

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

<b>RICHARD A. PRESSL and</b>	)	
<b>THERESA M. PRESSL</b>	)	
<b>Plaintiffs,</b>	)	
<b>v.</b>	)	<b>Case No. 7:15-cv-00343</b>
	)	<b>State Civil Action No.: CL15-631</b>
<b>APPALACHIAN POWER CO.,</b>	)	
<b>Defendant.</b>	)	

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT  
APPALACHIAN POWER COMPANY’S MOTION TO DISMISS**

COMES NOW the Plaintiff’s, Richard A. Pressl and Theresa M. Pressl (“Plaintiffs” or Pressls”) who, by counsel, submit this Brief in Opposition to Defendant Appalachian Power Company’s Motion to Dismiss. For the following reasons the Pressls respectfully request that the relief requested in the Motion to Dismiss be denied:

**STATEMENT OF THE CASE**

On June 2, 2015 your Plaintiffs, Richard A. Pressl and Terri M. Pressl filed their complaint against the Defendant, Appalachian Power Company (APCO), in the Circuit Court of Franklin County. The Pressls’ prayer for relief pursuant to the Virginia Declaratory Judgment Act Va. Code §8.01-188 *et seq.* solely asks the court to determine whether a flowage easement granted by the Pressls’ predecessors in title

to APCO allowed the Defendant to regulate the uses the Pressls may now make of their property which they own in fee.

On June 23, 2015 APCO filed its Notice of Removal transferring the case from state court to the United States District Court for the Western District of Virginia. (Dkt. # 1). On July 2, 2015 APCO filed its Motion to Dismiss the Plaintiffs' complaint. (Dkt. # 3). On July 10, 2015, the Pressls filed their Motion to Remand the case to the Circuit Court of Franklin County. (Dkt. # 6).

### **FACTS AND BACKGROUND**

The Defendant, APCO, operates the Smith Mountain Hydroelectric Project on Smith Mountain Lake and Leesville Lake in Bedford, Campbell, Franklin, Pittsylvania and Roanoke Counties, Virginia. (Comp. ¶ 6). APCO operates and maintains a power station and dam downstream from the Plaintiffs' property pursuant to a license from the Federal Energy Regulatory Commission (FERC). The waters impounded by APCO's dam at Smith Mountain form Smith Mountain Lake. (Comp. ¶ 7).

The Pressls are the owners of a lot which fronts and extends into the waters of Smith Mountain Lake. (Comp. ¶ 1). The Pressls' lot contains 2.663 acre plus  $\pm$  1/2 acre below the 800' contour line extending out into the waters of Smith Mountain

Lake. (Comp. ¶ 2, Comp. Exhibit A). The water levels in Smith Mountain Lake vary depending upon seasonal conditions and demand for power generation. (Comp. ¶ 8 n. 1). Thus the Pressls must use that portion of their property which is overflowed by the impounded waters of Smith Mountain Lake to fully use and enjoy the recreational activities which the lake has to offer. (Comp. ¶ 15).

The Pressls' property is subject to a Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir, herein after referred to as the "flowage easement." (Comp. Exhibit D, Def. Memorandum Exhibit B<sup>1</sup>). The flowage easement allows APCO to overflow that portion of the Pressls' property which is below the 800 foot contour. *Id.* The flowage easement specifically provides that the Pressls shall have the right to cross beyond the 800 foot contour to reach the impounded waters for recreational purposes. *Id.* The right to overflow the Plaintiffs' property was created to allow APCO to operate a dam and power station. *Id.* The Pressls predecessors in title specifically reserved the right to cross beyond the 800' contour to reach the impounded waters for recreational purposes.

The flowage easement further provides part:

Grantors hereby grant, bargain, sell and convey with covenants of general warranty, unto Appalachian forever the right to overflow and/or affect so much of said premises as may be overflowed

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<sup>1</sup> Unless otherwise stated references to the defendant's memorandum shall refer to Memorandum of Law in Support of Appalachian Power Company's Motion to Dismiss Complaint for Declaratory Relief.

and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, including pumping as part of any such operation.

ALSO, for the above mentioned considerations, 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 may hereafter be located on the portion of the said premises below the contour the elevation of which is 800 feet.

IT IS ALSO UNDERSTOOD AND AGREED BETWEEN THE PARTIES HERETO THAT:

1. Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach the impounded waters for recreational purposes . . .

