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

RICHARD A. PRESSL	)	
and	)	**Case No: 7:15-cv-00343**
	)	**State Civil Action No.: CL 15-631**
THERESA M. PRESSL	)	
Plaintiffs,	)	
v.	)	
APPALACHIAN POWER COMPANY	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO REMAND

COMES NOW Plaintiffs, Richard A. Pressl and Theresa M. Pressl ("Plaintiffs" or "Pressls") who, by counsel, submit this Memorandum of Law in Support of Their Motion to Remand. For the following reasons, the Pressls respectfully request that their Motion to Remand be granted and this case be remanded to the Circuit Court for the County of Franklin, Virginia. Plaintiffs state as follows:

FACTS AND BACKGROUND

The Pressls have been the owners of a lot which extends into the waters of Smith Mountain since 2012. (Compl. ¶ 1; Compl., Ex. A). Defendant, Appalachian Power Company ("Defendant"), operates the Smith Mountain Hydroelectric Project on Smith Mountain Lake in Franklin, Counties, Virginia, which was created in 1963. (Compl. ¶ 6-7). The Pressls' property is subject to a Flowage Right and Easement Deed Smith Mountain Combination Hydro Electric Project Upper Reservoir ("flowage easement") held by Defendant. (Pls.' Compl. ¶ 8). This flowage easement was executed in 1960 by the then owners of the Pressls' property. (Compl.,

Ex. D). The flowage easement authorizes Defendant to flood the Pressls' property up to the 800 foot contour line for the purposes of operating and maintain the hydroelectric dam. (Compl., Ex. D). The flowage easement also granted Defendant:

> [T]he right to enter upon said premises at any time and from time to time and, at [Defendant'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 of description which may hereafter be located on the portion of the said premises below the contour the elevation of which is 800 feet.

(Compl. ¶ 16). The flowage easement also explicitly grants the Pressls:

> [T]he right to possess and use said premises [subject to the flowage easement] in any manner no inconsistent with the estate rights and privileges herein granted to [Defendant], including (a) the right to cross said land to reach the impounded waters for recreational purposes. . .

(Compl. ¶ 16).

Soon after the Pressls purchased their property, they began making plans to construct a dock to access the waters of Smith Mountain Lake. (Compl. ¶ 14). However, Defendant informed the Pressls that it has the has the ability to control how the they use the property below the 800 foot contour level of their property, including the construction of a dock, and has made numerous arbitrary demands on the Pressls insisting that they must use and vegetate their property in particular ways. (Compl. ¶ 20).[1] Because of these demands, the Pressls have been unable to use the property below the 800 foot contour line or construct a dock to access the impounded waters for recreational purposes. (Compl. ¶ 19).

Defendant has also advised the Pressls that, as a condition of using their land below the 800 foot contour level, they must execute an Occupancy and Use Permit ("Permit"). (Compl. ¶ 29). The terms of this Permit state that it is a revocable license which Defendant may revoke for any

[1] For much of the time that Smith Mountain Lake has been in existence, Defendant has not attempted to regulate waterfront property owners' uses of their property below the 800 foot contour level. (Compl. ¶ 35).

act which violates a condition imposed by Defendant. (Compl. ¶ 30; Compl. Ex. G). The Permit is personal in nature and does not run with the land, but would expand Defendant's rights in the Pressls' property beyond those that exist in the flowage easement. (Compl. ¶ 31-32).

The Pressls filed this immediate case in the Circuit Court for the County of Franklin, Virginia on June 2, 2015, seeking declaratory judgment determining that the demands imposed by Defendant are at odds with the flowage easement, and that the flowage easement does not allow Defendant to regulate the Pressls' certain uses of their property. (Compl. ¶ 1, 21-28). Specifically, the Pressls' requested that the court determine that, among other things, Defendant cannot demand that the Pressls' relinquish their property rights under the flowage easement; Defendant cannot require the Pressls to enter into a revocable license as a condition of accessing the waters of Smith Mountain Lake for recreational purposes; Defendant's authority to regulate the Pressls' property below the 800 foot contour line is limited to the terms defined in the flowage easement; the flowage easement does not allow Defendant to regulate the size and type of dock the Pressls may construct on their property; the flowage easement does not require the Pressls to plant vegetation or allow Defendant to regulate how the Pressls stabilize their shoreline; and the Pressls are authorized to use their property below the 800 foot contour line in any manner not inconsistent with Defendant's maintenance of the dam. (Compl. 17-19).

Defendant was served with the Complaint on June 12, 2015 and, pursuant to 28 U.S.C. §§ 1441 and 1446, removed this case to this Court on June 23, 2015. In its Notice of Removal, Defendant alleges that it has the authority to require the Pressls to enter into a Permit pursuant to pursuant to "its land rights" and its Federal Energy Regulatory Commission ("FERC") license, granted to it by FERC pursuant to the Federal Power Act ("FPA"). (Notice of Removal ¶ 5;

Compl. Ex. G).[2] Defendant further alleges that, because it is in possession of a FERC license and must abide by the rules and regulations of FERC, its FERC license, and the FPA, that federal question jurisdiction exists under 16 U.S.C. § 825p. (Notice of Removal ¶ 9). Defendant further alleges that, interpretation of the flowage easement would also require an interpretation of its FERC license, thus triggering federal law. (Notice of Removal ¶ 10). Defendant also argues that this Court is an appropriate setting for this case because it is allegedly similar to the issues presented in hearings before FERC back in 2010 and 2011 pertaining to property now owned by the Pressls. (Notice of Removal ¶ 12-13).

On July 10, 2015, the Pressls filed their Motion to Remand pursuant to 28 U.S.C. § 1447(c), requesting that this Court remand this case back to the Circuit Court for the County of Franklin, Virginia. For the following reasons, the Pressls' request should be granted.

