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ECKERT
SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
919 East Main Street, Suite 1300
Richmond, VA 23219

TEL: 804 788 7740
FAX: 804 698 2950

Eric M. Page
epage@eckertseamans.com
804.788.7771

October 22, 2021

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Mr. Bernard J. Logan, Clerk
Virginia State Corporation Commission
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Richmond, Virginia 23218

Re: Case No. PUR-2021-00211
Petition of Chickahominy Pipeline, LLC for Declaratory Judgment

Dear Mr. Logan:

Enclosed please find a Reply in Support of the Petition for a Declaratory Judgment on behalf of Chickahominy Pipeline, LLC in the above matter.

Thank you for filing this document in the appropriate manner. Please do not hesitate to contact me should you have any questions or need anything further.

Sincerely,

/s/ Eric M. Page

Eric M. Page

Enclosure
cc: Honorable D. Mathias Roussy, Jr.
William Henry Harrison, IV, Esquire
Ryan P. Murphy, Esquire
Dennis A. Walter, Esquire
Helen E. Phillips, Esquire
Elaine S. Ryan, Esquire
Elizabeth B. Wade, Esquire
Gregory Buppert, Esquire

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

PETITION OF

CHICKAHOMINY PIPELINE, LLC CASE NO. PUR-2021-00211

For a declaratory judgment

REPLY IN SUPPORT OF THE PETITION FOR A DECLARATORY JUDGMENT

Chickahominy Pipeline, LLC ("Chickahominy"), by counsel, pursuant to the Hearing Examiner's Ruling entered in this proceeding on October 6, 2021 (the "Ruling"), and 5 VAC 5-20-110 of the Rules of Practice and Procedure ("Rules") of the State Corporation Commission ("Commission"), provides this reply in support of the Petition for a Declaratory Judgment ("Petition") filed by Chickahominy in this proceeding. In support thereof, Chickahominy states as follows:

I. Procedural History

On September 3, 2021, Chickahominy filed its Petition requesting that the Commission determine that the proposed construction, ownership, and operation of a natural gas pipeline (the "Pipeline") to transport natural gas to the proposed combined-cycle generating facility (the "Facility") to be constructed by Chickahominy Power, LLC ("CPLLC") and located in Charles City County, Virginia is not subject to the Commission's jurisdiction pursuant to Title 56 of the Code of Virginia. In its Petition, Chickahominy requested, in view of several factors related to the construction of the Pipeline, that the Commission expedite its consideration of the Petition and render a ruling no later than November 1, 2021.

On September 15, 2021, the Commission issued a Procedural Order that directed Chickahominy to provide notice of its Petition, allowed any interested person to file a notice of participation as a respondent, established dates for such notices, and provided dates for the Staff of the Commission ("Staff") and interested parties to file responses to the Petition and for Chickahominy to file replies thereto. Chickahominy provided proof of such notices on September 23, 2021.

On September 21, 2021, Louisa, Henrico, and Hanover Counties (collectively the "Counties") filed separate Motions for Extension of the procedural schedule, which Chickahominy did not oppose. On that same date, the Staff also filed motion seeking an extension of the deadlines to file notices of participation, responses to the Petition, and Chickahominy's reply. On September 22, 2021, Virginia Natural Gas, Inc. ("VNG") filed a response to the Motions for Extension, in which VNG did not oppose the relief requested therein, so long as any extension to file notices of participation and responses to the Petition applies to all interested parties.

In his Ruling dated September 22, 2021, the Hearing Examiner granted Staff's motion and found the Counties' Motions for Extension moot despite not being properly before the Commission.[1] The Hearing Examiner, therefore, extended the date for interested parties to file notices of participation to October 8, 2021; for Staff and respondents to file responses to the Petition to October 8, 2021); and for Chickahominy to file its reply to October 22, 2021.

Subsequently, Louisa County filed its Notice of Participation on September 27, 2021; and VNG filed its Notice of Participation on October 4, 2021. On October 5, 2021, Henrico County filed its Notice of Participation and an Answer to the Petition ("Henrico Answer").

[1] Hearing Examiner's Ruling at 2, n.3 (Sept. 22, 2021).