The flowage easement contains a clear statement of the flowage easement's particular purpose. Specifically, the flowage easement grants APCO the right to overflow the Pressl's property to allow the construction and operation of a dam and hydroelectric power station being constructed by APCO at Smith Mountain at the time the easement was executed. (Comp. ¶ 17).

The Pressls' complaint alleges that the flowage easement does not give APCO the right to regulate any use beyond overflowing their property and maintaining a dam and hydroelectric power station which they may make of their property below

the 800 foot contour. (Comp. Exhibit D). The Pressls further allege that 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. (Comp. ¶10). APCO insists that the flowage easement grants it the authority to regulate the uses which a private landowner may make of their property which lies below the 800 foot contour. Defendant's Memorandum of Law §V. Specifically, APCO insists that the flowage easement allows it to regulate how the plaintiffs may make use of their property lying below the 800' contour including but not limited to the removal and planting of vegetation, the size and type of dock which the plaintiff's may construct and stabilization of the shoreline.

The Plaintiffs' complaint requests in relevant part the following forms of relief:

- C. That the Court further find that APCO lacks the authority to demand that your plaintiffs relinquish without compensation valuable property rights they and their predecessors in title retained by under the original flowage easement.
- D. That the Court further find that APCO lacks the 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.
- E. That the Court find that APCO has no regulatory authority over the plaintiffs' property which lies below the 800 foot contour beyond those rights defined by the flowage easement, the contemporaneous expressions of the parties, and vested rights to build and own structures to access Smith Mountain Lake for recreational purposes.
- F. That the Court find that APCO cannot regulate the size and type of dock that the plaintiffs may construct on their property.

- G. That the Court find that APCO cannot regulate how the plaintiffs stabilize the shoreline of their property by requiring them to plant vegetation below the 800 foot contour.
- H. That the Court find that APCO cannot regulate whether the plaintiffs may dredge in front of their property to improve any dock which they may construct.
- I. That the Court find that the Pressls 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;

The Pressls have filed a Motion to Remand this case to the Circuit Court of Franklin County. In their Memorandum of Law in support of the Motion to Remand the Plaintiffs assert the following arguments responsive to the contentions raised by APCO in its Motion to Dismiss; 1) that federal question jurisdiction does not exist because no federal claim is present on the face of the Pressls' complaint and 2) that the defendant's FERC license does not transform this case into one arising under federal law as the defendant's property rights arise under the flowage easement and that the complaint does not allege any violations of the Federal Power Act (FPA) or the defendant's FERC license. Without waiving their objection to have their claim decided in state court, the Pressls respond to the Motion to Dismiss as follows:

**I. THE PLAINTIFFS' COMPLAINT IS NOT A COLLATERAL ATTACK ON AN ORDER ISSUED BY FERC; RATHER IT ASKS THE COURT TO DETERMINE THE RIGHTS OF THE PLAINTIFFS AND THE DEFENDANT PURSUANT TO THE FLOWAGE EASEMENT.**

**A. THE PRESSLS' COMPLAINT IS NOT A COLLATERAL ATTACK ON AN ORDER ISSUED BY FERC.**

APCO argues that the Pressls' complaint is a collateral attack on orders issued by FERC. However, the Pressls claims for relief do not relate to APCO's operations pursuant to its license issued by FERC. Furthermore, the Pressls complaint does not allege that APCO has violated the terms of APCO's license issued by FERC or the FPA. FERC regulates what a licensee can and cannot do pursuant to a license granted under the FPA. *See* 16 U.S.C. §797. Any violation of a license issued by FERC is solely to be determined between FERC and its licensee. *Id.*

**i. FERC HAS NOT AND CANNOT ADJUDICATE PRIVATE PROPERTY RIGHTS BETWEEN THE LICENSEE AND THIRD PARTIES.**

The Plaintiffs are not asking the court to make any findings with respect to the orders regarding the Defendant's license issued by FERC. FERC cannot and has not made any specific findings regarding the rights of persons owning land which lies below the waters of Smith Mountain Lake. *Appalachian Power Company*, 146 FERC ¶ 62,083, at ¶46 n.23, Project No. 2210-207, Order Modifying and Approving Updated Shoreline Management Plan (FERC 2014). In the Order Modifying and Approving the Shoreline Management Plan, FERC specifically stated "The licensee

is required by standard article 5 to acquire and retain all rights necessary to carry out project purposes, and any questions concerning specific property rights would best be resolved in a court of competent jurisdiction.” *Id.*

FERC has made no determination in regards to the property rights at issue in this case. Specifically, FERC recognizes a role for state law claims regarding property rights. FERC Chairman Cheryl A. LaFleur recently stated in a letter to U.S. Congressman Robert Hurt “The Shoreline Management Plan (SMP) applies to those lands in the project boundary where Appalachian Power has property rights. The licensee has no authority to regulate construction over privately owned lands, unless the property owner has given them those rights.” A copy of Chairman LaFleur’s letter to Congressman Hurt is attached hereto as **Exhibit A**.