STATEMENT OF THE CASE

This Court does not have subject matter jurisdiction over this matter and, as such, this case should be remanded back to the Circuit Court for the County of Franklin, Virginia pursuant to 28 U.S.C. § 1447(c). The face of the Pressls' Complaint asserts what is plainly a state-law claim—specifically, the interpretation of the flowage easement that their property is subject to. The face of the Complaint does *not* contain or present an issue of federal question. Even if a federal issue could be found on the face of the Complaint, the presence of such an issue could only be characterized as an anticipated defense and, as such, does not justify removal of this.

Defendant's arguments in support of removal are nothing more than attempt to inject a federal issue into a clearly state-law claim. Contrary to Defendant's allegations in its Notice of Removal, possession of a FERC license pursuant to the FPA does not transform this case into

[2] The Permit is an instrument of Defendant's own creation and has not been approved by FERC and is not part of their FERC license.

one arising under federal law. Defendant errors in presuming that its interests in the Pressls' property is determined by the FERC license rather than the flowage easement. However, a FERC license in and of itself cannot alter or modify a licensee's property rights. Furthermore, 16 U.S.C. § 825p does not support federal subject matter jurisdiction here because the Pressls' state-law claim does not arise under federal law and the relief being sought by Plaintiffs is not of the variety that can be remedied by this § 825p. The Pressls' are not seeking or requesting an interpretation of the FPA, Defendant's FERC license, or a rule or regulating of FERC. Also, federal subject matter jurisdiction is not justified because the Pressls' request for an interpretation of the flowage easement is a state-law claim that does not implicate a significant federal issue, and the FPA does preempt Plaintiffs' state-law claim.

Finally, Defendant's additional arguments in their Notice to Remove which, they allege support removal, are unavailing. The cases cited by Defendant for support are not on point and inapplicable to the circumstances of this case. Furthermore, the FERC proceedings and orders in 2010 and 2011, involving the property at issue that now belongs to the Pressls, merely addressed Defendant's rights pursuant to FERC and its FERC license order. There is nothing in the orders interpreting the flowage easement or the parties' rights pursuant to the easement. Unlike the FERC hearings and order, this case requests an interpretation of the Pressls' property rights under the flowage easement; it does *not* request an interpretation of Defendant's FERC license.

Because the Pressls' Complaint plainly presents a state-law issue, federal question subject matter jurisdiction does not exist. Therefore, this case must be remanded to the state court. Because Defendant lacked an objectively reasonable basis for seeking removal, the Pressls' costs and attorney's fees incurred as a result of removal should be granted.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS' MOTION TO REMAND MUST BE GRANTED PER 28 U.S.C. § 1447 BECAUSE THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE.

"In order for an action to be removed from state court to federal court, the action must be one 'of which the district courts of the United States have original jurisdiction.'" *Porter v. Buck*, No. 7:14CV00176, 2014 U.S. Dist. LEXIS 98153, *4 (W.D. Va. July 18, 2014) (quoting 28 U.S.C. § 1441(a)). Under 28 U.S.C. § 1447, a case filed in state court that has been removed to a district court shall be remanded back to the state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." The Fourth Circuit Court to Appeals best summarized the standard for reviewing whether removal of case to federal court is proper in *Mulcahey v. Columbia Organic Chems. Co.*:

> The burden of establishing federal jurisdiction is placed upon *the party seeking removal*. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 66 L. Ed. 144, 42 S. Ct. 35 (1921). Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868 (1941). If federal jurisdiction is doubtful, a remand is necessary. *In re Business Men's Assur. Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993); *Cheshire v. Coca-Cola Bottling Affiliated, Inc.*, 758 F. Supp. 1098, 1102 (D.S.C. 1990).

29 F.3d 148, 151 (4th Cir. 1994) (emphasis added).

Here, federal diversity jurisdiction does not exist because there is no diversity of parties. Thus, for federal subject matter jurisdiction to exist, it must be federal-question jurisdiction arising under 28 USC § 1331, which grants district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." "Whether a case 'arises under' federal law for purposes of § 1331" is governed by the "well-pleaded-complaint rule." *Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 830 (2002).

Here, the Pressls' Complaint complies with the well-pleaded complaint rule because a federal question is not present on the face of the Complaint. Furthermore, Defendant's FERC license does not inject federal a federal question into the Complaint.

A. Federal jurisdiction does not exist over this case because a federal question is not present on the face of the Pressls' Complaint.

Removal based on "federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). "Because this well-pleaded complaint rule 'makes the plaintiff the master of the claim[, the plaintiff] may avoid federal jurisdiction by exclusive reliance on state-law.'" *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 912 (8th Cir. 2009) (quoting *Caterpillar, Inc.*, 482 U.S. at 392). "[A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Caterpillar, Inc.*, 482 U.S. at 399 (emphasis in original). It is well established that "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393 (emphasis in original).

Here, no federal question is preset on the face of the Pressls' Complaint. The Complaint, summarily, alleges: the plaintiffs' own property; the property is subject to a flowage easement in the name of Defendant, which was executed in 1960; that the flowage easement grants specific rights to both Plaintiffs and Defendant, and specifically authorizes Plaintiffs to "possess and use" the property subject to the flowage easement; Plaintiffs wish to make certain uses of the property

subject to the flowage easement; Defendant alleges that the flowage easement does not allow Plaintiffs to make such uses without first obtaining Defendant's permission; to obtain such permission, Defendant alleges that Plaintiffs must be granted a permit and revocable license from and created by Defendant; and Plaintiffs seek declaratory judgment requesting that the court determine that the flowage easement allows them to make the desired uses on their property subject to the flowage easement without having to get Defendant's permission, and that that the flowage easement does not grant Defendant the right to control and regulate these uses. This complaint is a request for an interpretation of the easement, which is a matter of state-law. *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (holding that "[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States, and further dictating that '[t]he great body of law in this country which . . . defines the rights of its [property] owners in relation to the state or to private parties, is found in the statutes and decisions of the states'" (quotation omitted)); *Columbia Gas Transmission Corp. v. Drain*, 191 F.3d 552, 558-59 (4th Cir. 1999) (holding that the interpretation of easements is a matter of state-law and "'does not turn on some construction of federal law,'" and, as such, "federal-question jurisdiction under [28 U.S.C. 1331] will not lie" with such actions (quotations omitted)). There is absolutely nothing on the face of the Pressls' Complaint that presents an issue of federal question. The face of the Complaint makes no reference to the FPA, Defendant's FERC license, or the SMP. Likewise, the aforementioned are not referenced in or incorporated into the flowage easement. The Complaint, and all of its requests for relief, refer to and are brought under the state-law theory of easement interpretation.

