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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 and Request
for Expedited Consideration***

Dear Mr. Logan:

Enclosed please find a Petition for 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: Mr. William F. Stephens
Mr. John Stevens
William H. Chambliss, Esquire

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF

CHICKAHOMINY PIPELINE, LLC

CASE NO. PUR-2021-00211

For a declaratory judgment

**PETITION FOR DECLARATORY JUDGMENT
AND REQUEST FOR EXPEDITED CONSIDERATION**

Chickahominy Pipeline, LLC (“Chickahominy”), a Virginia limited liability company, by counsel, pursuant to 5 VAC 5-20-100 (C) of the Rules of Practice and Procedure of the State Corporation Commission (“Commission”), respectfully petitions the Commission to issue a declaratory judgment determining 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 to be constructed by Chickahominy Power, LLC (“CPLLC”) is not subject to the Commission’s jurisdiction pursuant to Title 56 of the Code of Virginia, as follows:

I. Introduction

1. On May 8, 2018, in its Final Order in Case No. PUR-2017-00033, the Commission awarded CPLLC a certificate of public convenience and necessity to construct a 1,650 MW combined-cycle generating facility with three combustion turbines, natural gas supplementally-fired heat recovery steam generators, and steam turbines in Charles City County, Virginia (the “Facility”).

2. The Facility is located in the service territory of Virginia Natural Gas, Inc., (“VNG”), a certificated natural gas local distribution company. When operational, the Facility will require a significant volume of natural gas per day to satisfy the Facility’s net nominal

generating capacity of 1,650 MW. As a result of discussions with VNG, CPLLC has determined that it is impracticable and unfeasible to procure an adequate supply of natural gas from VNG.

3. In order to procure an adequate, reliable, and economical supply of natural gas, CPLLC will purchase natural gas from a third-party provider ("Supplier") with upstream and midstream operations in Virginia ("Supplier").

4. Chickahominy was formed as the entity that will construct, own, and operate the Pipeline that will transport the natural gas that CPLLC will purchase from Supplier for the Facility.

5. Chickahominy will design, construct, own, and operate the interconnect to deliver natural gas to the Facility. CPLLC will design, construct, own, operate, and maintain any required pressure regulation/compression, overpressure protection, and any gas processing, conditioning, monitoring, or control equipment deemed necessary, as well as the connecting pipe from Pipeline's interconnect to the Facility. The Facility will not engage in the retail sale of electricity or provide retail electric service to customers within the Commonwealth.

6. Chickahominy seeks a ruling from the Commission that, pursuant to Virginia Code § 56-265.4:6 (B), it does not need Commission approval to construct the Pipeline because (a) Chickahominy will not serve two or more customers; and (b) Chickahominy is not a "public utility" that requires a certificate of public convenience and necessity to construct the Pipeline pursuant to Virginia Code § 56-265.2.

II. An Actual Controversy Exists

7. 5 VAC 5-20-100 (C) provides that "[p]ersons having no other adequate remedy may petition the commission for a declaratory judgment." A declaratory judgment is appropriate in this case because Chickahominy seeks confirmation that its proposed construction, ownership, and operation of the Pipeline are not subject to the Commission's jurisdiction prior to commencing

construction of the Pipeline. Without such a ruling, Chickahominy's investment of significant time and large financial sums in constructing the Pipeline will be at risk. A declaratory judgment is appropriate in this instance because an actual controversy exists. At issue is whether Chickahominy must obtain a certificate of public convenience and necessity before commencing to construct the Pipeline.

III. Legal Authority

8. The explicit language of the Virginia Code, specifically Chapter 10.1 of Title 56, §§ 56-265.1 *et seq.* (the "Utility Facilities Act"), as well as Commission precedent, support a determination that the Pipeline is not subject to the Commission's jurisdiction. While the Commission has comprehensive jurisdiction over "non-utility gas service" and public utilities, the Utilities Facilities Act does not afford the Commission jurisdiction over the construction and operation of the Pipeline. CPLLC, a private entity that is not a public utility and is not providing non-utility gas service, has arranged for the purchase of natural gas from a natural gas supplier that will be transported to its certificated facility by Chickahominy. These are transactions involving private parties over which the Commission has no authority to require regulatory approval.

