IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JOHN R. GRANO, JR.	)	
	)	
and	)	
	)	
CYNTHIA TAFT GRANO,	)	Civil Action No.:
	)	3:20cv0065
Plaintiffs,	)	
v.	)	
	)	
RAPPAHANNOCK ELECTRIC COOPERATIVE, A Virginia Nonstock Corporation,	)	
	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT RAPPAHANNOCK ELECTRIC COOPERATIVE'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND/OR FOR FAILURE TO STATE A CLAIM (ECF 12)

INTRODUCTION

The Complaint (ECF No. 1) presents, concrete injuries and a ripe, actual controversy. It alleges that on July 1, 2020, Virginia Code § 55.1-306.1 ("Statute") expanded REC's existing electrical distribution easement contracts, specifically the Granos' 1989 easement with REC, and transferred the right to use the Granos' property for fiber optic equipment from the Granos to REC.[1] Before the Statute, under the easement contract, REC had no legal right to make such use. But since July 1, 2020 (the Statute's effective date), REC has possessed that right--meaning the Granos cannot prohibit REC from exercising its right—and the Granos have no right to compensation— "as a matter of law." Virginia Code § 55.1-306.1(D). In short, the Complaint

[1] Defendant Rappahannock Electric Cooperative is referred to as "REC," and Plaintiffs John R. Grano, Jr. and Cynthia Taft Grano are referred to collectively as "the Granos." The Commonwealth of Virginia (the "Commonwealth") has filed a Notice of Intent to Intervene (ECF 10) (Dec. 10, 2020), but has not yet filed a motion to intervene as a party, or otherwise acted in the case.

alleges facts which support Due Process, Contracts Clause, and 42 U.S.C. § 1983 civil rights claims because it plausibly asserts that under color of state law[2], REC *already* possesses the right to use the Granos' land for fiber optic equipment. *See* Compl. ¶ 11 ("The Statute has already unconstitutionally rewritten the Granos' 1989 Electric Distribution Easement with REC, resulting in the divestment of the Granos' property rights, including the right to exclude, without process or condemnation, resulting in injury-in-fact to the Granos."). This allegation alone is sufficient to defeat REC's Motion to Dismiss ("Motion"), and it does not matter that REC claims that it has not yet physically invaded the Granos' property; what matters is that the Statute has effectively rewritten and expanded REC's existing easement, and impaired the obligation of an existing, vested contract. REC's Motion should be denied.

STATEMENT OF RELEVANT FACTS AND ALLEGATIONS

Since 1989, REC has possessed an Electric Distribution Easement on the Granos' property allowing it to "operate and maintain an electric distribution system[.]" Compl. ¶ 17. Broadband and communications provision and expansion are not the operation and maintenance of an electric distribution system, and therefore are not permitted under the easement. Compl. ¶ 28. Prior to the Statute, REC acknowledged that its1989 Electric Distribution Easement did not contain the right to use the Granos' property for laying or maintaining fiber optic cable or any other broadband or communications instrumentalities other than those which are "appurtenan[t] and attach[ed]" to an "electric distribution system." Compl. ¶ 26. *See* (ECF No. 13) REC Br. at 2-4 (detailing REC's efforts to acquire by negotiation the ability to use the Granos' property for fiber optic).

[2] In fact, REC possesses the right *because* of state law and not merely under its color.

That all changed on July 1, 2020. On that date Virginia Code § 55.1-306.1 became effective, and "as a matter of law" (as the Statute's text notes), "conveyed from the Granos to REC the right to itself or to allow others to lay fiber-optic cable on the property [upon payment to REC, but not the Granos][3], and deprived the Granos of constitutionally-protected property interests, without a reasonable basis, without due process, and without condemnation and payment of just compensation." Compl. ¶ 102. *See also* Compl. ¶¶ 34, 35, 41-43, 54-56, 59, 60, 75-77. On October 28, 2020, the Granos filed a Complaint against REC seeking declaratory and injunctive relief under 42 U.S.C. § 1983, for three substantive claims:

1. An arbitrary and capricious deprivation of property without due process of law (substantive due process). Compl. ¶¶ 91-111.

2. A deprivation of property without procedural due process. Compl. ¶¶ 112-120.

3. A violation of the Contracts Clause. Compl. ¶¶ 121-127.

The Complaint alleges actual and ongoing injuries to the Granos. Virginia Code § 55.1-306.1 directly deprived and transferred to REC certain of the Granos' property rights. *See* Compl. ¶ 75 ("[a]s of July 1, 2020 the Granos have lost the right to exclude others from placing fiber optic lines, broadband or communications systems on their property.") *See also* Compl. ¶¶ 11, 59.

The Granos have already been subject to a deprivation of their property rights by physical invasion, including REC's placement of fiber optic structures in anticipation of the rights conveyed by the Statute,[4] and REC's ongoing entitlement after July 1, 2020 to exercise its rights under the Statute without limitation at a time of its choosing. Compl. ¶¶ 69, 70. *See also* Compl.

[3] Pursuant to 55.1-306.1(O) REC "may assess fees and charges" to a "communications provider" as defined in the Statute to use the 1989 Easement.