In ¶¶ 8 and 11 of Defendant's Notice of Removal, it argues that a "federal question appears on the face of the Complaint" because Exhibit G to Plaintiffs' Complaint references a SMP that

Defendant alleges is incorporated into its FERC license. However, even if it does, under the well-pleaded complaint rule, the federal question must be present on the face of the complaint, and reference to federal issues in an attachment to a complaint is not enough to trigger federal question jurisdiction. *Albert Einstein Med. Ctr. v. Nat'l Ben. Fund for Hosp. & Health Care Emps.*, 740 F. Supp. 343, 348 (E.D. Pa. 1989); *Reneaud v. City of Traverse City*, No. 1:13-CV-619, 2013 U.S. Dist. LEXIS 109400, *6 (W.D. Mich. Aug. 5, 2013); *Cal. ex rel. Harris v. Rose*, NO. CIV. S-13-0675 LKK/DAD2013, U.S. Dist. LEXIS 69382, *8-11 (E.D. Cal. May 14, 2013); *Keeling v. Rohm & Haas Co.*, NO. 3:07-CV-504-S, 2007 U.S. Dist. LEXIS 89553, *5 (W.D. Ky. Dec. 3, 2007); *c.f. City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 174-76 & n.4 (2d Cir. 2004) (finding a letter attached to a complaint referring to a federal cause of action insufficient to establish federal question jurisdiction). Thus, even if the SMP somehow invokes something of the federal question variety, reference to it in an attachment to the Complaint is not sufficient for triggering federal question jurisdiction here because federal question is not apparent on the face of the Complaint. Just as importantly, Exhibit G also contains a clause that explicitly states that "[t]he terms and provisions of the [flowage easement] shall control wherever the same may be in conflict with this Permit." (Comp. Ex. G at ¶ 23). This language clearly recognizes that the flowage easement, which is at issue here, controls the applicability of the Permit. The language of the flowage easement neither references nor requires adherence to a federal license or SMP.

Furthermore, assuming, *arguendo*, that the Pressls' requests for relief somehow entangle or affect other rules or regulations pertaining to federal law (which it does not), removal of this case to federal court still would not be justified. *See Ne. Rural Elec. Mbrshp. Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 891 (7th Cir. 2013) (remanding a case because the plaintiff's

complaint presented "a claim for a declaratory judgment based on state contract law" even though the contract at issue was subject to FERC regulations);.*Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.*, No. 4:11CV3112, 2011 U.S. Dist. LEXIS 152634, *9-10 (D. Neb. Nov. 23, 2011) (remanding a case back to state court even though the face of the complaint requested "an interpretation of relevant rules, regulations and policies," some of which touched upon federal, because "the heart of the matter" of the case was a state-law issue); *see also Appalachian Power Co. v. Nissen*, No. 7:14-cv-00535, 2015 U.S. Dist. LEXIS 45030, *4-6 (W.D. Va. Apr. 6, 2015) (analyzing *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634 in noting that federal jurisdiction existed over a case involving state property rights when the complaint explicitly sought enforcement of the FPA). Here, the heart of this matter is the state-law issue of easement interpretation. Even if the Complaint does invoke other rules or regulations in its requests for relief, they would best be characterized as anticipated defenses, and could not be the basis for removal. *See Caterpillar, Inc.*, 482 U.S. at 393.

The face of the Pressls' Complaint does not present an issue of federal question. Instead, the Complaint presents a claim for declaratory judgment based on an issue of state property law. Therefore, this Court does not have subject matter jurisdiction over this case and it must be remanded to the Circuit Court of Franklin County, Virginia.

In Defendant's Notice of Removal, they erroneously attempt to inject federal question jurisdiction into Plaintiffs' state-law claims by referencing a federal license issued to Defendant by the FERC. As discussed in Section B, the fact that Defendant possesses a federal license is not sufficient to remove this case to federal court.

B. Defendant's FERC license Subject to the FPA does not transform this case into one arising under federal law.

As previously discussed, "a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Caterpillar, Inc.*, 482 U.S. at 399 (emphasis in original). However, in Defendant's Notice of Removal, it attempts to do just that. In the Notice of Removal, Defendant argues that, because Defendant has a FERC-issued license pursuant to the FPA that incorporates a SMP, it is authorized to regulate and dictate uses of and concerning the flowage easement. Defendant contends that, because the FERC license and SMP contain regulations pertaining to the shoreline of Smith Mountain Lake, where the Pressls' property is situated, this case is one that turns on federal question jurisdiction.

Defendant's rationale is littered with errors. It incorrectly assumes: (1) that its rights in the Pressls' property arise out of its FERC license, (2) that 16 U.S.C. § 825p provides this Court with subject matter jurisdiction over this case, (3) that this case implicates significant federal issues because Defendant has a FERC license pursuant to the FPA, and (4) that the FPA preempts the issues of state-law presented in Plaintiffs' Complaint.

1. Defendant's FERC license does not transform this case into one arising under federal law because Defendant's interests in Plaintiffs' property arise out of the flowage easement and not the FERC license.

In ¶ 5, of its Notice of Removal, Defendant alleges that "the issue of whether there is any requirement for the Plaintiffs to agree to the terms of the Permit before engaging in certain activities is directly related to the [Defendant's FERC license]." However, Defendant's argument is based on a fatal logical flaw which assumes that its interests in, and ability to control, the Pressls' property arises out of the FERC license itself. Here, Defendant's interests and ability to

control the Pressls' property arises out of the flowage easement, and is limited by the terms contained therein.