FERC in its licensing orders recognizes that it has no authority to make determinations regarding property rights recognized pursuant to state law. *See, e.g. 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”). Simply stated FERC only requires that the licensee have sufficient property rights to carry out the project purposes. The requirement that the licensee acquire and retain sufficient property rights to carry out the project purposes is specifically imposed upon APCO. *Appalachian Power Company*, 146 FERC ¶ 62,083, at ¶46 n.23, Project No. 2210-207, Order Modifying and Approving Updated Shoreline Management Plan (FERC 2014).

**ii. FERC HAS NOT MADE A DETERMINATION REGARDING APCO’S PROPERTY RIGHTS PURSUANT TO THE FLOWAGE EASEMENT.**

The cases cited by the Defendant can be distinguished from this case as the Pressls’ claims do not seek to alter the operation of a FERC project or challenge any specific order issued by FERC to its licensee where the licensee has properly acquired all necessary property rights to satisfy FERC demands or any provision of the FPA. The Pressls’ claims solely seek a court determination of the parties respective rights granted or reserved under the terms of the flowage easement.

The Pressls do not seek to invalidate or review an order issued by FERC. As set forth in §I.B.2. of the Plaintiff’s Memorandum of Law in Support of their Motion to Remand, 16 U.S.C. 825p is inapplicable to the claims set forth in the Pressls’

complaint. The Supreme Court in interpreting the FPA has held that “private property rights are rooted in state law.” *Fed. Power Comm’n v. Niagra Mowhawk Power, Corp.*, 347 U.S. 239, 256 (1954). The cases cited by the Defendant are inapplicable to this case. The theme central to the cases cited by the Defendant is that the plaintiffs all sought to invalidate an action by FERC. None of the cases cited by the defendant seek judicial determination of rights created under state law. The Pressls seek judicial determination of their rights pursuant to the flowage easement to allow uses which are not inconsistent with the operation and maintenance of a dam and hydroelectric plant.

In *City of Tacoma v. Taxpayers of Tacoma*, the State of Washington objected to FERC’s issuance of a license to the City of Tacoma to construct a hydro electric facility on the Cowlitz River. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 324-325 (1959). The Defendant misconstrues the holding in *City of Tacoma* to completely prohibit the application of state law. While the holding in *City of Taxoma* recognized that the plaintiffs could not dispute FERC’s decision to grant a license, the Court recognized that the FPA did not completely invalidate state law. *Id.* at 340. Specifically, the Court recognized that provisions in the city’s charter may limit the ability of the city to issue bonds to finance the project something which FERC cannot regulate. *Id.* Justice Harlan concurring with the decision of the Court in *City of Tacoma* clarified the Court’s holding stating “I do not understand the Court to suggest

that the Federal Power Act endowed the Commission and the Court of Appeals with the authority to decide any issues of state law if such law were deemed controlling or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed re-examination of such a decision in other proceedings.” *Id.* at 342 (Harlan Concurring).

The Defendant argues that the Fourth Circuit has held that prior proceedings with FERC preclude litigation in the district court based upon 16 U.S. C. §825 l(b). *See Halifax County v. Lever*, 718 F.3d 649 (4th Cir. 1983). Halifax County took issue with the procedures followed by FERC in issuing a license to the defendant. *Id.* at 650. Halifax County did not assert any claims arising under state law as the Pressels raise in their complaint. Furthermore, the county had notice of and participated in proceedings before FERC. Similar cases cited by the Defendant also involved direct attacks on licensing orders issued by FERC. *See California Save Our Streams Council v. Yeutter*, 887 F2d.908, 911-12 (9th Cir. 1989) (challenge to U.S. Forest Service’s failure to follow provisions of National Environmental Protection Act and American Indian Religious Freedom Act did not provide independent basis for district court jurisdiction when conditions imposed by the Forrest Service had no significance outside the licensing process); *Sw. Center for Biological Diversity v. FERC*, 967 F. Supp. 1166 (D. Ariz. 1997) (challenge to conditions in permit which did not require FERC to consult with the United States Fish and Wildlife Service).