[4] *See, e.g.*, Compl. at 3, note 1.

¶ 10 ("The Granos have standing to challenge the actions taken by the Defendant. The Granos have been injured-in-fact by Defendant's actions, and are subject to immediate and substantial risk of prospective harm."); Compl. ¶ 115 ("Under color of Virginia Code § 55.1-306, REC has taken the Granos property, and the Granos are under the threat of having their property taken . . ."); Compl. ¶¶ 6, 119.

The Complaint also alleges that the 1989 Electric Distribution Easement is a contract, and that the Statute substantially impaired the Granos' rights and obligations under that contract. Compl. ¶¶ 121-127.

STANDARDS OF REVIEW

REC seeks dismissal on two separate grounds, each subject to a different standard.

REC first seeks dismissal asserting the claim is not a ripe case or controversy for which the Granos have standing to sue, because REC does not currently intend to build fiber optic cable across their property. The Granos largely agree with REC's statement of the standard of review applicable to motions to dismiss under Fed. R. Civ. P. 12(b)(1), although they disagree that a factual jurisdictional challenge is appropriate, as none of the facts alleged by REC, even if true, impact the subject matter jurisdiction of this court.

The Granos also agree with REC's statement of the standard of review that governs REC's 12(b)(6) motion (failure to state a claim): this court does not undertake a serious examination of the facts (all facts alleged in the Complaint must be accepted as true unless totally "implausible"), and only looks at the legal sufficiency of the Complaint; here, whether the Complaint pled the elements of Due Process, Contracts Clause, and section 1983 claims.

ARGUMENT

I. The Complaint Alleges Current and Ongoing Injuries-in-Fact, and Presents an Actual Controversy, Ripe for Decision, Which the Granos Have Standing to Bring Before This Court.

The Complaint plausibly alleges all elements of standing: The Granos have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 759–60 (4th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The Complaint alleges that the Granos' property rights have been deprived by operation of the Statute, which, "as a matter of law," deprived the Granos of their right to exclude fiber optic equipment and gave the right to install or permit its installation on the Grano property to REC on July 1, 2020 (*see*, *e.g.*, Compl. ¶¶ 11, 59, 75); and an ongoing property deprivation by physical invasion that has both already occurred and which REC retains the unfettered right to repeat. The Complaint also plausibly alleges that the Granos had rights and obligations under the 1989 Electric Distribution Easement contract, and that the Statute substantially impaired these rights and obligations. *See* Compl. ¶¶ 121-127. Conveniently, but inappropriately, REC grounds its jurisdictional arguments, including standing, ripeness, and the actual controversy, in its own stated lack of present intent to *use* the rights it has *possessed* since July 1, 2020.[5] The Granos' claims are not contingent on REC's stated intent.

[5] The nature of the pled injury is the first element of the test for standing laid down by the Supreme Court. However, REC's reliance on *Maryland v. US* and *Clapper* in particular is fully misplaced – those cases have nothing to do with easements and everything to do with speculation about an exercise of Executive Branch power. They offer the Court no guidance in this matter.

A. The Granos Have Already Been Injured and Their Injury is Ongoing.

REC argues the Granos have no current, actual injury, but merely may be injured later whenever REC decides to install fiber optic equipment on the Granos' property. REC Br. at 10, 12. REC argues that the Granos have no claim because REC has not fully used those rights it "anticipated" receiving under the Statute.[6] Tellingly however, REC takes great pains to avoid any implication it possesses anything short of the full fiber optic rights granted by the Statute , or that by its abstention abandons, disclaims or limits those rights. Instead, it asserts, at most, that it is voluntarily forbearing (for now) from using the rights it already possesses. REC's assertions as to its present intent ignore the fact that REC now possesses the new rights by virtue of previously having an electrical distribution easement on the Granos' property. But it is that fact which gives the Granos' standing, their claim ripeness and jurisdiction to this Court to decide this matter already in controversy.

1) The Granos Were Deprived of Their Rights on July 1, 2020.

In contrast to REC's assertions, Virginia Code § 55.1-306.1 created an encumbrance on the Granos' title and property rights.

REC has repeatedly maintained that it has already obtained such property rights under the color of Virginia Code § 55.1-306.l, as shown in the correspondence quoted in Paragraphs 66 and 67 of the Complaint, and their use for that purpose described in Paragraphs 68-70 of the Complaint. In the Brief, REC admits to installing the appurtenances (although it claims it had permission for at least one of the appurtenances) and to the correspondence (Brief at 3-5), moreover, REC has repeatedly confirmed that it already has the rights obtained under the Statute. See Brief at 1-2 (the Statute "expands the use of that easement . . . . REC has not exercised its

[6] *See* REC Br. at 4 (Describing its actions prior to July 1, 2020 "REC chose not to employ its *anticipated rights* under Virginia Code § 55.1-306.1 as to the Property.") (emphasis added) (citing Declaration of John M. Arp ¶ 11)

rights"), 4 ("REC chose not to employ its anticipated rights"), 5 ("…it is true that Virginia Code § 55.1-306.1 provides that easements 'for the location and use of electric and communications facilities may be used to provide or expand broadband or other communications services' . . . REC has not sought to exercise any rights") 11 ("REC rightly understood that it would have . . . power under the new law"). Thus, it is not correct, for REC to imply in its argument that it does not possess the right to use the 1989 Electrical Distribution Easement in the manner prescribed in Virginia Code § 55.1-306.1—it does and it has said so. REC's current abstention from actively employing those rights simply does not change the fact that REC possesses them and that the Granos have suffered an actual injury in losing those rights.