It is well established that the FPA, SMPs, and FERC licenses, such as Defendant's, do not and cannot confer, abolish, create, modify, or supersede property rights. *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").

Here, Defendant "mistakes its duty to comply with and enforce the FERC license with a grant of the property rights necessary to enforce the license against property owners within the project boundary." *Schediwy*, 2014 U.S. Dist. LEXIS 29775, at *21. The "indirect regulatory authority" that follows the duty to enforce a federal license does not provide "a sufficient basis to invoke federal question subject matter jurisdiction." *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, *9-10 (citing *Central Iowa Power Coop. v. Midwest Independent Transmission System Operator*, Inc., 561 F.3d 904, 919 (8th Cir. 2009).); s*ee Central Iowa Power Coop.*, 561 F.3d at 919 (noting that indirect regulatory authority in that case was not sufficient to create a federal issue in a case otherwise dependent on state-law); *see also Bashaw v. Bank of New York Mellon Corp.*, No. CIV S102869, 2011 U.S. Dist. LEXIS 78108, 2011 WL 2964202, *2 (E.D. Cal. 2011) (noting that it is "unclear how merely invoking [a federal] regulations' existence presents a

substantial, disputed question of federal law"). Even if a party's possession of a FERC license automatically "causes" a "federal issue" to exist in a case invoking a state-law claim, such a "federal issue" is not enough to invoke federal question jurisdiction. *Jeffrey Lake Dev.*, v. Cent. Neb. Pub. Power & Irrigation Dist., 2011 U.S. Dist. LEXIS 152634, *8. Therefore, the fact that Defendant has a FERC license that grants it indirect regulatory authority does not result in a federal question arising in this case.[3]

2. Section 825p of Title 16 of the U.S. Code is inapplicable in this matter and does not provide this Court with jurisdiction over this case.

In ¶ 9, Defendant alleges that, because it has the responsibility under the FERC license, which is subject to the FPA, to "review and authorize certain activities within the Project boundary to ensure, among other things, that such activities meet the conditions set forth in the [SMP]," that this Court has federal question jurisdiction per 16 U.S.C. § 825p. Defendant is incorrect.

Section 825p states that federal district courts shall have "exclusive jurisdiction" over "all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of [the FPA] or any rule, regulation, or order thereunder." However, Defendant is incorrect. First, § 825p does not create a "cause of action or substantial federal interest required for federal-question jurisdiction." *Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583, 591 (6th Cir. 2013).[4] As the Supreme Court has noted, if "exclusive jurisdiction" is given to the

[3] To quote Justice Cardozo, "[t]he *most* one can say is that a question of federal law is lurking in the background[.]" *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936) (emphasis added). Here, if there is the presence of a federal issue, it is "so doubtful and conjectural, so far removed from plain necessity, [that it] is unavailing to extinguish the jurisdiction of the states." *Id.*

[4] In. *Singh*, the Six Circuit Court of Appeals was interpreting 15 U.S.C. § 717u of the Natural Gas Act. However, § 717u is identical to § 825p. *See Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) (interpreting equivalently sections of the FPA that are identical or correspond to the Natural Gas Act). As such, decisions interpreting these two statutes may be cited interchangeably. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

federal courts by a statute: "it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Pan Am. Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 664 (1961). Here, plaintiffs' claim pertaining to easement interpretation cannot be brought in the federal court because it is a state-law issue. Thus, it does not arise under federal law and § 825p is inapplicable here.

Next, Plaintiffs' Complaint is not seeking to enforce any liability or duty created by, or enjoining any violation of the FPA or its regulations or orders, or order thereunder. In fact, there is nothing in the Complaint that requests anything directly pertaining to the FPA or Defendant's FERC license. Simply reviewing the language of § 825p indicates that it is inapplicable and a remand is necessary when "[t]he United States is not a party to [a] case, [a] plaintiff is not seeking a judgment based on [a] FERC license itself, and [a] plaintiff is not asserting a right to judgment for [a] defendants' alleged violation of specific provisions within the [FPA], [a] License, or [a] Management Plan." *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, *9-10; *see also Nissen*, 2015 U.S. Dist. LEXIS 45030, *4-6 (distinguishing the holding of *Jeffrey Lake Dev.* from the case in that matter because Appalachian Power Company explicitly sought to enforce its FERC license and SMP against the defendants). Likewise, here, the Pressls are not seeking a judgment about the FERC license itself and are not asserting a right to judgment for Defendant's alleged violation of specific provisions within the FPA, Defendant's FERC license, or the SMP. Rather, they are seeking an interpretation of the flowage easement under state-law. Therefore, § 825p is inapplicable in this case.

In ¶ 9 of its Notice of Removal, Defendant attempts to support its argument that federal subject matter jurisdiction under § 825p is appropriate in this case by citing to several cases that

are inapplicable here. For example, cite to *Appalachian Power Co. v. Nissen*, No, 7:14-cv-00535, 2015 U.S. Dist. LEXIS 11609, *11-12 (W.D. Va. Feb. 2, 2015). However, in *Nissen*, unlike here, the court determined that federal subject matter jurisdiction under § 825p was appropriate because Appalachian Power Company, the plaintiff in that case, specifically brought suit "to enforce its liabilities and duties under the FPA." *Id.* Plaintiffs in this case do not seek to enforce of any liabilities or duties under the FPA. Furthermore, this decision was supplemented by *Nissen*, 2015 U.S. Dist. LEXIS 45030, *7, which clearly suggests that § 825p does not allow for federal subject matter jurisdiction when a plaintiff is not seeking a declaration that "it has certain responsibilities under the FPA," or that a defendant is "in violation of the FPA" or "FPA regulations embodied in the FERC license."

