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

JOHN R. GRANO, JR.	)	
	)	
and	)	
	)	
CYNTHIA TAFT GRANO,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 3:20CV0065
	)	
RAPPAHANNOCK ELECTRIC COOPERATIVE,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, Rappahannock Electric Cooperative ("REC"), by counsel, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, submits the following brief in support of its Motion to Dismiss the Complaint filed by John R. Grano, Jr. and Cynthia Taft Grano (the "Granos" or "Plaintiffs") for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

INTRODUCTION

The Granos have brought this Complaint in an unfounded effort to challenge the Constitutionality of Virginia Code § 55.1-306.1—seeking declaratory and injunctive relief under 42 U.S.C § 1983 in each of the Complaint's three counts. Virginia Code § 55.1-306.1 went into effect on July 1, 2020 and provides in relevant part that "[e]asements for the location and use of electric and communications facilities may be used to provide or expand broadband or other communications services." As member-owners of the cooperative who receive their electric service from REC, the Granos are parties to such an electric easement in favor of REC and now

claim—wrongly—that the statute deprives them of their Constitutional and contract rights because it expands the use of that easement.

While REC supports Virginia Code § 55.1-306.1 and its role in addressing the crucial need to expand broadband Internet access to people in under-served areas of the Commonwealth, the Complaint must be dismissed before the Constitutional merits can be reached because this Court lacks subject matter jurisdiction. REC has not exercised its rights under the statute to place fiber optic cable on the Granos' property, nor has REC expressed any threat or future intent to do so. The Granos therefore lack standing to bring the claims set forth in the Complaint, which are not yet ripe, and there is no actual controversy that exists sufficient to grant declaratory relief. The Granos have also failed to allege sufficiently that REC was acting under color of state law—a necessary element under Section 1983—and thus fail to state a claim upon which relief can be granted. The Complaint should therefore be dismissed.

STATEMENT OF RELEVANT ALLEGATIONS AND FACTS

The Granos own property located at 25535 Somerville Road, Mitchells, Virginia, in Culpeper County (the "Property"), which they purchased in 1990 from Robert F. Taft. Complaint ("Compl.") ¶ 9. In 1989, Mr. Taft granted REC, a private non-stock corporation and utility consumer services cooperative, an easement over the Property. Compl. ¶¶ 13, 17, Ex. 2. The parties' Easement Agreement provides REC with "the perpetual right, privilege and easement of right of way over, under, upon and across [the Property] to construct, operate and maintain an electric distribution system including all appurtenances and attachments desirable in connection therewith," both "overhead and underground." Compl. ¶ 23, Ex. 2. The Easement Agreement states that the "facilities to be constructed" will "consist of the installation of primary and service

conductors, poles, guy supports, pad mount transformers, sectionalizing cabinet, conduit and appurtenances…." *Id*.

On November 19, 2019, months before Virginia Code § 55.1-306.1 went into effect, REC contacted the Granos seeking permission to install fiber optic cable on the Property, which lies within an FCC-designated broadband underserved census block location, to facilitate the expansion of a fiber utility network to support electric-grid operational services with the additional potential to facilitate broadband Internet access by REC or others. Declaration of John M. Arp, ("Decl.") ¶ 2 (copy attached as **Exhibit A**). The Granos indicated that they were amenable to the installation of fiber optic cable on the Property on the existing overhead lines and along the existing underground route. Decl. ¶ 3. On December 3, 2019, REC informed Ms. Grano that it would have to trim trees in order to install fiber optic cable on existing overhead lines, but Ms. Grano stated that she did not want trees cut back. Decl. ¶ 4. The next day, an REC representative met with Ms. Grano to discuss her concerns. Decl. ¶ 5. On December 5, 2019, with the Granos' permission, REC installed two 2-inch underground PVC conduits along the existing underground electrical route on the Property, predominately using a sensitive, less invasive installation procedure known as vibratory plowing that avoids open trenching. Decl. ¶ 6. REC did not install the fiber optic cable itself. *Id.*

From December 2019 through May 2020, REC and the Granos, either directly or through their counsel, attempted to negotiate a new easement for fiber optic cable. Decl. ¶ 7; *see also* Compl. ¶¶ 62-65 (describing the parties' easement negotiations).[1] REC sought to obtain an