Section 55.1-306.1's express terms altered the terms of the existing 1989 Electrical Distribution Easement "as a matter of law," and further clouded the Granos' title with an additional encumbrance. Virginia Code § 55.1-306.1(D). Effective July 1, 2020, the Statute expressly redefined existing easements for electrical distribution or communications easements and added rights to them for the pre-existing easement holders, including the right to install broadband fiber optic cables. The Statute did so in three steps:

1. First, it defined "easement" as an "existing . . . occupied electric distribution or communications" easement. *See* Virginia Code § 55.1-306.1(A). REC admits that on July 1, 2020 it possessed such an easement on the Granos' property. REC Br. at 2.

2. Next, the Statute expands such "easements" to include broadband "as a matter of law." Virginia Code § 55.1-306.1(D) ("Absent any express prohibition on the installation and operation of broadband or other communications services in an easement that is contained in a deed or other instrument by which the easement was granted, the installation and operation of broadband or other communications services within any easement shall be deemed, *as a matter*

of law, to be a permitted use within the scope of every easement for the location and use of electric and communications facilities.") (emphasis added).[7]

3. Finally, the statue relieves REC from paying compensation to the owner of a servient estate for the loss and transfer of her or his right of use. *Id*. § 55.1-306.1(E) (". . . any incumbent utility or communications provider may use an easement to install, construct, provide, maintain, modify, lease, operate, repair, replace, or remove its communications equipment, system, or facilities, and provide communications services through the same, without such incumbent utility or communications provider paying additional compensation to the owner or occupant of the servient estate or to the incumbent utility . . .").

On July 1, 2020, the Statute immediately altered the Granos' existing easement by adding to its previously bargained-for terms, and deprived the Granos of at least two property and constitutional rights: the right to exclude fiber-optic equipment[8] and the right to compensation,[9] and transferred them to REC. These injuries are not merely conjectural or hypothetical, they are actual—the Granos no longer possess the right to exclude from their property the uses or users set out in the Statute, and they are barred by the Statute from recovering compensation. This is the essence of the Granos' Due Process and section 1983 claims, which allege that because the Statute does not provide for just compensation, the deprivation of the right to exclude uses and

[7] The Complaint alleges that as of July 1, 2020, the 1989 Electrical Distribution Easement must be read to include the terms of Virginia Code § 55.1-306.1, and allow fiber optic use on the Granos' property. Compl. ¶¶ 42, 54-56, 60.

[8] The right to exclude others from one's property has been termed by the Supreme Court as "traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982).

[9] "[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (this included "requiring [landowners] to permit cable companies to install cable facilities" which is directly analogous to the Statute requiring a landowner to permit electrical and communications companies to install broadband facilities).

users is a violation of the Granos' substantive and procedural constitutional rights. The Complaint's multiple allegations about these deprivations pleaded concrete, present injuries, and this case presents a ripe controversy.[10]

2) The Harm to The Granos is Complete Without Any Further Action by REC.

Easements create obligations on the servient estate, but provide rights to the easement holder, rights independent of the latter parties' actions.[11] Easements transfer to the holder a right—but critically, not the *obligation*—to use the easement for the purposes specified in the instrument.[12] In short, an easement right is not diminished if the holder of the easement does not

[10] The Complaint alleges that REC has already obtained rights from the Granos by virtue of Virginia Code § 55.1-306.1. *See* Compl. ¶¶ 34, 35, 41-43, 54-56, 59, 60; Br. in Supp. of Mot. to Dismiss (ECF 13) at 2 (referring to REC's "rights under the statute."). "The Statute has *already* unconstitutionally rewritten the Granos' 1989 Electric Distribution Easement with REC, resulting in the divestment of Granos' property rights, including the right to exclude, without process or condemnation, resulting in injury-in-fact to the Granos." Compl. ¶ 11 (emphasis added). *See also, e.g.,* Compl. at 3 ("As of July 1, 2020, REC unconstitutionally possesses the purported right to lay, operate, and maintain fiber-optic cable on the Granos' property under the newly-passed Virginia Code § 55.1-306.1. . . and it purportedly retains the right . . . REC has previously affixed appurtenances . . . ") (emphasis added), Compl. ¶ 10 ("The Granos have been injured-in-fact by Defendant's actions"), ¶¶ 54-56, 75-77 (rights obtained by REC as of July 1, 2020), ¶ 68-70 (previous and ongoing use of the easement for fiber optic purposes, which the Brief confirms.), ¶ 83 ("REC now allegedly possesses, has used, and has declared its intent to use.") (emphasis added), ¶ 86 ("REC . . . acted upon those rights and is still acting upon them"), ¶ 90 ("An injunction . . . would prevent further constitutional violations from occurring") (emphasis added), ¶ 102 ("On July 1, 2020, Virginia Code § 55.1-306.l became effective and conveyed from the Granos to REC the right to itself or to allow others to lay fiber-optic cable on the property, and deprived the Granos of constitutionally-protected property interests") (emphasis added), ¶ 111 ("the statute has unconstitutionally deprived them of property"), ¶ 114 ("Virginia Code § 55.1-306.l deprived the Granos of their property rights"), ¶ 115 ("the procedures employed were constitutionally inadequate"), ¶ 116 ("The only process . . . was instantaneous, unappealable seizure"), ¶ 126 ("As a result of these actions, the Granos have suffered injury and are being irreparably harmed"), page 28 ("The rights transferred to REC . . . represent a deprivation of constitutional rights.").