Defendant also cites to *Va. Timberline, LLC v. Appalachian Power Co.*, No. 4:06-cv-00026, 2006 U.S. Dist. LEXIS 52156, *5-6 (W.D. Va. July 13, 2006) to support its argument that subject matter jurisdiction in this case pursuant to § 825p. However, in *Va. Timberline, LLC*, the terms and conditions of Appalachian Power Company's FERC license were specifically incorporated into the language of the property deed at issue, and, thus, interpreting the extent of the landowner's property rights necessarily involved the interpretation of the FERC license. *Id.* As such, the "terms of the federal license [were] actually in dispute" and, thus, a federal question appeared "on the face of [the complaint]." *Id.* at *5. Here, the Pressls' property deed and flowage easement are void of any language pertaining to or incorporating the FPA, Defendant's FERC license, or the SMP.[5] Thus, § 825p cannot be a basis for federal question subject matter jurisdiction in this case and is inapplicable.

[5] Two of the cases cited to by Defendant, *Curt D. Heisdel, et al. v. Bedford County, Virginia and Application Power Company*, No. 6:03cv00002 (W.D. Va. 2003) and *J.W. Holdings, Inc. v. Appalachian Power Company*, No. 6:04cv00033 (W.D. Va. 2004), are not available on Pacer or any other electronic resources.

3. Simply because Defendant has a FERC license does not mean that this case implicates a significant federal issue.

Defendant appears to allege that federal question jurisdiction exists because the Pressls' state-law claims implicate significant federal issues—that is, their FERC license and the FPA. "[I]n certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. Further, "[i]t is elementary that the burden is on the party asserting jurisdiction to demonstrate that jurisdiction does, in fact, exist." *Lovern v. Edwards*, 190 F.3d 648, 654, (4th Cir. 1999). For federal question jurisdiction to arise, there must exist "not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, 545 U.S. at 313. The category of such cases that trigger federal question are "special and small." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006).

Here, Plaintiffs' state-law claims simply do not implicate significant federal issues. Although Defendant has a FERC license placing conditions on the use of Defendant's property, the party's disagreement regarding the meaning of the flowage easement does not turn on a dispute over an interpretation of Defendant's federal license or federal law and, thus, does not create a substantial government interest that federal law must control rather than state-law. *See Singh*, 707 F.3d at 589-90 (finding that a dispute over the property rights contained in a natural gas pipeline easement that was subject to federal standards and regulations did not implicate a substantial issue of federal law because there was no dispute over the interpretation of the federal

law and standards); *Nissen*, 2015 U.S. Dist. LEXIS 45030, *7 (noting that a substantial issue of federal law was invoked when plaintiffs explicitly referenced alleged violations of federal laws and regulations in the complaint); *Shore Bank v. Harvard,* 934 F. Supp. 2d 827, 835 (E.D. Va. 2013) (finding that no substantial federal jurisdiction was implicated because the plaintiffs were not requesting the court to declare that the defendant did not have certain affirmative rights under federal law); *Bennett v. Bank of Am., N.A.*, No. 3:11-CV-003, 2011 U.S. Dist. LEXIS 51152, *4-6 (E.D. Va. May 10, 2011) (finding that plaintiffs did not raise significant federal question in their complaint when a dispute relating to a deed that was subject to a federal guideline even though the claim involved the federal guideline because the dispute was rooted in state contract law); *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, *7-8 (finding the that a significant question of federal law was not implicated in a matter involving disagreement over the interpretation of lease terms that happened to be subject to a FERC license); *Lee v. Citimortgage, Inc.*, 739 F. Supp. 2d 940, 943 (E.D. Va. 2010) (finding that no substantial question of federal law existed when a suit relating to the relates and obligations of the parties to a contract subject to federal HUD regulations "necessarily require[d] analysis of [the] federal [HUD] regulation" because the rights and obligations of the parties were "governed by state-law"). Thus, federal question jurisdiction does not exist in this case because the Complaint does not implicate significant federal issues.

4. The FPA does not preempt the issues of state-law presented in the Pressls' Complaint.

Defendant seems to suggest that federal subject matter jurisdiction exists because this case touches on the FPA, which preempts Plaintiffs'' state-law claim. (in ¶ 8-10). However, it is established law that that the FPA does *not* completely preempt state-law, especially when the case involves properly pled state-law claims. *Ne. Rural Elec. Mbrshp. Corp. v. Wabash Valley*

Power Ass'n, 707 F.3d 883, 893-94 (7th Cir. 2013).[6] FERC itself recognizes the role of state-laws in resolving property disputes.[7] *See Wabash Valley Power Ass'n*, 707 F.3d at 896-97 (stating that "FERC itself recognizes a role for state contract law in adjudicating contract disputes involving federal tariffs," and reaching this conclusion by citing to several FERC license orders). Because Plaintiffs plead a state-law claim, this case is not preempted by the FPA and t should be remanded to state court.

Taken altogether, federal jurisdiction just does not exist in this case. This case is analogous to *Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.*, No. 4:11CV3112, 2011 U.S. Dist.

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[6] In reaching this conclusion, the Seventh Circuit Court of Appeals, in a footnote, cited to six district cases, stating:

> See, *e.g., Jeffrey Lake Dev., Inc. v. Cent. Nebraska Pub. Power & Irr. Dist.*, 4:11CV3112, 2011 U.S. Dist. LEXIS 152634, 2011 WL 7122188, *6 n.4 (D. Neb. Nov. 23, 2011), report and recommendation adopted, 2012 U.S. Dist. LEXIS 11709, 2012 WL 296144 (D. Neb. Feb. 1, 2012) ("there is no complete preemption under the FPA"); *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 06-CV-0053-LRR, 2007 U.S. Dist. LEXIS 24038, 2007 WL 1058561, *23 (N.D. Iowa Mar. 30, 2007), rev'd and remanded on other grounds, 561 F.3d 904 (8th Cir. 2009) ("neither in section 317 of the FPA, 16 U.S.C. § 825p, nor any other provision of the FPA does Congress manifest an intent to completely preempt state law in the field of electrical power regulation"); *Consol. Edison Co. of New York, Inc. v. Entergy Nuclear Indian Point 2*, 05-CV-0222 (RO), 2006 U.S. Dist. LEXIS 18167, 2006 WL 929208, *2 (S.D.N.Y. Apr. 7, 2006)("there is no evidence in the [FPA] of a congressional intent to create complete preemption"); *In re California Retail Natural Gas & Elec. Antitrust Litig*., 170 F. Supp. 2d 1052, 1057-58 (D. Nev. 2001) (no complete preemption under FPA or Natural Gas Act); *Hendricks v. Dynegy Power Mktg*., 160 F. Supp. 2d 1155, 1159 (S.D. Cal. 2001) ("fact that the FPA includes an exclusive jurisdiction provision does not mean that the entire field is preempted"); *Indeck Maine Energy, LLC v. ISO New England*, 167 F. Supp. 2d 675, 687 (D. Del. 2001) ("[FPA] does not completely preempt state law in the field of electrical power regulation because Congress has not manifested an intent to do so in the statute").