[1] Despite its good faith, member-sensitive efforts to secure a new easement from the Granos and its ultimate decision not to place fiber optic cable over the Property, REC does not concede that its existing easement language does not allow for the installation of fiber optic cable. For all the reasons discussed in this brief, however, that question need not be reached to resolve this case.

updated electrical easement to include fiber provisions or a fiber specific easement, with REC including payment considerations. Decl. ¶ 7*; see also* Compl. ¶ 62, Ex. 5 (referencing and attaching proposed easement). REC also offered to install additional underground fiber along the overhead portion of the route to mitigate the need to trim trees. Decl. ¶ 7. During the course of these negotiations, counsel for REC explained to counsel for the Granos that, despite the passage of Virginia Code § 55.1-306.1, REC preferred to negotiate a new easement with the Granos in lieu of exercising its rights under that statute. Decl. ¶ 8. Counsel for REC stated in an email that "[m]y client is not the type to be heavy handed and could easily wait until July 1 to proceed. However, they want to maintain a good relationship with its members. We also believe the telecommunication facilities benefit the entire community." *Id.,* Ex. A; *see also* Compl. ¶¶ 66-67 (citing parts of the email exchange between counsel).

As the easement negotiations stalled, REC began to pursue designs for an alternative route that would avoid the Property and facilitate the installation of fiber optic cable through the area. Decl. ¶ 9. REC was able to identify an alternative route that does not cross or touch the Property. Decl. ¶ 10, Ex. B (map of alternate route). REC and the Granos ultimately came to an impasse and were unable to agree on a new easement, so REC moved forward with its plan to implement the alternate route for the fiber optic cable installation and obtained easements from all property owners by May 30, 2020. Decl. ¶ 11. REC chose not to employ its anticipated rights under Virginia Code § 55.1-306.1 as to the Property. *Id*.

Because the alternate route required that the fiber cable cross a river, REC was obligated to obtain a permit from the Virginia Marine Resources Commission ("VMRC"). Decl. ¶ 12. As required for the VMRC permit, REC mailed letters to five landowners whose properties were adjacent to the alternate route's river crossing, informing them of the future construction. Decl. ¶

13, Ex. C (copy of form letter). The Granos were one of those five landowners. *Id.* As part of the VMRC permitting process, REC also posted public notice of its plans in the Culpeper Star-Exponent newspaper for fifteen days and on that newspaper's website for seven days. Decl. ¶ 14.

In July 2020, REC received a permit for the alternate route, and by August 28, 2020, the alternate route and river crossing were completed. Decl. ¶ 15. Ms. Grano contacted REC in July 2020 to inquire whether REC had chosen an alternate route and about the timing of the removal of remaining temporary installation equipment on the original route. Decl. ¶ 16. REC informed Ms. Grano that the alternate route for fiber optic cable had indeed been selected and would bypass the Property. *Id*. Subsequently, in an email she sent to REC on August 28, 2020, Ms. Grano acknowledged that "REC has chosen a different route than using our easement." Decl. ¶ 17, Ex. D (copy of email).

REC has never installed fiber optic cable on the Property. Decl. ¶¶ 6,18. While the underground conduits (which were installed with the Granos' permission) remain, all other appurtenances for fiber optic cable, such as wheels and pull cord spools, have been removed from the Property. Compl. at 3, 18; Decl. ¶ 18. REC has no future plan or intention to place fiber optic cable on the Property. Decl. ¶ 19.

While 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," the statute is ultimately irrelevant here because REC has not sought to exercise any rights under that law and has no plans to do so in the future in regard to the Property. Compl. ¶¶ 34-35; Decl. ¶ 19.

STANDARD OF REVIEW

Under Rule 12(b)(1), "[i]t is hornbook law that a plaintiff seeking relief in a federal court has the burden of alleging and proving the jurisdictional facts." *Sligh v. Doe*, 596 F.2d 1169, 1170 (4th Cir. 1979). Challenges to the subject matter jurisdiction of a complaint under Rule 12(b)(1) can be facial or factual. *See Madrid v. Robinson*, 218 F. Supp. 3d 482, 484 (W.D. Va. 2016). A facial challenge is one arguing that "the complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Id.* (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). On a facial challenge, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.* On the other hand, a "factual challenge is one in which it is 'contended that the jurisdictional allegations of the complaint were not true.'" *Id.* On a factual challenge, "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004).