[11] "[E]asements are not land, they merely burden land that continues to be owned by another." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1845 (2020) (citation omitted). "An easement is a 'nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.'" *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014) (quoting *Restatement (Third) of Property: Servitudes* § 1.2(1) (1998)).

[12] Easements can be created either expressly, or prescriptively through exercise. *See Anderson v. Delore*, 278 Va. 251, 257, 683 S.E.2d 307, 309 (2009). The 1989 Electrical Distribution Easement is an express easement. REC could lose its easement rights if it abandons those rights, but if created expressly, "the mere failure to use an easement . . . is not sufficient evidence of abandonment." *Watts v. C.I. Johnson & Bowman Real Estate Corp.*, 105 Va. 519, 525, 54 S.E. 317, 319 (1906). If the property right embodied in an easement was somehow incomplete by nonuse as REC's argument implies, not only would nonuse be sufficient evidence of abandonment, but abandonment would be unnecessary.

immediately or completely use the rights it possesses. Property and eminent domain law recognize this principle. If REC had used eminent domain to acquire these same rights from the Granos, REC's constitutional just compensation obligation would not be deferred or reduced if REC claimed it had no intention to use the rights it had condemned. What would matter is that REC would have a present *right* to use all of the rights it had acquired – that is the effect of an easement. *See United States v. 2,648.31 Acres of Land*, 218 F.2d 518, 523 (4th Cir. 1955) ("[R]eliance is placed upon the elementary rule that compensation must be made once for all and must be estimated according to the full measure of the right acquired."); 5 Nichols, *Law of Eminent Domain* § 18.03 ("[T]he law presumes that the condemning authority will utilize the property taken to its fullest extent.")[13]

Although REC's representative has declared that it *currently* has no intent "to place fiber optic cable on the Granos' property," this declaration is (1) not an abandonment of the 1989 Electrical Easement and its Statute-mandated expansion of REC's use to include fiber optic, (2) does not run with the land and does not lift the encumbrance on title, (3) does not bind REC's successors and assigns, (4) does not prevent others from using the 1989 Easement under the terms of the Statute and (5) is not of record.[14] REC's statements about its "present" or "current"

---

[13] *See also W. Union Tel. Co. v. Polhemus*, 178 F. 904, 906 (3d Cir. 1910) ("The whole right is paid for without regard to the probability of its being exercised.") (internal citations and quotation marks omitted); Eaton, *Real Estate Valuation in Litigation* at 292 (2d ed. Appraisal Institute 1995) ("The appraiser should assume that the condemnor will utilize the rights acquired to their fullest extent.").

[14] An analogous situation is unfolding with regard to the now-defunct Atlantic Coast Pipeline. As that ongoing situation illustrates, acquiring easement rights and using them are two separate things, but payment must be made when the rights are acquired, not when the rights are used. Despite the wish of hundreds of landowners, ACP has retained the easements it obtained even without any current or future intent to use the rights it obtained from those landowners. Sarah Rankin, *Regulators Get Plan For Undoing The Atlantic Coast Pipeline*, RICHMOND TIMES-DISPATCH (Jan. 5, 2021), https://richmond.com/ap/business/regulators-get-plan-for-undoing-the-atlantic-coast-pipeline/article_5e53a93e-8c96-5221-b4e4-42ee0a0f29c1.html (wherein a representative of Atlantic Coast Pipeline, LLC stated that though it has no intention of continuing the project or selling the easements to a third party to build a similar project "the company does not intend to voluntarily release the easement agreements it secured on landowners' properties.").

intentions are only good until the moment when those intentions change.[15]

REC's intentions for employing the rights the Statute added to the 1989 Easement are irrelevant, other than to demonstrate that REC indeed presently possesses rights that prior to the Statute, belonged to the Granos. This Court should reject REC's statements about its intention to employ rights it now possesses and deny its motion based upon the effect of the law on July 1, 2020.

3) The Granos Adequately Pled Their Actual and Ongoing Harm in The Complaint.

