 16 U.S.C. §814. FERC directs that private property rights disputes must go straight to a state court. See cases cited in Part I. The Pressls, unlike the plaintiff in J. W. Holdings, did not sign a permit and then dispute APCO's authority to regulate. J. W. Holdings, Inc. v. Appalachian Power Co., Civil Action No. 6:04-CV-00033 (W.D. Va. 2005), JA 156-164. The Pressls, unlike the plaintiff in J. W. Holdings, also do not currently have several proceedings pending before FERC which might resolve the issue. JA 163. Further, the summary holdings set forth in J. W. Holding are of no precedential value in deciding this case.

APCO also argues that the Pressls are bound by the administrative proceedings initiated by their predecessor in title, Mr. Frie. The Pressls are not bound because they were not parties to them. The Pressls also cannot be bound by the erroneous interpretation of the easement rights by Frie. Contrary to Frie, the

Pressls dispute sufficiency of APCO's private property rights. Additionally, the Pressls purchased from Bank of the James, not directly from Frie, and Frie was the transferee of APCO permit which was personal to Frie and did not convey an easement or other property interest in the grantee. 134 FERC 61,113, at ¶7, JA 226-32. Unlike Frie, the Pressls have not signed a permit or voluntarily submitted to the jurisdiction of FERC.

APCO argues that FERC orders also bind non-parties. Contrary to the property owners in Otwell, the Pressls did not own the property in question at the time the Frie FERC orders were issued. 133 FERC 62,135 (Nov. 10, 2010); 134 FERC 61,113 (Feb. 17, 2011); JA 37-39. In Otwell, the court reasoned that any person or entity with the interest in the proceedings before FERC could evade FPA's exclusive judicial review by simply choosing not to participate or by creating a corporate entity to champion their interests. Otwell v. Ala. Power Co., 747 F.3d 1275, 1282 (11th Cir. 2014). This reasoning is not applicable here. Furthermore, and most importantly, in Otwell the Appellants sought an injunction requiring Alabama Power to construct cooling towers in order to stabilize water levels, proposals expressly considered and rejected by FERC, and the court held that this was the main issue in the case. Id. at 1281. This issue belonged before FERC. The Pressls' determination of private property rights does not belong before FERC and FERC has not made any specific findings, and has no legal

authority to make any findings, as to the rights of the parties pursuant to the flowage easement in Frie. No collateral attack doctrine is thus applicable.

On page 46, APCO further argues that the issues in the Pressls' Complaint were also at the heart of the CURB Complaint to FERC. Appalachian Power Company, 153 FERC 61,299 (2015). That is incorrect. The Pressls cannot be regarded as collaterally attacking the CURB FERC order because their type of cause of action was preserved by the CURB FERC order. The CURB FERC order stated as follows: "if a landowner believe that a licensee's easement precludes certain activity, such a dispute must be resolved between the property owner and APCO in a property law action in a court of appropriate jurisdiction [and] [i]f it is determined that the licensee does not have sufficient rights to comply with the license requirements, the Commission could require the licensee to obtain the additional rights by easement or eminent domain". Id. at ¶29. The Pressl were not parties to CURB FERC Order and their flowage easement was not interpreted therein. In similar manner, whether or not CURB is going to seek judicial review of its FERC Order is also not at issue because FERC has specifically held that it was not deciding any property issues because those were issue for a court.

APCO cites to Skokomish Indian Tribe v. United States, 332 F.3d 551, 560 (9th Cir. 2003) to further support its argument that the Pressls are impermissibly collaterally attacking the aforesaid FERC Orders. However, the Tribe has

participated in FERC proceedings and even filed an appeal to them and the FERC case was still pending when the 2003 decision was rendered Id. at *554-555. That is not the case here. Further, the 2003 decision was subject to a lengthy appellate review including an issuance of a substitute opinion at 401 F.3d 979, *985, FN4 (2005) wherein the Ninth Circuit corrected itself and held that the Tribe was not attempting to collaterally attack the FERC decision rather it was suing for damages based on impacts that were not covered by the license and thus holding that the FPA did not preempt the Tribe's treaty-based claims.

Also, contrary to APCO's argument on page 46, this Court's decision in Halifax County v. Lever does not support the conclusion that the Pressls' suit is barred by 16 U.S.C. §825l (b). Lever can be distinguished. Halifax County was a party to a FERC proceeding wherein the county was at first trying to file a competing application for licensing and instead of filing for a rehearing with FERC, the county filed in district court asking for an order requiring the defendants to surrender the permit to operate a dam. County of Halifax v. Lever, 718 F.2d 649 (4th Cir. 1983). The Pressls are not party to any FERC proceeding. In addition, Halifax County was not about private property rights dispute but was an action by Halifax County to invalidate a permit to operate dam issued to the defendants and the court held that under the FPA FERC had exclusive right to

grant, cancel or rescind permits for the construction and operations of dams. Id. at 651.

APCO's arguments that the Pressls should have asked FERC to resolve the property dispute and that the Pressls are seeking a trial court to review FERC orders are thus without any basis. APCO's discussion that follows in this part of its Brief is superfluous and designed to confuse and distract from the issues before the court.

III. APCO's Misstatements of Facts.

On page 45, APCO states that the Pressls want to engage in similar activities to Mr. Frie with one of the differences being construction of even larger dock. The survey however shows three poles to be removed, thus resulting in a smaller dock. JA 48.

On page 6, APCO states that the Pressls' property contains conservation area wetlands and that the Pressls wish to build in the designated conservation area. However, APCO has represented to the contrary to FERC. "The licensee [APCO] states that the proposal would not be located in a wetland; rather, it would be located in an area with fringe vegetation present." JA 72 (¶4). "The licensee states that, although wetlands are present at the rear of the cove, wetlands would not be affected by the dock's construction." JA 74 (¶10). APCO also represented to FERC that the Virginia Department of Game and Inland Fisheries (VDGIF) stated

that no impacts to wetlands and fringe vegetation would occur if the Frie application was approved and that it should be approved. JA 72 (¶5). Additionally, it is APCO who designates areas within the project.

APCO's misstatement of fact with respect to substituting the word "project" in the prayer for relief (I) was already addressed.

IV. Justiciable Controversy.

The Pressls wish to rely on the same arguments they made in the district court in showing that the requests for relief "C" and "D" represent justiciable controversy. JA 214-216.

CONCLUSION

This case belongs in state court and the District Court was in error.

Respectfully submitted,

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Certificate of Compliance

The Reply Brief of Appellants has been prepared using:

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