Wabash Valley Power Ass'n, 707 F.3d at 893 n.6. All the cases cited to were located outside of the Seventh Circuit.

[7] FERC regularly places language recognizing the role of courts in resolving disputes over property and contract issues into its license orders. *See, e.g., 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 FERC licensees must up taken up in 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").

LEXIS 152634, *9-10 (D. Neb. Nov. 23, 2011), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 11709 (D. Neb. Feb. 1, 2012).

> In [*Jeffrey Lake Dev.*], defendant Central Nebraska Public Power & Irrigation District [] managed land pursuant to a license issued by [FERC] in accordance with the [FPA]. [Defendant] also developed a management plan for this land []. *Id.* [Plaintiff] Jeffrey Lake Development, Inc. leased a portion of the land which was subject to the FERC license. *Id.* A dispute emerged when [plaintiff] attempted to build a structure that Central claimed was forbidden under the lease. 2011 U.S. Dist. LEXIS 152634, [WL] at *2. [Plaintiff] brought an action in Nebraska state court seeking a declaratory judgment that [defendants] would be required to adhere to its past conduct and previous interpretation of the lease provisions, which [plaintiff] claimed would permit the construction of the structure at issue. *Id.* [Defendant] removed the case on the basis of federal question jurisdiction, 28 U.S.C. § 1331, and [Plaintiff] responded by filing a motion to remand. *Id.* The magistrate judge ultimately recommended that this motion be granted and that the case be remanded to state court. 2011 U.S. Dist. LEXIS 152634, [WL] at *6.

Nissen, 2015 U.S. Dist. LEXIS 45030, *3-4. The court made several determinations that are relevant here. First, the court determined that, even though the complaint requested an interpretation of the language of the lease *and* "other related and applicable rule[s], regulation[s], or polic[ies]" that may be federal in nature, this request did not trigger a federal question because "the heart of the matter was a state-law breach of lease issue." *Id.* at *9. The court also noted that, even if the "relevant rules, regulations and policies implicate[d] federal law at all, it [would] best [be] characterized as addressing [an anticipated defense] and thus would not support removal from state court. *Id.* at *14 n.3. Furthermore, the court found that, even though defendant was in possession of a FERC license that allowed it to adopt permitting procedures over the leased portion of the land that was subject to and bestowed upon it the "responsibility of ensuring" that use of lands were "consistent with federal law and policy," this "indirect regulatory authority" and "policing" power did not transform a dispute over the interpretation of the lease into a federal question, and, thus, did not "provide[] a sufficient basis to invoke federal

question subject matter jurisdiction." *Id.* at *11-15.Moreover, the court stated that, although defendant had a FERC license that placed conditions on its use of property and management of leases, a disagreement over the terms of the lease at issue "[did] not create such a substantial federal governmental interest that federal law, rather than state-law, must control plaintiffs' requests for relief, which are rooted in a state-law claim for breach of a lease." *Id.* at *15. Finally the court determined that § 825p was inapplicable to the case because "[t]he United States [was] not a party to [the] case, the plaintiff [was] not seeking a judgment based on the FERC license itself, and the plaintiff [was] not asserting a right to judgment for defendants' alleged violation of specific provisions within the FPA, the License, or the Management Plan." *Id.* at *18. Therefore, the court determined that subject matter jurisdiction did not exist over the case and recommended that it be remanded to state court. *Id.* at *20.[8]

Similarly, a portion of the Pressls' property is subject to the flowage easement held by Defendant. Defendant alleges that this portion of the property is subject to its FERC license. A dispute has emerged regarding the Pressls' property rights under the flowage easement. Pressls' filed this suit in state court seeking declaratory judgment that Defendant. Defendants removed this case to federal court alleging the existence of federal question jurisdiction. However, like in *Jeffrey Lake Dev.*, federal question jurisdiction does not exist here. First, the Pressls' Complaint simply requests an interpretation of the flowage easement, and does not invoke the interpretation of other rules, regulations, or policies that may be federal in nature. Even if it did, this would best be characterized as an anticipated defense that would not support removal. Thus, the heart of this matter, like in *Jeffrey Lake Dev.*, is a state-law easement interpretation claim. Second, simply because Defendant has a FERC license that grants it indirect regulatory authority and policing

[8] This recommendation was adopted by the district court. *Jeffrey Lake Dev. v. Cent. Neb. Pub. Power & Irrigation Dist.*, No. 4:11CV3112, 2012 U.S. Dist. LEXIS 11709 (D. Neb. Feb. 1, 2012).

responsibilities, such authority does not invoke federal question subject matter jurisdiction. Third, this dispute over the interpretation of the terms of flowage easement is rooted in state-law and does not trigger substantial federal government interest. Finally, federal subject matter jurisdiction does not exist under § 825p because the Pressls are not seeking judgment based on the FERC license itself, and plaintiffs are not asserting a right a right to judgment for Defendant's alleged violation of specific provisions within the FPA, its FERC license, or the SMP. Therefore, there is not subject matter jurisdiction in this matter and, as in *Jeffrey Lake Dev.*, the only appropriate result is for this case to be remanded.