A motion under Rule 12(b)(6) tests whether the complaint "state[s] a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). Under the federal notice pleading standards, a plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). While "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff," *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), the Court "is not obligated to accept unsupported legal allegations,

legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events." *Young v. CitiMortgage, Inc*., 2013 U.S. Dist. LEXIS 94046, at *3 (W.D. Va. May 23, 2013) (citing cases). The facts in a complaint must be sufficient to "nudge claims 'across the line from conceivable to plausible.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc*., 591 F.3d 250, 256 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 680)).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over The Claims Set Forth In The Complaint Because Plaintiffs Lack Standing, Their Claim Is Not Yet Ripe For Adjudication, And There Is No Actual Controversy.

A. Plaintiffs do not have standing to bring this suit because they have no injury.

The Granos do not have standing to bring this action because they lack any injury-in-fact, for their alleged injuries are entirely hypothetical. As the Supreme Court has stated, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" and "'[o]ne element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (internal citations omitted).

The Granos must satisfy the following three requirements to establish Article III standing and invoke the jurisdiction of this Court:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest);
> (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and
> (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017). To secure standing, the Plaintiffs "bear the burden of satisfying *each* of these three elements." *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 772 (W.D. Va. 2002).

As to the first element, the Granos must establish the invasion of a "legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Where (as here) the alleged injury has not yet occurred, the injury-in-fact requirement may be satisfied upon a showing that (1) the injury is "certainly impending," or (2) there is a "substantial risk the harm will occur." *PETA, Inc. v. Stein*, 737 F. App'x 122, 128-29 (4th Cir. 2018). Even an "objectively reasonable likelihood" of an occurrence is insufficient to confer standing based upon imminent injury. *Beck*, 848 F.3d at 276 ("[A] threatened event can be 'reasonabl[y] likel[y]' to occur but still be insufficiently 'imminent' to constitute an injury-in-fact.") (citing *Clapper*, 568 U.S. at 407-08)).

Furthermore, REC's mere possession of the power or ability to take an action that could harm the Granos is insufficient to establish an injury. *See, e.g.*, *Maryland v. United States*, 360 F. Supp. 3d 288, 316-17 (D. Md. 2019) (holding that the plaintiff had no standing even where defendant, the federal government, had the power to cease enforcement of the Affordable Care Act ("ACA") and the President expressed intent to stop enforcing the ACA; these two facts did not establish a substantial risk of the harm occurring, especially where plaintiff could not point to "any actual threat by the President to terminate enforcement of the ACA."); *Clapper*, 568 U.S. at 410 (holding that even though the federal government had the power to act under federal surveillance law, plaintiffs had no standing to contest the law absent a "certainly impending" injury as a result of the government exercising that power).

The Granos have not alleged facts sufficient to show that they have sustained any injury-in-fact. This Court can determine that the Granos have failed to establish any injury on the basis of their pleadings (the facial challenge) or by reviewing evidence outside of the pleadings (the factual challenge). Under either standard, the Granos' claims must be dismissed.

1. The Complaint fails to allege facts upon which standing can be plausibly inferred (the "Facial Challenge").

The allegations in the Complaint, even taken as true, fail to establish that the Granos have standing to bring this case. The Complaint contains the bare legal conclusions that "[t]he Granos have standing to challenge the actions taken by Defendant" and that they have been "injured-in-fact" and are "subject to immediate and substantial risk of prospective harm." Compl. at 6. The only facts the Granos are able to allege, however, are that REC "possesses the purported right" to lay fiber optic cable on their property, that REC has claimed that it has the right to install fiber optic cable on their property, and that REC has "previously fixed appurtenances" to allow it to run fiber optic cable on the Property — but that REC has removed those appurtenances. Compl. at 3, 17-18. The Granos further allege that REC "may return at any time" to install fiber optic cable on the Property. *Id*. at 3. They also cite an email from counsel for REC, which stated that REC "could 'easily just wait until July 1 to proceed,'" with placing fiber optic cables on the Property, in lieu of agreeing to a new easement with the Granos, and reflecting counsel's position that the new law "allows" REC to place fiber optic cables on their Property. Compl. at 16-17.