The Statute's deprivation of the Granos' rights and vesting those rights in REC has been repeatedly and plausibly alleged in the Complaint as the injury-in-fact.[16] *See, e.g.*, Compl. at 3 ("REC unconstitutionally possesses the purported right to lay, operate, and maintain fiber-optic cable on the Granos' property under the newly-passed Virginia Code § 55.1-306.1. . . . [I]t has claimed to acquire these rights under color—and by virtue—of the Statute"). Accordingly, the Granos' injuries are "concrete" and "actual," in the same way as any other deprivation of property rights would be: (1) the Granos have been deprived of their rights; (2) the causation can be traced to REC, which now possesses, and acknowledges it possesses, the rights the Statute transferred from the Granos; and (3) declaratory and injunctive relief would address these injuries by returning the lost rights to the Granos and preventing future exercise by REC or its successors in interest. *See Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017).

---

[15] If the doctrine of ripeness required the Landowners to hold their lawsuit for the unconstitutionally conveyed rights to be fully exercised (a contention for which there is no authority cited in REC's Brief), the Landowners would surely and rightly be facing a different REC motion to dismiss on statute of limitations grounds.

[16] The standard for the complaint notice pleading standard under Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court's jurisdiction . . . [and] . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]" The *Twombly*/*Iqbal* "plausibility" standard does not supplant this requirement or demand a plaintiff plead Due Process, Contracts Clause, and section 1983 claims with particularity. *Cf.* Fed. R. Civ. P. 9(b).

Furthermore, the Complaint alleges that the Granos have already been subject to a deprivation of their property rights, and REC's continuing and unlimited right to physically invade under the Statute. Compl. ¶¶ 69, 70. *See also* Compl. ¶ 10 ("The Granos have standing to challenge the actions taken by the Defendant. The Granos have been injured-in-fact by Defendant's actions, and are subject to immediate and substantial risk of prospective harm."); Compl. ¶ 115 ("Under color of Virginia Code § 55.1-306, REC has taken the Granos property, and the Granos are under the threat of having their property taken . . . ."); Compl. ¶¶ 6, 119. This damage too is an actual controversy ripe for judgment. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("[T]he claim here is ripe insofar as Article III standing is concerned, since . . . petitioner has been deprived of property.").[17]

The Granos have met their burden to demonstrate the court's jurisdiction over their due process claims, and this Court should deny REC's Motion to Dismiss, which attempts to distort jurisdictional and property law for the purposes of more expedient litigation.

B. Contracts Clause

While REC's motion seeks dismissal of the entire three-count complaint, it does not claim that the Contracts Clause claim is not ripe, or lacks standing.[18] The Complaint plausibly alleges all of the factual and legal elements of such a claim, which, if taken as true would entitle

[17] *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the [condemnor] occupies") (internal citations omitted); *Maniere v. United States*, 31 Fed. Cl. 410, 420 (1994) ("Pursuant to a taking claim under the Fifth Amendment, a plaintiff must initially show standing, including proof of personal injury, that is, the requisite interest in the property at issue and the deprivation thereof by the United States.").

[18] Because REC waived the opportunity to challenge the ripeness of the Contracts Clause claim in its motion, it cannot raise it in their Reply Brief. The Granos note it here simply to provide the court with a complete picture of the claim in their Complaint.

the Granos to relief: (1) the Granos and REC are parties to, and have interests in, a contract (the existing 1989 Electrical Distribution Easement) which sets out the rights and obligations of the parties; (2) the Granos' rights and obligations are vested under Virginia law; (3) on July 1, 2020, Virginia Code § 55.1-306.1 substantially impaired the rights and obligations under their existing, vested contract with REC by altering "as a matter of law" the bargained-for scope of use of the 1989 Electrical Distribution Easement to give REC the right to use the property for fiber optic equipment and prevent the Granos from excluding REC for such purposes. *See Bray v. Ins. Co. of State of Pa.*, 917 F.2d 130, 135 (4th Cir. 1990) ("To violate the contracts clause the legislature must alter an existing contract.") (citing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 264–65 (1827)). The Granos have standing to raise this claim. *See* 16 C.J.S. *Constitutional Law* § 184 ("To bring a claim for a violation of the Contract Clause of the United States Constitution, a plaintiff must allege facts demonstrating that he or she possesses contractual rights that have been substantially impaired by the challenged law; if the threshold inquiry is met, the court must determine if the State has a significant or legitimate purpose behind the regulation.") (citing *Young v. Hawaii*, 911. F. Supp. 2d 972 (D. Haw. 2012)). *See also* 16 C.J.S. *Constitutional Law* § 184 ("any party to a contract whose rights are affected by a Statute impairing its obligation may contest its validity provided the contract is valid in its inception") (citing *Everglades Drainage Dist. v. Florida Ranch & Dairy Corp.*, 74 F.2d 914 (5th Cir. 1935); *Davis v. McCasland*, 75 P.2d 1118 (Ok. 1938)). [19]

[19] That REC did not enact the Statute itself is of no relevance. *See infra* Section II. Additionally, the Commonwealth of Virginia has noticed its intervention "to defend the constitutionality of Virginia Code § 55.1-306.1," *see* Notice of Intent to Intervene (ECF 10) (Dec. 10, 2020), and REC is a party that is necessary or indispensable to any judgment on the Contracts Clause Claim. See Fed. R. Civ. P. 19(a)-(b).