A. *Chickahominy is not Providing "Non-Utility Gas Service"*

9. Virginia Code § 56-265.4:6 provides as follows:

A. In this section the following terms shall have the following meanings:

...

"Non-utility gas service" means the sale and distribution of propane, propane-air mixtures, or other natural or manufactured gas to two or more customers by way of underground or aboveground distribution lines by a person other than a natural gas utility or an affiliated interest of a natural gas utility, master meter operator, or any person operating in compliance with § 56-1.2.

...

B. A person, individually or together with its affiliated interests, other than the natural gas utility that holds the certificate to provide natural gas service in a particular territory or one of its affiliated interests, shall apply to the Commission for and obtain approval prior to providing non-utility gas service to:

1. Two or more residential or commercial customers located one-half mile or less from any existing underground natural gas line operated by a utility under the jurisdiction of the Commission;
2. More than 10 residential or two commercial customers located more than one-half mile but within one mile or less from any existing underground natural gas line operated by a utility under the jurisdiction of the Commission;
3. More than 20 residential or five commercial customers located more than one mile but within three miles or less from any existing underground natural gas line operated by a utility under the jurisdiction of the Commission; or
4. More than 50 residential or 10 commercial customers located more than three miles but no more than five miles from an existing underground natural gas line operated by a utility under the jurisdiction of the Commission.

10. Chickahominy will not be engaging in the sale of natural gas, nor will it be providing natural gas service to two or more customers. Therefore, it need not apply to the Commission for and obtain approval prior to transporting natural gas that CPLLC will purchase from Supplier.

11. The Commission acknowledged this exemption from regulation in a recent declaratory judgment action in which Xpress Natural Gas, LLC (“XNG”) requested that the Commission declare that its proposed CNG facility and connection facilities (to Transco and CNG customers) are not subject to Commission jurisdiction.¹ Under XNG’s proposal, Transco would design, construct, own, and operate the interconnect to deliver the natural gas to the CNG facility.

¹ *Petition of Xpress Natural Gas, LLC for a declaratory judgment*, Case No. PUE-2015-00004, Petition at 22–25 (Jan. 9, 2015).

XNG would design, construct, own, operate and maintain any required pressure/regulation/compression, overpressure protection, and any gas processing, conditioning, monitoring or control equipment deemed necessary, as well as the connecting pipe from the interconnect to the CNG facility. XNG's connecting pipe would be downstream of the interconnect to Transco's metering and pressure regulating pipeline facilities. The Commission determined that XNG's proposed connecting pipe was not subject to Commission jurisdiction under Virginia Code §§ 56-265.1 (B) and 265.4:6 because XNG did not plan to serve more than one customer under Virginia Code § 56-265.4:6 (B). However, the Commission did find that it has jurisdiction to regulate and prescribe rates, charges, and fees for the provision of retail CNG service provided by XNG pursuant to Virginia Code § 56-232.2, but that given the circumstances, it refrained from regulating and prescribing those rates. The Commission also limited its determination to the specific facts in that proceeding.

12. The Commission's determination in the XNG case is appropriate in the case brought by Chickahominy. Echoing the Staff's concern that XNG not provide service to more than one customer or through a distribution system, the Commission determined that it would not exercise jurisdiction over the pipeline to the CNG facility because it would not serve more than one customer. Likewise, Chickahominy will not serve more than one customer, so the Commission has no jurisdiction to approve the Pipeline pursuant to Virginia Code § 56-265.4:6.

B. Chickahominy is not a "public utility"

13. While Virginia Code §§ 56-265.1 (b) and 265.4:6 do not require a certificate in order to provide services to one customer, Virginia Code § 56-265.2 (A) requires a certificate 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

...” “Public Utility” is defined in Virginia Code § 56-265.1 (b) 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 ...” (emphasis added).