The denial of the Defendant's Motion to Dismiss does not render the judicial review provisions of the FPA nugatory as the Plaintiffs do not seek review of an order or license issued by FERC.

Although courts have had the occasion to consider the effect of the FPA on private property rights they have done so only in the context of a direct challenge to an action by FERC. The Ninth Circuit considered the property rights created pursuant to a treaty with the United States. *See Skokomish Indian Tribe v. United States* 332 F.3d 551, 560 (9th Cir. 2003). In *Skokomish Indian Tribe*, the court determined that unlike fee simple ownership the treaty rights granting the right to take fish from the usual and customary fishing grounds. *Id.* at 560. The court further noted that the rights granted under the treaty may be modified by changing circumstances. *Id.* at 558. The Pressls' property rights will only change if they elect to transfer or convey their rights until such time they will own the property below the 800' contour in fee simple absolute.

**iii. THE FERC PROCEEDINGS INVOLVING RICHARD FRIE DID NOT DECIDE APCO'S PROPERTY RIGHTS PURSUANT TO THE FLOWAGE EASEMENT.**

The Defendant asserts that the proceedings involving the Plaintiffs predecessor in title, Richard Frie, preclude the present litigation. Unlike the present case Mr. Frie was the transferee of a permit issued by APCO to Mary Anne Petty Morgan. Order Denying Request for Rehearing and Motion for Late Intervention, 146 FERC ¶

62,083, at ¶7, Project No. 2210-209 (FERC 2011). The Frie permit, which is attached hereto as **Exhibit B**, specifically states that it is limited by authority granted to APCO pursuant to its license issued by FERC. The permit creates a personal right to the permit applicant and does not convey an easement or other property interest to the grantee. (Comp. Exhibit D Terms and Conditions ¶ 12). The permit is only transferable upon the written consent of APCO. *Id.* Unlike Mr. Frie, the Plaintiffs have not voluntarily submitted to the jurisdiction of FERC.

Defendant cites the Eleventh Circuit's decision in *Ortwell v. Ala. Power Co.* for the proposition that non-parties may not challenge prior administrative proceedings. *Ortwell v. Ala. Power Co.*, 747 F.3d 1275, 1282 (11th Cir. 2014). However, the Defendant's reliance upon *Ortwell* is misplaced. Unlike the Pressls, the plaintiffs in *Ortwell* challenging how Alabama Power could operate pursuant to its FERC license by asking the court to order the defendant to make changes to its power plant and minimize releases of water from its dam allowing more water to remain in Smith Lake. In this case the issue central to the Pressls' claims is that APCO lacks sufficient property rights to regulate the uses which the Pressls may make of their property below the 800' contour. In *Ortwell*, the district court specifically found that Alabama Power had the requisite property rights to enforce the FERC license. *See Ortwell v. Ala. Power Co.*, 944 F. Supp. 2d 1134, 1137 (N.D. Ala. 2013)

Most importantly the Frie proceedings involving Mr. Frie directly challenged

the order issued by FERC. *Id.*, at ¶18. The permit issued to Mr. Frie has since been revoked by APCO and his appeal to the Fourth Circuit was dismissed as moot when Mr. Frie was divested ownership interest in the property in foreclosure proceedings. *Id.* ¶7 n.10, Defendant's Memorandum of Law p. 6, n.10.

The orders attached to the defendant's memorandum of law do not make any mention of the flowage easement upon which the Plaintiffs' claims for declaratory relief are based. (Defendant's Memorandum of Law Exhibits D & E). Property rights are not conveyed, abolished or modified based solely upon the fact that they are located within the boundaries of a project licensed by FERC pursuant to the FPA. *Pub. Util. Dist. v. Seattle*, 382 F.2d 666, 670-72 (9th Cir. 1967) (quoting *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250, 256 (1954)); *Tri-Dam v. Michael*, No. 1:11-CV-2138, 2014 U.S. Dist. LEXIS 42472, \*9-10 (E.D. Cal. Mar. 28, 2014); *Tri-Dam v. Schediwy*, 1:11-cv-01141-AWI-MJS, 2014 U.S. Dist. LEXIS 29775, \*21 (E.D. Cal. Mar. 5, 2014); *Tri-Dam v. Keller*, No. 1:11-cv-1304, 2013 U.S. Dist. LEXIS 80617, \*11 (E.D. Cal. June 7, 2013); *see Niagara Mohawk Power Corp.*, 347 U.S. 239, 250, 256 (1954) (holding that one's "private property rights are rooted in state-law," and determining that neither [the FPA], nor the license issued under it, expressly abolishes existing prop[erty] rights"). The Pressls have not completed an application to obtain a permit from APCO. (Comp. 28). The permit issued to Frie was personal in nature and has not been transferred to the Pressls. *See* Exhibit B.