It is plain from these allegations that Plaintiffs have not yet suffered any injury, and the possibility of future injury is remote and entirely speculative. The Granos' alleged injury, as pleaded in the Complaint, is that REC "*may*" return to the Property to install fiber optic cable. The closest the Plaintiffs come to alleging a "threatened" injury is REC's statement that it "could" wait until the new law went into effect to install fiber optic cable. Of course, this statement indicates

only REC's belief that it *could* proceed under the statute, not that it would do so, or that it had any plans or intent to do so.

At best, these allegations only provide a potential injury that is "conjectural or hypothetical," but that is not "actual or imminent." *Lujan*, 504 U.S. at 560. As the Supreme Court has repeatedly held, a "threatened injury must be *certainly impending* to constitute injury in fact" and that "[a]llegations of *possible* future injury" are not sufficient. *Clapper*, 568 U.S. at 409 (internal citations omitted) (holding that the federal government's "objectively reasonable likelihood" of enforcing newly passed federal law was not sufficient to establish an actual injury). The Granos have failed to allege that their threatened injuries are certainly impending, and instead allege only the mere possibility of an injury at a date uncertain in the future.

That REC has the power to act under the statute, or that REC believes it has such power, is insufficient to establish any injury on its own. *See, e.g.*, *Maryland v. United States*, 360 F. Supp. 3d at 316 (finding no standing where the defendant had not made any actual threats to take the action that would cause the alleged injury, because the claim consisted merely of "supposition and conjecture" about defendant's future actions); *Clapper*, 568 U.S. at 410 (holding that even though the federal government had the power to act under federal law, plaintiffs had no standing absent a showing of "certainly impending" injury as a result of the government exercising that power).

Thus, even taking Plaintiffs' allegations as true, the Granos allege nothing more than a *possible* future injury. There is no allegation of "certainly impending" harm sufficient to confer standing, and the Complaint should be dismissed for lack of subject matter jurisdiction.

2. The evidence will definitively establish that Plaintiffs have suffered no injury and that no injury is impending (the "Factual Challenge").

Plaintiffs also cannot prove that they have suffered any injury under a factual challenge. To the contrary, the factual record shows that the Granos have suffered no injury, as laid out in the

Declaration of John M. Arp. *See generally* Ex. A. Despite the Granos' contention that REC *may* enter its property to install fiber optic cable, REC has no intention of placing fiber optic cables on the Granos' property now or in the future. Decl. ¶ 19. REC originally sought to negotiate a new easement with the Granos for the fiber optic cable. Decl. ¶ 7. After several months of unsuccessful negotiations, however, REC decided to pursue an alternate route to place fiber optic cables that did not involve the Property, but that would accomplish REC's goal of expanding the fiber utility network and providing the potential to facilitate broadband Internet access in that area. Decl. ¶¶ 9-10.

REC ultimately found an alternate route and has since placed fiber optic cables along this new path, after obtaining permits and easements from all affected landowners. Decl. ¶¶ 10-15. Notably, when REC sought to install fiber optic cable on the property of the landowners along the alternate route, REC sought and obtained easements from each of those landowners and did not act pursuant Virginia Code § 55.1-306.1. Decl. ¶ 11.

Not only has REC found an alternate route that does not involve the Property or the easement, but REC has communicated this fact to the Granos, and Ms. Grano has explicitly stated that she understands that REC chose an alternate route, which has been completed. Decl. ¶¶ 13, 16-17. As the Granos are well aware, REC now has no reason to lay fiber optic cables on the Property and no intention to do so – either imminently or at any point in the future. Decl. ¶ 19.