This Court recently analyzed the court's decision in *Jeffrey Lake Dev.* in *Appalachian Power Co. v. Nissen*, No. 7:14-cv-000535, 2015 U.S. Dist. LEXIS 45030 (W.D. Va. Apr. 6, 2015). In *Nissen*, Appalachian Power Company, relying on its FERC license to invoke federal jurisdiction under § 825p, brought suit in this Court against defendants, owners of parcel of property on Smith Mountain Lake subject to a flowage easement similar to the one at issue here. *Id.* at *1-4. The crux of Appalachian Power Company's allegations was that the defendants' uses on the portion of the property subject to the flowage easement were contrary to the easement. *Id.* After the court determined that federal subject matter jurisdiction existed over the case, the defendants filed a request for reconsideration and specifically cited to *Jeffrey Lake Dev. Id.* at *3-6. This Court distinguished the case at issue from *Jeffrey Lake Dev.*, specifically noting that, while the plaintiffs in *Jeffrey Lake Dev.* "did not 'cite to any specific section of the FPA, its regulations, or even any specific provisions of the Management'" in their complaint and did not seek a finding that the defendant in that case was "somehow . . . violating the FPA or its regulations," Appalachian Power Company's complaint did. *Id.* at *5. Specifically, this Court stated:

> Thus, unlike the plaintiff in *Jeffrey Lake*, [Appalachian Power Company] has invoked a substantial issue of federal law, namely whether Defendants' actions

> violate the terms of the FERC license order and the SMP. Likewise, jurisdiction under 16 U.S.C. § 825p is proper because [Appalachian Power Company] is seeking a declaration that it has certain responsibilities under the FPA and that Defendants are in violation of the FPA regulations embodied in the FERC license[.]

Id. at *7. Here, following this Court's logic in *Nissen*, it is clear that federal subject matter jurisdiction does not exist in the immediate case. The Pressls' Complaint neither invokes, nor alleges a violation of, the FPA, the FERC license order, or the SMP. Plaintiffs have not invoked a question of federal law and, as such, § 825p is inapplicable and this Court lacks subject matter jurisdiction over this case.

Even if this Court were to determine that federal question subject matter jurisdiction did exist in this case pursuant to one of Defendant's aforementioned theories, the claims in the Complaint that arise out of state-law claims must be remanded back to the state court. Pursuant to 28 U.S.C. § 1441(c)(2), when a civil action is removed, the court may sever and remand to the state court from which it was removed any claim that is not within the original or supplemental jurisdiction of the court. In short, § 1441(c)(2) requires that the court to "sever and remand the claims over which the court lacks jurisdiction." *Moore v. Svehlak,* No. ELH-12-2727, 2013 U.S. Dist. LEXIS 97329, *23 (D. Md. July 11, 2013) (citing 28 U.S.C. § 1441(c)(2)). Therefore, even if this this case requires the interpretation of Defendant's FERC license, or invokes some federal question, this Court must remand all claims unrelated to the federal question. This would include a remand of all claims pertaining Plaintiffs' rights and interests under the flowage easement.

Therefore, Defendant's FERC license does not transform this case into one arising under federal law. Defendant's interests in the Pressls' property arise from the flowage easement and not its FERC license. Furthermore, § 825p is inapplicable in this matter. Moreover, the Pressls' Complaint does not implicate significant federal issues simply because Defendant has a FERC

license. Finally, the FPA does not preempt state-law. Defendant's "reasons" for removal are simply attempts to inject a federal question into Pressls' Complaint. However, as stated previously, a defendant cannot remove a case to federal court by "injecting a federal question into an action that asserts what is plainly a state-law claim." *Caterpillar, Inc.*, 482 U.S. at 399. The substantial similarities between this case and *Jeffrey Lake Dev.* warrants a similar result to that case. Therefore, Defendant's FERC license does not justify federal question jurisdiction here, and this case should be remanded to the Circuit Court for the County of Franklin, Virginia. Even if federal question subject matter jurisdiction did somehow exist, Plaintiffs' claims pertaining to their rights and interests under the flowage easement must be remanded pursuant to 28 U.S.C. § 1441(c)(2).

C. Defendant's additional arguments in its Notice of Removal do not support a finding that federal question subject matter jurisdiction exists in this case.

In addition to the arguments addressed in Section B of this memorandum, Defendant also makes several other arguments in its Notice of Removal which allegedly support a finding that federal question subject matter jurisdiction exists on the face of the Pressls' Complaint. However, Defendant's arguments are unavailing.

In ¶ 10, Defendant alleges that the Pressls' requests for relief "requires the Court to interpret the terms of the [FERC license] to determine what [Defendant] must do to "maintain" that federal license," and claims that this alone is enough to raise a federal issue. But again, Defendant is incorrect. The Pressls aren't requesting this Court to determine what Defendant "must do" to "maintain" its FERC license. The Pressls' requests for relief merely seeks an interpretation of the terms of the flowage easement. The Pressls' reference to the maintenance of the dam comes directly from the language of the flowage easement itself. Furthermore, the cases cited by Defendant are inapplicable here. In both *United States v. S. Cal. Edison Co.*, 413 F.

Supp. 2d 1101 (E.D. Cal. 2006) and *Va. Timberline, LLC*, 2006 U.S. Dist. LEXIS 52156, the court was requested to interpret the meaning of a FERC license which was subject to federal law. Here, this Complaint requests the Court to interpret a flowage easement, which is subject to state-law.

Additionally, in ¶¶ 12-13 of its Notice of Removal, Defendant discusses prior FERC proceedings pertaining to the property at issue and its previous owners. These hearings do not justify federal question subject matter jurisdiction in this case. Defendant alleges that, because it filed an application with FERC requesting that FERC expand its police power and indirect regulatory authority allowing it to authorize certain uses over the property at issue if Defendant held the sufficient property rights to do so. However, as previously discussed, neither a FERC license nor a FERC license order modifies, abolishes, creates, or supersedes property rights. *Pub. Util. Dist.*, 382 F.2d at 670-72 (quoting *Niagara Mohawk Power Corp.*, 347 U.S. at 250, 256); *Michael*, 2014 U.S. Dist. LEXIS 42472, *9-10; *Schediwy*, 2014 U.S. Dist. LEXIS 29775, *21; *Keller*, 2013 U.S. Dist. LEXIS 80617, *11; *see Niagara Mohawk Power Corp.*, 347 U.S. at 250, 256 (holding that one's "private property rights are rooted in state-law," and finding that neither [the FPA], nor the license issued under it, expressly abolishes existing prop[erty] rights").