The Pressls' rights in regard to the land below the 800' contour are solely defined by the specific terms of the flowage easement which does not obligate either the Pressls or their predecessors in title to the terms of the Defendant's license to generate hydroelectric power issued by FERC.

**iv. IT IS UNNECESSARY FOR THE PLAINTIFFS TO ASK FERC TO ADJUDICATE THEIR PROPERTY RIGHTS PURSUANT TO THE FLOWAGE EASEMENT.**

The Plaintiffs' complaint should not be dismissed simply because there is a separate complaint filed by a different party now pending before FERC. Specifically, the Defendant argues that the complaint filed Cut Unnecessary Regulatory Burden, Inc. (CURB) raises issues which are similar to the Pressls' complaint. No property right is held or asserted by CURB. The basis of the CURB complaint relates to multiple actions taken by APCO and FERC. The CURB complaint and this case are not the same. CURB is an independent entity not under the control of the Pressls.

The Defendant argues that the Pressls cannot sit back and allow a "corporate champion" to advocate its interests before FERC. While the Pressls raise claims similar to those raised by CURB, they do not touch and concern the defendant's FERC issued license. Furthermore, for the reasons stated herein and in the Pressls' Memorandum of Law in Support of their Motion to Remand it is unnecessary for the Pressls' to intervene in administrative proceedings involving the Defendant licensee and FERC.

APCO concludes that in order for the court to grant the declaratory relief requested in the complaint, the court must find that there is some error in the orders issued by FERC. This false and diversionary. No FERC order is put in issue in the Plaintiff's complaint. Therefore, the Defendant's motion to dismiss should be denied.

**B. THE PRESSLS' COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AS THE FEDERAL POWER ACT DOES NOT APPLY TO THE RELIEF REQUESTED IN THE COMPLAINT.**

The Plaintiffs need not exercise administrative remedies under the FPA as the FPA does not apply to their claims requesting that the court determine the parties respective rights pursuant to the flowage easement. The Plaintiffs are not seeking the review of an administrative decision by FERC or violation of the FPA. Furthermore, as stated in the plaintiffs' memorandum in support of their motion to remand the FPA does not completely preempt issues of state law. *See* Plaintiff's Memorandum of Law in Support of their Motion to Remand § I. C.

The Defendant contends that the holding of *J.W. Holdings, Inc. v. Appalachian Power Co.* requires your Plaintiff to exhaust their administrative remedies pursuant to the FPA. Unlike the Pressls, J.W. Holdings had applied to APCO for permits to construct docks on the land below the 800' contour on Smith Mountain Lake. *J.W. Holdings, Inc. v. Appalachian Power Co.*, Civil Action no. 6:04-CV-00033 (W.D. Va. 2005) at 3-4. Additionally, J.W. Holdings had intervened in several administrative

proceedings involving FERC. *Id.* At the time J.W. Holdings had filed its suit in the district court, it had applications pending before APCO subject to the review and approval of FERC and had intervened as a party in regards to the proceedings before FERC involving the renewal of APCO's license to operate the Smith Mountain Hydro-electric pump storage project. *Id.* Thus J.W. holdings voluntarily submitted to the jurisdiction of FERC. It is also important to note that J.W. Holdings was specifically challenging whether the two parcels in question were properly brought into the project. Whereas, the present claims raised by the Pressls center around whether the property rights granted to APCO are sufficient to allow the regulation of uses to which the Pressls may make of that portion of their property lying below the 800' contour.

The property rights in question between the Pressls and APCO arise from the flowage easement. As stated herein FERC has not made any specific findings with regards to the rights of the parties pursuant to the flowage easement. Furthermore, FERC clearly stated that it does not regulate private property rights as these are matters for the courts. *See Ne. Rural Elec. Mbrshp. Corp. v. Wasbash Valley Power Ass'n.*, 707 F.3d 883, 893-94 (7<sup>th</sup> Cir. 2013), Plaintiff's Memorandum of Law in Support of their Motion to Remand §I. B. 4. n. 6 & 7.