Plaintiffs cite to an email from REC's counsel stating that REC "could" wait until July 1, 2020 – the date that Virginia Code § 55.1-306.1 went into effect – to install the fiber optic cable. Compl. at 16-17. The email in question, however, plainly indicates that, although REC rightly understood that it would have power under new law to act unilaterally in placing fiber on the Granos' easement, REC did not intend to proceed under the statute, but instead desired to negotiate

a new easement. Decl. ¶ 8, Ex. A. In the email, counsel for REC states that "[m]y client is not the type to be heavy handed and could easily wait until July 1 to proceed. However, they want to maintain a good relationship with its members. We also believe the telecommunication facilities benefit the entire community." *Id.* (emphasis added). Thus, the sole statement from REC that Plaintiffs cite to support their alleged threatened injury actually indicates that REC had *no* intent to exercise its authority under Virginia Code § 55.1-306.1.

There is no "certainly imminent" danger that REC will purportedly violate any of the Granos' rights, as REC has abandoned any plans it had to place fiber optic cable on the Property and has no intention of entering the Property for the purpose of installing fiber optic cable without their consent—and, indeed, REC has no need to do so. Because, as a factual matter, the Granos have suffered, and will suffer, no injury, this case should be dismissed for lack of subject matter jurisdiction.

B. This case is not yet ripe for judicial intervention.

The Court also lacks subject matter jurisdiction because this case is not yet ripe for adjudication, and the Granos will face no hardship, because the purported controversy rests upon events that may never occur.

The limitations of Article III include principles of standing as well as ripeness, which "presents a 'threshold question [] of justiciability.'" *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 269 (4th Cir. 2013) (internal citations omitted). Like standing, ripeness "is a question of subject matter jurisdiction." *Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) (internal citation omitted). Whereas standing focuses on who can sue, ripeness "concerns the appropriate timing of judicial intervention." *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (quoting *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 389 (4th Cir. 2001)).

In determining ripeness, the Court must "balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2012).

A case is fit for judicial decision "when the action in controversy is final and not dependent on future uncertainties." *Scoggins,* 718 F.3d at 270. By contrast, a claim is not fit for adjudication "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). The Court should dismiss this case for lack of ripeness "where nothing in the record shows that [Plaintiffs] have suffered any injury thus far and the future effect of the law relied upon remains wholly speculative." *Gasner v. Bd. of Supervisors*, 103 F.3d 351, 361 (4th Cir. 1996) (citing *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972)).

Hardship "is measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Doe*, 713 F.3d at 759 (internal quotations omitted). The Court may also consider the "cost to the plaintiff of delaying review." *Id.* The threatened harm must be "immediate, direct, and significant." *Pearson v. Leavitt*, 189 Fed. Appx. 161, 164 (4th Cir. 2006) (citing *West Virginia Highlands Conservancy, Inc. v. Babb*itt, 161 F.3d 797, 800 (4th Cir. 1998)).

The Fourth Circuit has noted that "[r]ipeness analysis holds much in common with standing analysis." *Doe*, 713 F.3d at 758 n.10. And "although the phrasing makes the questions of who may sue and when they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir 2006) (quoting Erwin Chemerinsky, Federal Jurisdiction § 2.4 (4th ed. 2003)). The Supreme Court has also acknowledged that "standing and ripeness boil down to the same question" in some cases.

See, e.g., *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128 n.8 (2007); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014).

For many of the same reasons that they lack standing, the Granos' case is also not yet ripe for adjudication. The case is not fit for adjudication because the action in controversy has not occurred—and indeed may never occur. The Granos face no hardship because there is no immediate threat to them or to their rights. As with standing, the Court may determine ripeness based on the pleadings (the facial challenge), or by considering the evidence (the factual challenge). The Granos' claims again fail under either test.