On October 6, 2021, Hanover County filed a Notice of Participation as a Respondent and an Answer and Motion for Ruling ("Hanover Answer"). On October 8, 2021, Louisa County filed its Response and Answer ("Louisa Response"). On October 8, 2021, the Staff of the State Corporation Commission ("Staff") filed its Response to Petition ("Staff Response"). On October 8, 2021, Concerned Citizens of Charles City County, Hanover Citizens Against A Pipeline, Appalachian Voices, and Chesapeake Bay Foundation (collectively "Environmental Respondents") filed a Notice of Participation and Response in Opposition to Petition ("Environmental Respondents' Response"). On October 8, 2021, VNG filed its Response to the Petition ("VNG Response").

II. Introduction

The only issue that the Commission is asked to determine is whether Chickahominy's ownership, construction, and operation of the Pipeline to transport natural gas, that CPLLC will purchase from a supplier ("Supplier"), to CPLLC's Facility is subject to Commission jurisdiction under Chapter 10.1 of Title 56, §§ 56-265.1 *et seq.* (the "Utility Facilities Act"). As Chickahominy sets out in its Petition, this question is easily answered by logical and reasonable readings of two statutes. First, Chickahominy will not be providing "non-utility gas service" as defined in Virginia Code § 56-265.4:6 (A) because it will not be providing natural gas service to two or more customers, and it therefore does not need Commission approval pursuant to Virginia Code § 56-265.4:6 (B). Second, Chickahominy is not a public utility according to Virginia Code § 56-265.1 (b) because it will not own or operate facilities for the "transmission or distribution . . . of natural . . . gas . . . for sale for heat, light or power." Simply put, since Chickahominy is not selling natural gas, it does not fall within the definition of a public utility under the Utility Facilities Act. Neither

the Staff's nor the Respondents' pleadings contradict Chickahominy's contentions, and the Commission should rule accordingly.

III. Argument

A. It is undisputed that Chickahominy will not be providing non-utility gas service.

Neither the Staff nor the Respondents in this proceeding disagree with the Petition's contention that Chickahominy will not furnish "non-utility gas service" as defined in Virginia Code § 56-265.4:6 (A) and therefore need not seek Commission approval to transport natural gas to the Facility pursuant to Virginia Code § 56-265.4:6 (B).

B. Chickahominy is not a "public utility."

As set forth in the Petition, the Utility Facilities Act requires that the Commission issue a certificate of public convenience and necessity for a "public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business."[2] "Public Utility" is defined in the Utility Facilities Act as a "company that owns or operates facilities within the Commonwealth of Virginia for the . . . transmission or distribution . . . of natural . . . gas . . . ***for sale*** for heat, light or power . . . ."[3] Because Chickahominy will not transport natural gas ***for sale***, it does not fall within the definition of a public utility under the Utility Facilities Act, and Chickahominy need not obtain a certificate of public convenience and necessity from the Commission to construct and operate the Pipeline.

CPLLC will purchase natural gas from the Supplier. Chickahominy will construct, own, and operate the Pipeline, and will transport that natural gas to the Facility. There will be no sale

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[2] Va. Code § 56-265.2 (A).

[3] *Id.* § 56-265.1 (b) (emphasis added).

of natural gas by the Petitioner, Chickahominy to CPLLC. Rather, the only sale in the transactions involving Chickahominy, CPLLC, and Supplier involves the sale of natural gas by Supplier to CPLLC.[4] Chickahominy, therefore, cannot fall within the definition of a public utility in Virginia Code § 56-265.1 (b) because it will not transport natural gas "***for sale***." There is no mercantile relationship between Chickahominy and the natural gas, and therefore Chickahominy is not a public utility.

Staff contends that the relationship between Chickahominy and CPLLC indicates an attempt to "subvert" the Utility Facilities Act by eliminating the "mercantile" relationship between the entity transporting the natural gas and the entity purchasing the natural gas.[5] Whether or not Chickahominy and CPLLC are affiliated makes no difference in interpreting the Utility Facilities Act's definition of "public utility" because the two companies are separate and distinct. Therefore, there is no "subversion" of the Utility Facilities Act.