The Supreme Court of Virginia has found that a valuable property rights do exist subject to the terms of APCO's flowage easement. *See Brown v. Haley*, 233 Va.

210, 221, 355 S.E.2d 563, 571 (1987) (finding that an implied easement to access the waters of Smith Mountain Lake existed when the plaintiffs showed that the parties contemplated that purchasers would have access to the waters of the lake); *Smith Mtn. Lake Yacht Club, Inc. v. Raymanker*, 261 Va. 240, 249, 542 S.E.2d 392, 397 (2001) (holding a lake front property owner may not build a dock on the lands of another without express permission); *Anderson v. Delore*, 278 Va. 251, 258, 683 S.E.2d 307, 310 (2009) (holding that in a dispute regarding the terms of an easement which fails to set forth its purpose or scope the easement is to be construed based upon the parties intentions of the parties at the time of the grant). Unlike the easement in *Delore*, the flowage easement specifically states that the grantor grants unto APCO “the right to overflow and/or affect so much of said premises . . . as a result of the construction, existence, operation and/or maintenance of the aforesaid dam and power station.” (Comp. Exhibit D). In construing an easement where the purpose is set forth in the grant, the easement is to be construed from the words in the deed and the extent of the easement may not be ascertained from any other source. *Anderson v. Delore*, 278 Va. at 257, 683 S.E.2d at 310 (2009) (citing *Hamlin v. Pandapas*, 197 Va. 659, 663-664, 90 S.E.2d 829, 833(1956)). The Supreme Court of Virginia has also recognized that an implied easement exists when “the parties to a land transaction contemplate that purchasers will have access to the water for recreational purposes and such access adds materially to the value of the property

conveyed, use of the property retained for access to the water is reasonably necessary for the beneficial use and enjoyment of the property conveyed.” *Stoney Creek Resort, Inc. v. Newman*, 240 Va. 461, 467, 397 S.E.2d 878, 882 (1990). The right to use and enjoy the waters of Smith Mountain Lake is a significant feature integral to the Pressls property.

The flowage easement clearly expresses that APCO is granted the right to overflow the Plaintiff’s property for the construction operation and maintenance of a dam and power plant at Smith Mountain. Based upon the fact that the flowage easement does not limit how the Plaintiffs may use their property to access the lake for recreational purposes and applying the rules of construction of easements as determined by the precedent of the Supreme Court of Virginia, the Plaintiffs are not required to exercise their administrative remedies available under the FPA.

**II. THE PLAINTIFFS’ COMPLAINT SPECIFICALLY SETS FORTH CLAIMS WHICH REPRESENT ACTUAL CONTROVERSIES APPROPRIATE FOR DECLARATORY RELIEF.**

A declaratory judgment action is appropriate “where the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate an afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Centennial Life Ins. Co. v. Posten*, 88 F. 3d 255, 256 (4th Cir. 1996) (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 32 1, 325 (4th Cir. 1937)).

**A. PLAINTIFFS' REQUESTS FOR RELIEF "C", "D" AND "G" PRESENT ACTUAL JUSTICIABLE CONTROVERSIES.**

Defendants statement that the plaintiff's request for relief "C" and "D" are speculative is incorrect. The flowage easement makes no reference to any scheme of regulation. Dispositively, the flowage easement makes no mention of any application/permit process which the grantors or their successors in interest would be required to submit to before constructing facilities, removing vegetation and stabilizing the shoreline so that they may make full use and enjoyment of the recreational activities that Smith Mountain Lake has to offer.

If the Pressls were to independently begin construction of a dock, shoreline stabilization or plant vegetation without first submitting an application they would expose themselves to enforcement litigation. *See Appalachian Power Co. v. Arthur, Appalachian Power Co. v. Nissen.* Furthermore, if taken to its logical conclusion, APCO's assertion that the easement gives it the ability to "cut , burn and/or remove therefrom any and all buildings, structures and improvements" from the plaintiffs' property would allow APCO to do so without any notice to the Pressls. Requests for relief "C" and "D" ask the court to find that APCO lacks the authority "to demand" and "to require" the Plaintiffs to execute the revocable license agreement. The Defendant misconstrues the statements in paragraphs 28 and 29 of the complaint.