The allegations of the Granos' Complaint are a far cry from those in cases in which courts have concluded that a plaintiff does not have standing to raise a Contract Clause claim. *See*, *e.g.*, *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1131 (C.D. Cal. 2004) (plaintiff lacked standing to bring a Contract Clause claim because—although a contract was impaired—the plaintiff was not a party to the contract, and "the only plaintiffs with standing" are the parties to the contract); *Gathwright v. Mayor and Council of City of Baltimore*, 30 A.2d 252 (Md. 1943) (tax sale of land was not a contract).

The Granos' injury was complete—and their Contracts Clause claim was ripe--on July 1, 2020.

II. The Complaint Alleges That REC Deprived The Granos of Property Rights "As A Matter Of Law" Under Color of The Statute, and Established "State Action".

A. The Statute Under Color of Which REC Has Acted is Not in Doubt in This Case.

REC's second argument fares no better. Here, the focus shifts from allegations of the Granos' injuries, to the defendant's relationship with the state. The federal civil rights statute provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Supreme Court holds that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Screws v. United States*, 325 U.S. 91, 109 (1945)

(quoting *United States v. Classic*, 313 U.S. 299, 308-09 (1941).[20] The Complaint plausibly pleaded that REC acts "under color of state law" because it alleges that REC "exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Adkins*, 487 U.S. 42, 49 (1988) (internal quotation marks and citation omitted).

The rules regarding what qualifies as "color of law" can fairly be called unclear.[21] In a more typical section 1983 case the allegations follow a general pattern: A private actor commits some sort of wrong, which the plaintiff seeks to tie back to the government to demonstrate that the action is taken "under color of state law." *See e.g.*, *Haavistola v. Community Fire Co. of Rising Sun*, F.3d 211, 215 (4th Cir. 1993). The present situation presents an opposite fact situation: there is no dispute about the state's role (enacting legislation) and the question is whether the conferral of rights upon a private actor is also a state action by the private actor. Asked differently, the question is whether REC's act of receiving and possessing rights "as a matter of law" is an action under color of state law. The answer is resoundingly "yes," because REC has not just acted under "color" of law, REC has received the rights directly as a result of

[20] *See also West v. Adkins*, 487 U.S. 42, 49 (1988) ("[T]raditional definition" of acting under color of state law "requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" but "if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'") (citations omitted), *rev'g* 815 F.2d 993 (4th Cir. 1988). *See also American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (where deprivations of rights under the Fourteenth Amendment are alleged in § 1983 action, Fourteenth Amendment's state-action requirement and § 1983's under-color-of-state-law requirement merge).

[21] *See*, *e.g.*, *Community Med. Ctr. v. Emer. Med. Servs.*, 712 F.2d 878, n.4 (3d Cir. 1983) ("Commentators and judges have variously characterized the state action doctrine as 'murky waters,' a 'protean concept,' 'obdurate,' and 'a conceptual disaster area.'") (citations omitted).

the law, by virtue of already possessing the 1989 Easement. For all of the reasons stated above in Section I, no more "action" is required of REC.[22]

REC has not shown any reluctance to be legislatively deputized in the Commonwealth's scheme to deprive Virginia property owners of their property rights. Indeed, it was a coconspirator. During the 2020 General Assembly Session Virginia's electric cooperatives, including REC, sought and authored the legislation which would allow them to install broadband and communications equipment in their existing easements without paying any compensation to property owners. Virginia's electrical cooperatives, through their trade organization the Virginia, Maryland & Delaware Association of Electrical Cooperatives ("VMDAEC"), served as the chief drafters of the legislation that became the Statute.

Under Fed. R. Evid. 201(b)(2), the Court may take judicial notice of adjudicative facts[23] which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.". *Hearing on H.B. 831 before the Comm. On Labor and Commerce* (Feb 6, 2020)(available at http://sg001harmony.sliq.net/00304/harmony/en/PowerBrowser/PowerBrowserV2 /20200313/1/13119?mediaStartTime=20200206183541&mediaEndTime=20200206185617&viewMode=2#info_), a partial transcript is attached hereto as Exhibit 1. In a committee hearing of the Virginia House of Delegates on the legislation which would be passed as Virginia Code § 55.1-306.1, Sam Brumberg, Esquire, Association Counsel at the Virginia, Maryland & Delaware Association of Electric Cooperatives and representing "Virginia's Electric

[22] "REC further informed the Grano Family that when the Statute became effective on July 1, 2020, the 'clear language of the Statute' 'allows [REC] to incorporate telecommunications or broadband facilities into their current electric utilities all within the casement that currently encumbers [the Granos'] property,' and to do so without paying compensation." Compl. ¶ 67.

[23] "[F]acts concerning the immediate parties--who did what, where, when, how, and with what motive or intent [are] called adjudicative facts." Fed. R. Evid. 201(a) advisory committee's note to 1972 proposed rules.