In its Answer, Henrico County makes similarly unsubstantiated, yet more odious, allegations that Chickahominy, as a "shell entity," is taking a "build first and ask later" approach to construct the Pipeline.[6] Specifically, Henrico County seems to assert that Chickahominy, after constructing the proposed Pipeline to provide natural gas to the Facility, will "subsequently seek to add customers to a now-constructed pipeline."[7] Such a charge is preposterous on many levels.

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[4] *See, e.g., Comm. Nat. Res., Inc. v. Comm.*, 219 Va. 529, 533 (1978) (noting that no sale of gas occurred between the owner of a natural gas pipeline and an industrial customer when the pipeline owner transported natural gas that was purchased by the industrial customer from a source other than the pipeline owner because the utility was acting as an agent of the industrial customer).

[5] Staff Response at 2.

[6] Henrico Answer at 2.

[7] *Id.*

First, if Chickahominy had intended to take a "build first and ask later" approach to construction of the Pipeline, it would be illogical to have filed a Petition requesting that the Commission rule on whether the Utility Facilities Act requires a certificate. Second, Henrico County's unfounded assertion is contradicted by the foundation of Chickahominy's argument that its proposed Pipeline is not subject to Commission jurisdiction because it will not serve more than one customer.[8] Chickahominy cannot in the future serve any additional customers without Commission approval.[9] To do otherwise would subject Chickahominy to a rule to show cause brought by the Commission, probably followed by sanctions and penalties.[10] Third, it is utterly irresponsible to imply that Chickahominy is misleading the Commission about its intention to serve retail customers in addition to transporting the natural gas to the CPLLC Facility when there is no indication whatsoever that this is the case.

Moreover, even if CPLLC and Chickahominy are related, the Staff's characterization of the formation of Chickahominy as improper or inappropriate is unfounded and tenuous. As VNG admits, there are exemptions to certification included in the Utility Facilities Act.[11] Another exceptions is found in Virginia Code § 56-265.1 (b) – entities that do not transport natural gas ***for sale*** are not required to obtain certificates of public convenience and necessity to construct and

[8] *See* Petition at 3–5.

[9] *See* Va. Code § 56-2654.4:6 (B) (1) ("A person . . . shall apply to the Commission for and obtain approval prior to providing non-utility gas service to . . . [t]wo or more residential or commercial customers.").

[10] *See* 5 VAC 5-20-90 (A); *see also e.g., Petition of Staff of the State Corporation Commission For Declaratory Judgment Interpreting Various Sections of the Utility Facilities Act of Title 56 of the Code of Virginia and for other Relief*, Case No. PUE-2004-00020, Order Denying Petition (Mar. 18, 2004) (denying Staff's petition for declaratory judgment for a declaration that a VNG affiliate is a public utility under the Utility Facilities Act and noting that Staff could bring a motion for rule to show cause).

[11] VNG Response at 6.

operate a pipeline that will transport the natural gas that CPLLC will purchase from the Supplier. Chickahominy was formed for this very purpose – its business is purposefully separate and distinct from the business of CPLLC, which is to construct the Facility for which CPLLC has already obtained a certificate of public convenience and necessity from the Commission. There is nothing nefarious or subversive about forming an affiliate to do business that the parent does not do, as there are certain liability, tax, and financing advantages to such formation. In fact, there are statutes that *require* certain entities to form subsidiaries in order to engage in various functions.[12] Consequently, even if an affiliate relationship between CPLLC and Chickahominy exists, it is entirely appropriate for one entity to transport natural gas while the separate, affiliated entity constructs the certificated Facility.

The arrangement between CPLLC and Chickahominy does not "subvert regulatory oversight," as claimed by Staff.[13] Rather, Chickahominy's proposed activities comport with the oversight intended by the Utility Facilities Act. The General Assembly has determined that, by enacting Virginia Code § 56-265.1 (b), an entity such as Chickahominy that is only transporting, and not selling, natural gas on its pipeline is not a public utility and, therefore, not subject to regulatory oversight. Staff claims that because "a mercantile relationship will necessarily exist between CPLLC and its potential supplier,"[14] since the Supplier will not be providing natural gas at no charge, this is sufficient to trigger the "for sale" requirement in the statute. The overly

[12] *See, e.g.*, Virginia Code § 56-231.34:1 (A) (requiring utility consumer services cooperatives to form affiliates to engage in unregulated business activities).

[13] Staff Response at 3.