Furthermore, defendant ignores its own policies which require the application and permit be issued prior to beginning construction. *See* Comp. Exhibit G Terms and Conditions no. 3 (“Construction shall begin within 90 days and shall be completed within one (1) year of the permit issuance date.”).

This Court’s decision in *Nissen* can be differentiated from the relief which the Pressls request. *Nissen* involves a case where the property owner began construction of a dock and a road within the project boundary in addition to placing artificial fill below the 800' contour without obtaining approval from APCO. *Appalachian Power Co. v. Nissen*, 2015 U.S. Dist. LEXIS 45030 \*5 (W.D. Va. April 7, 2015). The Court in *Nissen* did not hold that a landowner is prohibited from constructing a dock.

Turning to request for relief “G” which the Defendant alleges is moot or that there is no actual justiciable issue. Defendant ignores the plain statements of paragraphs 20 and 21 of the complaint. Paragraph 20 e. states in relevant part:

AEP would require the Pressls to plant vegetation below the 800 foot contour as opposed to placing rip-rap along the shoreline as many other waterfront property owners have done. The planting of vegetation below the 800 foot contour would deny the Pressls a clear and unobstructed view of Smith Mountain Lake. Certainly, a clear and unobstructed view of Smith Mountain Lake would greatly enhance the value and desirability of the plaintiffs’ property.

Paragraph 21 of the complaint states “despite not having any obligation to do so, the Pressls have expended time and considerable money in an attempt to comply with

APCO's demands (underscore added)." Thus while the Pressls have attempted to work with APCO, their cooperation is not based upon the fact that they have the legal obligation to do so. Furthermore, the complaint does not allege that the Pressls have been successful in their negotiations with APCO. After three years of attempting in good faith to negotiate with the Defendant, the Pressls have failed to see any meaningful progress towards resolution of their claims. (Comp. ¶¶ 19-21). Defendant also misconstrues the complaint. Specifically, the complaint alleges that the Plaintiffs can remove vegetation from the area below the 800' contour. (Comp. ¶¶ 20, 22 and 35). The complaint does not state that the Pressls have been successful in their attempts.

APCO's right to control how a property owner may landscape their property based upon the flowage easement has recently been discussed by this Court. This Court recently stated in *Appalachian Power Co. v. Nissen* "Defendants (the Nissens) claim that APCO lacks a property interest sufficient to compel them to undertake re-vegetation of their property, however, is plausible on its face. There is nothing in the plain language of the easement which grants APCO such a right." *Appalachian Power Co. v. Nissen*, 2015 U.S. Dist. LEXIS 53878, \*13 (W.D. Va. April 24, 2015). Contrary to the express terms of the flowage easement and this Court's decision in *Nissen*, APCO contends that it has the exclusive authority to regulate the planting and removal of vegetation, brush and debris.

**B. PLAINTIFFS' REQUESTS FOR RELIEF "E," "F," "H" AND "I" STATE LEGALLY SUFFICIENT CLAIMS WHICH ARE RIPE FOR ADJUDICATION.**

There is no case where a party has specifically challenged APCO's rights pursuant to the flowage easement where the court determined that the landowner cannot have a dock or that APCO can restrict the size dock which the landowner may construct. The complaint specifically alleges that the flowage easement does not grant the Defendant sufficient property rights to regulate the uses to which the Plaintiffs may make use of their property including; constructing a dock, stabilizing their shoreline by planting vegetation and installing rip rap and dredging to improve any dock which may be constructed. (Comp. ¶¶ 22-25). However, Defendant asserts that it has sufficient property rights to regulate those exact things and uses pursuant to the flowage easement. Thus the parties have taken contrary and antagonistic positions with respect to the rights granted to them pursuant to the flowage easement.

The Defendant cites the language in the flowage easement which allows it to remove buildings, structures, trees and brush from the land lying below the 800' contour as a basis for its authority to regulate the uses the Plaintiffs may make of their property below the 800' contour. However, the Defendant ignores the specific language of the flowage easement which states "Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate rights and privileges herein granted to Appalachian, including (a) the right to cross said land

to reach the impounded waters for recreational purposes.” (Comp. Exhibit D). Furthermore, the easement does not contain any words limiting how the Plaintiffs can access the waters of Smith Mountain Lake for recreational purposes. The Plaintiffs proposed uses of their property do not conflict with the purpose of the easement.