Cooperatives" admitted he was the primary drafter of the bill. *See* Exhibit 1 at page 1, line 14 and page 3, lines 3-4) (in which Mr. Brumberg responds to a characterization of an earlier draft of the bill as containing an incomprehensible "word soup" by referring to himself as "Chief Cook of the word soup.").

REC's assertion that the Complaint "posit[s] only two facts" alleging REC has violated the Granos' rights under color of state law does not reflect the Complaint. *See* REC Br. at 18. REC asserts that the color of law allegation is supported only by the assertion that REC has been delegated eminent domain power, and is a state-regulated entity. This is an attempt to force the analysis into a shape the facts do not resemble: that the state action is neither obvious or direct in the merits of the Complaint.

But in reality, consistent with 42 U.S.C. § 1983, the Complaint alleges that REC is a legal person who, "under color of Virginia Code § 55.1-306.1" "now allegedly possesses [and] has used" a number of property rights which it has obtained unconstitutionally. Compl. ¶¶ 13, 104, 83. "[REC] has claimed to acquire these rights under color—and by virtue of—the Statute, and it purportedly retains the right to physically invade the Granos' property to exercise them under color of the statute at any point in the future." Compl. at 3. The Complaint also alleges that REC believed and stated that Virginia Code § 55.1-306.1 would grant them the rights they wanted on July 1, 2020 without any need to compensate the Granos. *See* Compl. ¶ 66 (When the Grano Family did not accede to REC's request for voluntary transfer of a fiber optic easement, REC responded that its offer of compensation for a negotiated fiber optic easement was merely a "good faith gesture" and that REC could "easily just wait until July 1 to proceed" without reaching a deal or paying compensation.)

B. REC Acted Under State Law, Even Under the Tests REC Invokes in Its Brief.

"[A] private party acts under color of state law where the state, through extensive regulation of the private party, has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state." *Haavistola v. Community Fire Co. of Rising Sun*, F.3d 211, 215 (4th Cir. 1993) *cited in Conner v. Donnelly*, 42 F.3d 220, 223-24 (4th Cir. 1994) ("Although the Supreme Court 'has articulated a number of different factors or tests [for the 'under color of state law' requirement] in different contexts,' it has not adopted a succinct test applicable to all situations.") (quoting *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 939 (1982)).

First, the statute created a symbiotic relationship between the Commonwealth and REC. *See Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961) (The "symbiotic relationship" test asks whether a private party can be fairly said to be a state actor where "the state has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity.").

Here, the Commonwealth and REC are inextricably intertwined through the Statute. The Commonwealth announced a public policy preference (55.1-306.1(B)(1) *et seq.*), and enacted legislation, at REC's urging, which authorized existing easement holders to implement the Commonwealth's policy preference. The Commonwealth transferred property rights to REC (and all other similar easement holders) for the express purpose of carrying out the Commonwealth's policy. REC, in turn, received and possesses the rights conveyed by the Statute. The relationship is fully symbiotic and creates a clear condition supporting the Granos' 1983 claim. That REC has acted under color of state law states the matter too mildly – it is the very law itself, not its color, by which REC received the rights in controversy.

REC is not a bystander to the implementation of Virginia Code § 55.1-306.1, but the willing and necessary agent of the state to effect the stated policy preference. The harm to the Granos' rights could not be accomplished by the State or REC acting alone, but only symbiotically.[24]

The Commonwealth has "insinuated itself into a position of interdependence" with REC because, as the statute itself notes, the transfer of the Granos' property to REC was automatic "as a matter of law." Virginia Code § 55.1-306.1(D); 365 U.S. at 725; *See also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366 (1974). Because it does not have eminent domain power for broadband, REC cannot act independent of the Commonwealth, as its sole authority flows from the Statute. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.") (emphasis in original). The Supreme Court also ruled that "although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004 (citations omitted). Here REC qualified itself under the Statute to receive new rights, and the Commonwealth provided REC with significant overt encouragement to implement the Commonwealth's policy by transferring the Granos' rights to REC.

Second, under the "joint action" test, a private party can be fairly said to be a state actor where a private party is a "willful participant in joint action with the State or its agents." *Lugar*,

[24] REC does not have eminent domain power to condemn for commercial broadband purposes and the Commonwealth may only condemn for public uses, not private uses. *See generally*, Va. Const. Art. I, Sec. 11; Va. Code §§ 56-231.15, 56-231.23, 56-231.43.

457 U.S. at 941. The Complaint alleges a situation akin to those cases in which the state compelled the private actor to deprive another of their rights. In those cases, as here, when the state takes an active role in the deprivation, the actions of the private actor are deemed to be that of the state. *See Adickes v. Kress & Co*., 398 U.S. 144 (1970), where the Court held "'[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute.' To act 'under color' of law does not require that the accused be an officer of the State. It is enough that [s]he is a willful participant in joint activity with the State or its agents.'" *Id*. at 151 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)). As detailed previously, REC was not simply a passive bystander, but an active instigator and leading force behind the statute.