[14] *Id.*

expansive definition of "for sale" advocated by Staff[15] and the Environmental Respondents[16] renders the words, "for sale" superfluous in the statute. In other words, since a company transporting natural gas will always involve a "sale" at some point in the series of transactions, Staff and Environmental Respondents would have the Commission believe that the General Assembly included the words, "for sale" in Virginia Code § 56-265.1 (b) for no reason. Such a contention "violates the settled rule of statutory construction that an enactment should be interpreted, if possible, in a manner which gives meaning to every word."[17] The term "for sale" should only be considered superfluous or surplusage if "inserted through mistake or inadvertence, . . . incapable of any sensible meaning, . . . repugnant to the remainder of the enactment and tend to nullify it, [and] if the [statute] is complete and sensible without them."[18]

The more logical and correct reading of Virginia Code § 56-265.1 (b) is that the General Assembly purposely requires the company transporting natural gas to be the entity involved in the "sale" in order to require a certificate of public convenience and necessity. This reading is logical because the legislature obviously determined that it would not raise a company such as Chickahominy, whose purpose is simply to transport natural gas for one "customer" that is purchasing natural gas from a supplier, to the level of a "public utility" requiring a certificate of public convenience and necessity. If the General Assembly had meant to regulate companies such as Chickahominy, it would have deleted the words, "for sale" from Virginia Code § 56-265.1 (b)

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[15] *Id.*

[16] Environmental Respondents' Response at 6 ("for sale" to include the sale of natural gas by a third-party supplier to CPLLC).

[17] *Monument Assoc. v. Arlington Cty. Bd.*, 242 Va. 145, 149 (1991) (citing *Gallagher v. Commonwealth*, 205 Va. 666, 669 (1964)); *see also First Va. Bank v. O'Leary*, 251 Va. 308, 312 (1996).

[18] *Monument Assoc.*, 242 Va. at 149–50 (citations omitted).

because it would have been clear that any company whatsoever that transports natural gas is to be considered a public utility.

Staff further criticizes Chickahominy's citation of *Petition of Montvale Water, Inc. for declaratory judgment* ("*Montvale*")[19] in which the Commission declined to regulate as a public utility a nursing home providing water to its residents because the water was not for sale.[20] In *Montvale,* the Chief Hearing Examiner, in her Report that was ultimately adopted by the Commission, determined that the "definition of 'public utility' requires a mercantile relationship between a utility and its customers for water and sewerage service as is required for electric and gas utilities."[21] Staff attempts to distinguish the Commission's decision in *Montvale* by pointing to the Commission's clarification in its Order that if the nursing home were to meter water usage of the individuals customers, then the nursing home would have "the presence of a public utility" because the "*sale* of water would thus become a distinct business, and not merely an amenity incidental to . . . [the] business."[22] Staff, therefore, illogically imputes a mercantile relationship between Chickahominy and CPLLC in the instant case because "there will be metering of the

[19] *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, Petition (May 1, 2002).

[20] Staff Response at 2–3.

[21] *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, Chief Hearing Examiner's Report at 8 (Mar. 23, 2004); *see also id.* at 8–10 (citing *Application of The Joline K. Gleaton Family Trust, The Marion A. Gleaton Family Trust, and Gleaton's Mobile Homes, L.L.C. and Bradley P. Dressler, For authority to transfer utility assets under Chapter 5, Title 56 of the Code of Virginia*, Case No. PUE-2004-00005, Order Dismissing Application, (Mar. 1, 2004); *Application of Prince George Sewerage and Water Company For cancellation of its certificates of public convenience and necessity and to amend its charter*, Case No. PUE800097, 1981 S.C.C. Ann. Rep. 188 (Sept. 15, 1981)).

[22] *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, 2004 S.C.C. Ann. Rept. 326, 328, Order (June 10, 2004) (emphasis added) ("*Montvale Order*").

natural gas that flows to the Facility."[23] However, Staff ignores the proposed arrangement, in which Chickahominy will not be selling the natural gas to CPLLC.