1. The Complaint fails to allege facts upon which ripeness can be established (the "Facial Challenge").

The Complaint does not establish that this matter is fit for adjudication or that the Plaintiffs face any hardship. There is no allegation that REC has actually placed fiber optic cable on the Property. By contrast, the relevant allegations in the Complaint provide only that REC "may" enter the Property at some time in the future to install fiber optic cable and that REC believes that it has the right to enter the Property to do so. *See* Section I.A.1 above. The Plaintiffs do not allege that REC has plans to return to the Property to install fiber optic cable or that REC has threatened to return to the Property for that purpose. *Id.*

As both the Fourth Circuit and the Supreme Court have stated, a case is not ripe for adjudication if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins,* 718 F.3d at 270. In *Scoggins*, for example, the plaintiffs were disabled residents, bringing an action under the Fair Housing Amendments Act, alleging that they were denied a necessary modification or accommodation for their disability. *Id.* at 270-71. The Fourth Circuit held that the issue was not ripe for a determination because the plaintiffs' request for an accommodation had not yet been denied, and it was thus possible that their request for an

accommodation would indeed be granted. *Id.* Here, as in *Scoggins*, it is still entirely possible, based on the Plaintiffs' own allegations as pleaded, that REC will never return to the Property to install fiber optic cables. Thus, their claim rests upon a future event that "may not occur as anticipated, or indeed may not occur at all." *Id.* *See also National Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 1999 U.S. Dist. LEXIS 21985, *15 (E.D. Va. Sept. 2, 1999) (finding case was not ripe for adjudication where plaintiffs alleged only that a guidance memo from the Environmental Protection Agency "may [a]ffect many of its members sometime in the future.").

Furthermore, the second prong of the ripeness test, hardship, depends on the "immediacy" of the threat. *Doe*, 713 F.3d at 759. Plaintiffs, however, have failed to articulate any hardship that they would face if the Court does not rule on its claims. There is admittedly no fiber optic cable on the Property. Furthermore, the Granos have only pleaded that REC "may," at some unknown time in the future, return to the Property to install fiber optic cable. There is no allegation that REC will do so immediately, or even soon, or at any specific time whatsoever. This vague allegation that REC may one day install fiber optic on their property fails to allege any immediate threat.

The Granos' claims thus depend entirely upon contingent future events that may never occur, and the Granos fail to provide a single hardship that they would face if forced to wait to bring their claim until it became ripe. Further, the Granos have not alleged any immediate harm. Because this case is not ripe for adjudication, the Court should dismiss the Complaint for lack of subject matter jurisdiction.

2. The evidence shows that the Granos' claim is not ripe for adjudication (the "Factual Challenge").

Upon a review of the evidence, it is beyond doubt that this case is not ripe for decision. As explained, REC has not installed fiber optic cable on the Property and has no intention of entering the Property to install fiber optic cable. Decl. ¶ 18-19. Indeed, as well known to the Granos, REC has found an alternate route to lay fiber optic cable and provide broadband access for the area near the Property. Decl. ¶¶ 9-17.

The Granos' claims all depend on a future potential action by REC – the installation of fiber optic cable on their Property without their consent—a circumstance that REC has sworn it has no intention of pursuing. Not only does the evidence show REC's stated intent *not* to enter the Property to install fiber optic cable, but the record shows that REC has no reason to do so because it has installed fiber optic cables on an alternate route. The Granos' claims therefore all rest upon a "contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scoggins,* 718 F.3d at 270. Because Plaintiffs cannot meet either prong of the ripeness test, the Complaint should be dismissed for lack of subject matter jurisdiction.

C. This Court lacks jurisdiction under the Declaratory Judgment Act because no actual controversy exists.

The Granos seek declaratory relief in each of the three counts of the Complaint. Each of these counts must be dismissed, however, because there is no actual controversy between the parties, as required by the Declaratory Judgment Act ("DJA"). The DJA allows a federal court, in "a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

The DJA is not an independent source of jurisdiction, but rather provides an additional remedy in appropriate cases of "actual controversy" where the court has subject matter jurisdiction from some other source. *WTGD 105.1 FM v. SoundExchange, Inc.*, 2014 U.S. Dist. LEXIS 127743, *16 (W.D. Va. Sept. 12, 2014). A declaratory action is appropriate if the dispute it presents is "definite and concrete, touching the legal relations of parties having adverse legal interests." *MedImmune, Inc.*, 549 U.S. at 127 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). The dispute must also be "real and substantial and admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (internal quotations omitted) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). While there is no bright line rule for determining whether a case or controversy exists, "the question in each case is whether the facts alleged under all the circumstances, show that there is a *substantial controversy*, between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Id.* (emphasis added).