C. REC's Cited Authority Is Misplaced and Inapplicable

REC relies almost exclusively on an unpublished 2019 ruling, *Pole Green Dev. Co., LLC v. Columbia Gas Trans*., LLC, 785 F. App'x 106, 107 (4th Cir. 2019) (per curiam). In that eminent domain case the court held that the complaint's allegation was incomplete where it only alleged that a pipeline company "had the ability to take land through eminent domain" "by virtue of Va. Code Ann. § 56-49" but failed to allege that the pipeline company had fulfilled all of the statutory antecedent conditions required to exercise condemnation power. *Pole Green*, 785 F. App'x at 107. *Pole Green* is specific to an affirmative exercise of state-granted domain power, and so is neither binding nor helpful, because this is not an eminent domain case.

The Complaint plainly states that "REC did not attempt to exercise eminent domain," and there are no antecedent requirements about which to be concerned. Compl. ¶ 64.[25] Rather, the authority for the deprivation of the Granos' rights and the state law under color of which REC

[25] In fact, the allegation in Paragraph 14 deliberately implies that it is dubious that fiber optic is included in REC's "energy" authority.

acted was Virginia Code § 55.1-306.1, which unconstitutionally expanded REC's 1989 Easement, and for which the only antecedent requirement was possession of the 1989 Easement. Compl. ¶¶ 59-60, 67. The Complaint explicitly states "[u]nder color of Virginia Code § 55.1-306.1, REC has taken the Granos' property." Compl. at ¶ 115; *see also* id. at 3, 29 (¶ 120).

This is more than a legally conclusory statement, it is the heart of the claim because of the nature of what occurred. Had the statute merely authorized REC to condemn fiber optic easements, with the attendant constitutional obligation for just compensation, this suit would not exist and *Pole Green* would be relevant. Virginia Code § 55.1-306.1 is a deliberate attempt to end-run such constitutional requirements in the service of the Commonwealth's stated policy preference. REC, which lobbied for exactly this statutory scheme, has availed itself of this effect.

REC acted under color of state law in receiving and now possessing the rights deprived from the Granos and conferred on REC by Virginia Code § 55.1-306.1. The Complaint properly stated a claim under 42 U.S.C. § 1983, and this Court should deny REC's Motion to Dismiss.

CONCLUSION

On July 1, 2020, through Virginia Code § 55.1-306.1 and without due process of law, REC acquired and now possesses new easement rights simply by virtue of already possessing the 1989 Electrical Distribution Easement. These new, altered rights allow REC to use the Grano property without first taking their rights by the eminent domain process or paying just compensation in violation of the Fifth and Fourteenth amendments, and rewrote their existing express 1989 Easement, in violation of the Contracts Clause.

REC's motion should be denied.

Respectfully submitted,

JOHN R. GRANO, JR.
CYNTHIA TAFT GRANO

By: /s/
Joshua E. Baker

Joshua E. Baker, Esquire
VSB No.: 74302
jeb@waldoandlyle.com
Brian G. Kunze, Esquire
VSB No.: 76948
bgk@waldoandlyle.com
Russell G. Terman, Esquire
VSB No.: 93804
rgt@waldoandlyle.com
WALDO & LYLE, P.C.
301 W. Freemason Street
Norfolk, VA 23510
Telephone: (757) 622-5812
Facsimile: (757) 622-5815

Robert H. Thomas, Esquire (Admitted *Pro Hac Vice*)
California State Bar No.: 160367
Hawaii State Bar No.: 4610-0
rht@hawaiilawyer.com
DAMON KEY LEONG
KUPCHAK HASTERT, LC
1003 Bishop Street, Suite 1600
Honolulu, HI 96813
Telephone: (808) 531-8031
Facsimile: (808) 533-2242
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and exact copies of the foregoing Plaintiffs' Brief in Opposition to Defendant Rappahannock Electric Cooperative's Motion to Dismiss for Lack of Jurisdiction and/or for Failure to State a Claim (ECF 12) have been served upon the following through the Court's Electronic Filing System on this 26th day of January, 2021:

Andrew P. Sherrod, Esquire
Elizabeth C. Burneson, Esquire
HIRSCHLER FLEISCHER,
A PROFESSIONAL CORPORATION
Post Office Box 500
Richmond, VA 23218-0500

/s/

Joshua E. Baker, Esquire
VSB No.: 74302
jeb@waldoandlyle.com
Brian G. Kunze, Esquire
VSB No.: 76948
bgk@waldoandlyle.com
Russell G. Terman, Esquire
VSB No.: 93804
rgt@waldoandlyle.com
WALDO & LYLE, P.C.
301 W. Freemason Street
Norfolk, VA 23510
Telephone: (757) 622-5812
Facsimile: (757) 622-5815

Robert H. Thomas, Esquire (Admitted *Pro Hac Vice*)
California State Bar No.: 160367
Hawaii State Bar No.: 4610-0
rht@hawaiilawyer.com
DAMON KEY LEONG
KUPCHAK HASTERT, LC
1003 Bishop Street, Suite 1600
Honolulu, HI 96813
Telephone: (808) 531-8031
Facsimile: (808) 533-2242
Counsel for Plaintiffs