Staff's criticism misses the point. In *Montvale*, the Commission's determination that if the nursing home installed individual meters the nursing home would be presumed to be acting as a public utility as defined in § 56-265.1 (b), was predicated on the fact that there would be a "sale of water" by the nursing home to "customers."[24] In this case, Chickahominy is not selling natural gas to CPLLC or any other party. Therefore, no "mercantile relationship" exists to trigger the "for sale" requirement in § 56-265.1 (b). *Montvale* is, thus, instructive and applicable to issue at hand.

C. Construction of the Pipeline will not violate VNG's exclusive franchise.

Both Staff[25] and VNG[26] contend that VNG's exclusive territory, and its obligation "to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same,"[27] defeats Chickahominy's claim that it does not need a certificate of public convenience and necessity to construct, own, and operate the Pipeline. While regulated public utilities holding a territorial certificate have exclusive obligations to serve under the Utility Facilities Act,[28] such exclusion does not preclude a non-public utility such as Chickahominy from transporting natural gas to CPLLC.

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[23] Staff Response at 3.

[24] *Montvale Order*, 2004 S.C.C. Ann. Rept. at 328.

[25] Staff Response at 4–7.

[26] VNG Response at 9–10.

[27] Virginia Code § 56-234 (A).

[28] *Id.* Virginia Code §§ 56-265.3, -265.4.

Staff and VNG rely on Virginia Code § 56-265.4 to support their contention that Chickahominy may not transport natural gas to the Facility because the Facility is located in VNG's exclusive service territory.[29] That provision, however, is not applicable to the narrow issue before the Commission because a prerequisite to granting a certificate "to operate in the territory of any holder of a certificate" is a determination that the "applicant" is a public utility as defined in Virginia Code § 56-265.1 (b). Chickahominy is not seeking a certificate to provide any services to CPLLC in VNG's service territory because *it is not a public utility*. Therefore, it is immaterial that the Commission cannot grant a certificate for Chickahominy to transport gas in VNG's service territory, as the Staff acknowledges.[30]

Both the Staff[31] and VNG[32] cite a 1998 decision by the Commission involving Prince George Electric Cooperative ("PGEC") (the "PGEC Case") to support their contention that Chickahominy may not transport natural gas to the Facility because of VNG's exclusive service territory.[33] In the PGEC Case, RGC Mineral Sands, Inc. ("RGC") sought to purchase electricity from Virginia Electric Power Company ("Virginia Power"), a public utility, even though its plant was located in the PGEC service territory. While the Staff acknowledges that the PGEC Case involved a "distinguishable set of facts,"[34] the Commission's findings in that case are also distinguishable from the case at hand and provide no constructive lesson. The Commission's

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[29] Staff Response at 5; VNG Response at 9.

[30] Staff Response at 6.

[31] *Id.*

[32] VNG Response at 9–10.

[33] *See Petition of Prince George Electric Cooperative For declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. For declaratory judgment*, 1998 S.C.C. Ann. Rept. 344, 1998 Va. PUC LEXIS 266, Order on Petitions for Declaratory Judgment (June 25, 1998) ("*PGEC Order*").

[34] Staff Response at 6.

decision in the PGEC Case is inapplicable because Chickahominy contends that it is not a public utility under the Utility Facilities Act and the Commission need not consider whether Chickahominy must obtain a certificate to operate in VNG's service territory, which was the issue in the PGEC Case.

In the PGEC Case, RGC purchased property wholly within PGEC's service territory, upon which it constructed a mineral processing plant. In an attempt to obtain electric service from Virginia Power, RGC purchased a piece of land adjacent to its mineral plant that extended into Virginia Power's service territory. Virginia Power then supplied RGC electricity through a meter located in Virginia Power's service territory.

The only issue before the Commission in PGEC's subsequent petition for declaratory judgment was "whether Virginia Power's sale of electricity to RGC violates the Utility Facilities Act under which certificates of public convenience and necessity are issued in Virginia."[35] In finding that the Virginia Power's sale of electricity to RGC violated the Utility Facilities Act, the Commission stated:

> Thus, § 56-265.3 requires that a *public utility* cannot provide service in a particular territory unless it first obtains a certificate of public convenience and necessity. . . . Further, § 56-265.4 precludes *utilities* from operating in another utility's service territory unless the incumbent utility is providing inadequate service. Even then, the incumbent utility is afforded an opportunity to cure the inadequacy. . . .[36]

The Commission's restatement of the provisions of the Utility Facilities Act demonstrates that only a *public utility* is required to obtain a certificate and precluded from operating in the territory of another public utility.