Plaintiffs have not alleged that there is a controversy of sufficient immediacy or reality to warrant a declaratory judgment. Plaintiffs allege only that REC "may" enter their Property, at some unknown time in the future, to install fiber optic cables. Compl. at 3. This statement of potential future action is neither immediate nor real, as needed to establish an actual controversy under the DJA. *See, e.g., Microstrategy Inc. v. Convisser*, 2000 U.S. Dist. LEXIS 6094, *10 (E.D. Va. May 2, 2000) (holding that defendants' letter threatening to sue plaintiff created a "possibility" of litigation, but that it did not "present a substantial controversy of sufficient immediacy and reality to warrant declaratory relief" because the letter invited plaintiff to reach an out-of-court resolution, and did not threaten to sue immediately). Like the allegations in *Microstrategy*, the

claims by the Granos leave open the possibility that REC will never enter the Property to install fiber optic cables, much less that it will do so immediately. Because no actual controversy exists, Plaintiffs claims for declaratory judgment must be dismissed.

II. The Granos Fail To State A Claim Under Section 1983 Because They Have Not Sufficiently Alleged That REC Acted "Under Color Of State Law."

All three counts of the Complaint are brought pursuant to 42 U.S.C. § 1983. Each of these counts must be dismissed because the Granos have failed to allege facts sufficient to establish that REC was acting under "color of state law" as required to state a claim under Section 1983. As explained by the Supreme Court, "[w]hen Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred 'under color of' state law; thus, liability attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961)).

In support of its assertion that REC acted under color of state law, the Granos posit only two facts—(1) that REC has a limited power of eminent domain and (2) that REC is regulated by the Virginia State Corporation Commission. Compl. at 7. Neither of these allegations is sufficient to establish that REC acted under color of state law, and the Complaint should be dismissed.

REC's limited power of eminent domain alone is not sufficient to assert state action. While it is true that a private entity *may* be subject to Section 1983 when it exercises a "power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain," that is not the end of the inquiry. *Pole Green Dev. Co., LLC v. Columbia Gas Transmission, LLC*, 785 F. App'x 106, 107 (4th Cir. 2019) (per curiam) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974)).

Virginia Code § 56-231.23(10) provides that certain utility cooperatives, such as REC, can exercise all powers set forth in Virginia Code § 56-49, "including the power of eminent domain as prescribed for other public service corporations by general law." Notably, Virginia Code § 56-49 "conditions the right to exercise eminent domain on . . . satisfaction of one of three antecedent requirements." *Pole Green Dev. Co., LLC*, 785 F. App'x at 107. The Fourth Circuit recently held that failing to allege that an entity satisfied one of the antecedent requirements is a failure to adequately allege that the entity had the power to take land through eminent domain and is thus a failure to claim that the party was acting under color of state law. *Id.* The Granos' Complaint does not allege that REC has exercised any powers of eminent domain over the Property and makes no reference to the antecedent requirements to exercise eminent domain under Virginia Code § 56-49. The Complaint thus fails to state a claim that REC acted under color of state law.

Furthermore, the allegation that REC is regulated by the State Corporation Commission also does not establish that REC acted under color of state law. The "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 350 (1974) (internal citations omitted). Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

The Complaint is devoid of even a single factual allegation that would permit the Court to determine that there was a sufficiently close nexus—or any nexus at all—between the Commonwealth and REC's actions. Plaintiffs' bare allegation that REC is regulated by the SCC does not by itself convert REC's actions to state actions. In order to survive a motion to dismiss,

"a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Because the Complaint contains no factual matter related to the nexus of the Commonwealth to REC's actions, Plaintiffs have not stated a claim to relief that is plausible on its face. The Complaint should be dismissed.

CONCLUSION

For all of the foregoing reasons, the Complaint lacks subject matter jurisdiction and fails to state claims upon which this Court can grant relief against REC. It is unfortunate that REC's members will have to bear the costs of this unfounded lawsuit, even as REC attempts to make a positive impact on broadband availability in rural Virginia. The Complaint should be dismissed with prejudice.

Respectfully submitted,

Dated: January 12, 2021

RAPPAHANNOCK ELECTRIC COOPERATIVE

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CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2021, I electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record for the parties.

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