In support of the contention that the flowage easement grants the Defendant sufficient property rights to regulate how the Pressls may use that portion of their property which lies below the 800' contour, Defendant cites *Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790, 2014 WL3900618 (W.D. Va. 2014). *Arthur* is distinguishable from the present case for two reasons; 1) *Arthur* involved an enforcement action based upon the defendant's violations of the FPA and 2) the Arthurs were *pro se* litigants who failed to provide any affidavits, other evidence or written response for the court to consider in opposition to APCO's motion for summary judgment. *Id.* In *Arthur* the court's finding that the flowage easement entitled it to enforce the SMP was based upon the fact that the “[defendants] have offered no argument that the APCO's property rights are insufficient to entitle it to the relief it seeks.” *Id.* Subsequently, no court has cited *Arthur* for the proposition that the flowage easement grants APCO the authority to regulate the construction of docks, stabilization of the shoreline including the installation of rip rap and the right to dredge to improve a dock.

Similarly the Defendant's reliance upon this Court's decision in *Appalachian*

*Power Company v. Nissen* is also misplaced. As previously set forth herein *Nissen* involves an enforcement action by APCO against a waterfront property owner who constructed a dock and path within the project boundary which is still pending before this Court.

In this case the complaint states that for much of the time that Smith Mountain Lake has been in existence there was no regulatory scheme by which APCO enforced the uses which waterfront property owners may make of their property. (Comp. ¶35). The Plaintiffs as waterfront property owners had the reasonable expectation that they could construct docks remove, vegetation below the 800 foot contour and perform such other acts to enhance the natural beauty of their property and use and enjoyment of the lake. *Id.* Given the history of development along the lake the Plaintiffs and other landowners held the reasonable belief that they had the absolute right to construct a dock to access the waters of Smith Mountain Lake. *Id.* In fact the Commonwealth of Virginia has codified the rights of private landowners to erect piers, wharves or landings upon watercourses. Va. Code §64.2-164. In fact along Bettys Creek where the Plaintiff's property is situated the plaintiffs' property is only one of the few properties not to be improved with a dock.

The Pressls ask the court for the following forms of relief in their complaint; 1) that APCO lacks the authority to demand that your Plaintiffs relinquish without compensation valuable property rights they retained through their predecessors in

title-under the original flowage easement, 2) that APCO lacks the 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, 3) that APCO has no regulatory authority over the plaintiffs' property which lies below the 800 foot contour beyond those rights defined by the flowage easement, the contemporaneous expressions of the parties, and historic custom and usage defined vested rights to build and own structures to access Smith Mountain Lake for recreational purposes, 4) that APCO has no authority based on the original flowage easement to regulate the size and type of dock that the Plaintiffs may construct on their property, 5) that APCO has no authority based on the original flowage easement to regulate how the Plaintiffs stabilize the shoreline of their property by requiring them to plant vegetation below the 800 foot contour, 6) that APCO cannot regulate whether the Plaintiffs may dredge in front of their property to improve recreational access to the lake including any dock which they may construct, 7) that the Court find that the Pressls 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. The Plaintiffs' requests for relief in the complaint are consistent with these reasonable expectations based upon the express terms of the flowage easement and the historical development of the lake.

## CONCLUSION

The Pressls have challenged the jurisdiction of this Court based upon the fact that federal question jurisdiction does not exist since the Pressls' claims arise under state law. *See* Plaintiff's Memorandum of Law in Support of their Motion to Remand.

The Plaintiffs are not challenging the FPA or any order issued by FERC. APCO erroneously asserts that the FPA and its FERC issued license allow them to regulate the uses which the Pressls must make of their property which lies below the 800' contour. However, FERC and the FPA do not preclude claims arising under the property laws of the states. As the Pressls' claims arise under state law they are not required to submit to administrative review of their claims by FERC. FERC cannot and does not regulate state law property claims. Therefore, the Defendant's Motion to Dismiss pursuant to Rule 12(b) (1) should be denied.

Contrary to APCO's assertions the complaint alleges actual and concrete claims between parties who have taken drastically distinct and adverse positions with regards to the interpretation of the flowage easement. A determination of the parties respective rights pursuant to the flowage easement would provide relief from uncertainty and controversy.

Therefore, APCO's motion to dismiss should be denied.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I, Steven C. Wandrei, Counsel for the plaintiffs do hereby certify that a true and correct copy of the foregoing this 30<sup>th</sup> day of July, 2015 was filed electronically with the clerk of this Court with a copy to opposing counsel named herein using the using the CM/ECF System

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