Furthermore, the orders cited in the Notice of Removal are clearly personal to Defendant and did not bind the previous owner or the property. They do not guide the previous property owners' property rights; rather, they dictated what Defendant is and is not authorized to do as a licensee of FERC. To wit, none of the orders demand that the previous property owners personally must or cannot act do something. These determinations only affect the property at issue if Defendant has requisite property rights.

Most importantly, neither of these orders interpret the flowage easement or the parties' rights pursuant to the easement—nor could they, as FERC has no authority to make determinations regarding property rights. *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"). Even if the orders did make a determination regarding the previous owner's property rights, such a decision would not bind the Pressls. The previous owner of the Pressls' property voluntarily executed a Permit identical to the one presented in Exhibit G of Plaintiffs' Complaint, requiring the owner to abide by the Defendant's FERC license and the SMP. However, this Permit is personal to the permittee and does not run with the land unless it is assigned. (*See* Compl., Ex. G at ¶ 12). Here, the previous owners' Permit was not assigned to subsequent owners and, because it was personal in nature, is terminated. Thus, unlike the previous land owners of this property, the Pressls are not subject to or bound by a permit.

Again, Defendant's argument here attempts to distract from the issue presented in the Complaint, which requests an interpretation of the flowage easement under state-law. The aforementioned proceedings before FERC simply sought an expansion of Defendant's authority given to it by FERC. As such, contrary to Defendant's claim, there is no similarity between the

issues and proceedings that were previously before FERC and the issues set forth in the Complaint. Defendant's interests in the Pressls' property arises out of the flowage easement; it does not arise from the authority given to it by FERC. Moreover, while the previous landowners executed a Permit with Defendant that was personal in nature, the Pressls have not. The burden of establishing that these orders trigger federal question jurisdiction is on Defendant. Since it is clear that the aforementioned FERC proceedings pertained Defendant's FERC rights rather than an interpretation of state-law, federal jurisdiction is highly doubtful and remand is necessary.

Therefore, this case should be remanded pursuant to 28 U.S.C. § 1447 because this Court lacks subject matter jurisdiction over this matter. The face of the Complaint does not present a federal question; rather, it seeks a state-law interpretation of an easement. Furthermore, Defendant's FERC license does not transform this case into one arising under federal law, and Defendant's arguments are nothing more than attempt to inject a federal question into an action that asserts what is plainly a state-law claim. Finally, the justifications for removal contained in its Notice of Removal are unavailing and do not support a finding of federal question subject matter jurisdiction in this case. Because, federal jurisdiction is clearly doubtful, and Defendant has not met its burden of establishing that it exists, and this case should be remanded back to the Circuit Court of Franklin County, Virginia.

II. THE PRESSLS SHOULD BE GRANTED JUST COSTS, ACTUAL EXPENSES, AND ATTORNEY'S FEES INCURRED AS A RESULT OF THE REMOVAL OF THIS CASE.

Pursuant to 28 U.S.C. § 1447(c), a court may require a defendant to pay a plaintiff's "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Attorney's fees are justified "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "[A] plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction

may affect the decision to award attorney's fees." *Id*. Attorney's fees may be granted when"[a] cursory examination of the complaint, relevant statutes, and case law by defense counsel would have revealed that the action was not removable." *HCR Manorcare Health Servs. - Chevy Chase v. Salakpi*, No.: RWT 09cv2614, 2010 U.S. Dist. LEXIS 34741, *10 (D. Md. Apr. 8, 2010).

Here, the Pressls did not delay in seeking a remand. Also, a cursory examination would have revealed that the Pressls' action was not removable. It is abundantly obvious that the face of the Complaint requests an interpretation of a state-law issue and contains no reference to a FERC license, the FPA, the SML, or federal law at all for that matter. Any allegation by Defendant that the Complaint did contain a federal question on its face is clearly disingenuous. Moreover, Defendant primarily relied on the existence of its FERC license order in arguing that federal subject matter jurisdiction exists in this case. However, it is well settled that merely being in possession of a federal license is not sufficient to establish federal question jurisdiction when the Complaint does not raise an issue pertaining to the FPA, or and FPA order, rules, or regulation. To wit, this was made clear to this Defendant back in April in *Nissen*, 2015 U.S. Dist. LEXIS 45030. As previously noted, in that case, this Court distinguished *Jeffrey Lake Dev.*, 2011 U.S. Dist. LEXIS 152634, and clearly indicated that § 825p does not allow for federal subject matter jurisdiction when a plaintiff is not seeking a declaration regarding enforcement, interpretation, or violation of the FPA, its rules, or it regulations.

Thus, Defendant lacked an objectively reasonable basis for seeking removal because there is clearly no federal question present on the Complaint, and because Defendant was well aware that of Court's recent determination in *Nissen*, which plainly explained when federal jurisdiction under § 825p is and is not warranted. As such, Plaintiffs should be granted costs, actual expenses, and attorney's fees incurred as a result of Defendant's removal.

CONCLUSION

For the foregoing reasons, Defendant's removal of this case to federal court was improper and Plaintiffs' Motion to Remand must be granted because this court does not have subject matter jurisdiction over this case. Furthermore

WHEREFORE, Plaintiffs respectfully request that their Motion to Remand be GRANTED, and that Plaintiffs' be awarded costs, actual expenses, and attorney's fees incurred as a result of this removal, and any other such relief as this Court finds justified.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 10th day of July, 2015, I filed the foregoing Motion to Remand with the Clerk of the Court using the CM/ECF system to:

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