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[35] *PGEC Order* at *4.

[36] *Id.* at *23 (emphasis added).

In the case at hand, Staff and VNG cite the PGEC Case to support their contention that VNG has a duty to furnish gas to CPLLC because the proposed facility is within VNG's service territory. However, Chickahominy is not a public utility and does not seek a certificate of public convenience and necessity to provide any service in VNG's service territory, and therefore it is not precluded from transporting natural gas to the Facility located in VNG's service territory.

Accordingly, Chickahominy's construction, ownership, and operation of the proposed Pipeline does not conflict with the exclusive franchise provisions in the Utility Facilities Act. The applicability of Virginia Code §§ 265.3 and 265.4 rest on a determination that Chickahominy is a public utility under § 265.1 (b). Because Chickahominy is not providing natural gas "for sale," it does not fall within the definition of a public utility, and it need not obtain a certificate of public convenience and necessity under the Utility Facilities Act.

IV. Conclusion

Chickahominy intends to construct, own, and operate a natural gas pipeline to transport natural gas solely to CPLLC's Facility. Chickahominy will not purchase, sell, or otherwise own the natural gas being supplied to CPLLC's Facility. Accordingly, Chickahominy is neither providing "non-utility gas service" to two or more residential or commercial customers, nor is it a "public utility" pursuant to the Utility Facilities Act. The Commission, therefore, need not approve a certificate of public convenience and necessity for Chickahominy to construct, own, and operate the proposed natural gas pipeline.

WHEREFORE, for the foregoing reasons, Chickahominy Pipeline, LLC respectfully requests that the Commission enter an order declaring that its proposed construction, ownership, and operation of the Pipeline are not subject to the Commission's jurisdiction under the Utility Facilities Act (Chapter 10.1 of Title 56, §§ 56-265.1 *et seq.*); that the Commission consider this

Petition on an expedited basis and issue an order as expeditiously as possible; and that the Commission grant such further relief as the Commission deems appropriate.

Respectfully submitted,

CHICKAHOMINY PIPELINE, LLC

By: */s/ Eric M. Page*

Eric M. Page, Esquire
Cody T. Murphey, Esquire
Eckert Seamans Cherin & Mellott, LLC
919 East Main Street, Suite 1300
Richmond, Virginia 23219
Telephone: (804) 788-7771
Facsimile: (804) 698-2950
epage@eckertseamans.com
cmurphey@eckertseamans.com

Counsel for Chickahominy Pipeline, LLC

Filed: October 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2021, a true copy of the foregoing was sent via electronic mail to:

William Henry Harrison, IV, Esquire
State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23218
william.harrison@scc.virginia.gov

Helen E. Phillips, Esquire
County Attorney
Sean Hutson, Esquire
Assistant County Attorney
Office of the Louisa County Attorney
1 Woolfolk Avenue, Suite 306
Louisa, Virginia 23093
hphillips@louisa.org

Joseph K. Reid, III, Esquire
Elaine S. Ryan, Esquire
McGuireWoods LLP
Gateway Plaza
800 E. Canal Street
Richmond, Virginia 23219-3916
jreid@mcguirewoods.com
eryan@mcguirewoods.com

Elizabeth B. Wade, Esquire
Southern Company Gas
Ten Peachtree Place, NE
Atlanta, Georgia 30309
ewade@southernco.com

J. T. Tokarz, Esquire
County Attorney
Ryan P. Murphy, Esquire
Assistant County Attorney
Office of the Henrico County Attorney
P.O. Box 90775
Henrico, Virginia 23273-0775
mur047@henrico.us

Dennis A. Walter, Esquire
County Attorney
Rebecca B. Randolph, Esquire
Deputy County Attorney
Office of the Hanover County Attorney
P.O. Box 470
Hanover, Virginia 23069-0470
dwalter@hanovercounty.gov
rbrandolph@hanovercounty.gov

Gregory Buppert, Esquire
Claire Horan, Esquire
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main St., Suite 14
Charlottesville, Virginia 22902-5065
gbuppert@selcva.org
choran@selcva.org

/s/ Eric M. Page
Eric M. Page