14. Therefore, the question is whether Chickahominy, the entity that will construct and own the Pipeline providing natural gas to the Facility, is a public utility for purposes of the Utility Facilities Act. Because Pipeline will not transport natural gas “*for sale*,” it is *not* a public utility under Virginia Code § 56-265.1 (b). Rather, the only sale in the transactions involving Chickahominy, CPLLC, and Supplier involves the sale of natural gas by Supplier to CPLLC. Chickahominy will not sell gas to CPLLC, and therefore it is not a public utility as defined in Virginia Code § 56-265.1 (b).

15. The Utility Facilities Act requires the existence of a mercantile relationship (*i.e.*, sale) for an entity to fall within the definition of a “public utility.” In this case, the only sale of natural gas will be between the third party supplier and CPLLC. Because Chickahominy will not take ownership of the natural gas, nor will the natural gas be sold after reaching the Facility, the natural gas flowing through the proposed Pipeline is not “for sale.” This reasoning is consistent with the legislature’s intent in the Utility Facilities Act to regulate the sale of natural gas, rather than the transportation of natural gas for use by a merchant plant to produce electricity. For the Utility Facilities Act to apply, a mercantile relationship must exist between the owner or operator of facilities for transmission or distribution of natural gas and a purchasing customer.

16. In *Petition of Montvale Water, Inc. for declaratory judgment*² the Commission declined to regulate as a public utility a nursing home providing water to its residents because the water was not *for sale*. In that case, a nursing home sought to supply the water needs of its residents

² *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, Petition (May 1, 2002).

by drilling wells and constructing a private water system on its property instead of connecting to the public water service. The nursing home was located within the certificated franchise territory of Montvale, the public service company certificated by the Commission to provide water. Montvale filed a declaratory judgment action with the Commission, contending that the nursing home will be a public utility under § 56-265.1 of the Utility Facilities Act by furnishing water to fifty or more customers, and must therefore obtain a certificate from the Commission prior to doing so. Both the Commission and Chief Hearing Examiner disagreed.

17. The Chief Hearing Examiner, in her Report, determined that the issue turned on the definition of a public utility under Virginia Code § 56-265.1. The Chief Hearing Examiner found that Virginia Code § 56-265.1 (b) “clearly requires a mercantile relationship between a public utility providing electric energy or gas to its customers . . . to fall within the definition of a ‘public utility.’”³ The Report, however, noted that no similar “for sale” requirement exists for water or sewer companies in Virginia Code § 56-265.1 (b). Citing to prior Commission decisions, the Chief Hearing Examiner, nevertheless, 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.”⁴

18. In its Order dismissing the declaratory judgment action, the Commission adopted the Chief Hearing Examiner’s Report conditioned upon the nursing home not metering water usage of the individual living units. Specifically, the Commission held that a mercantile relationship did

³ *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, Chief Hearing Examiner’s Report at 8 (Mar. 23, 2004).

⁴ *Id.*; 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)).

not exist because the nursing home's proposed water system had no separate volumetric measuring device by which the amount of water used by a tenant could be precisely known and charges therefore assessed.⁵ Importantly, the Commission found that "[t]he absence of water meters is a clear indication that the selling of water is not a distinct business of the property owner, though the estimated cost of furnishing water must surely be included with all other business expenses."⁶ Likewise, in our case, the delivery of natural gas to CPLLC by Chickahominy is not a sale, and the construction of the Pipeline does not involve the actions of a public utility.

IV. Expedited Consideration

19. In its Final Order of May 8, 2018, in Case No. PUR-2017-00033, approving the certificate of public convenience for CPLLC to construct its generating facility, the Commission provided that such authority shall expire five (5) years from the date of the Final Order unless CPLLC has commenced construction of the Facility. Because of the time involved in securing appropriate permits, approvals, financing, and other permissions, Chickahominy respectfully requests that the Commission expedite its consideration of this Petition and render a ruling no later than November 1, 2021.

V. Conclusion

20. Chickahominy intends to construct a natural gas pipeline to transport natural gas that CPLLC will purchase from a natural gas supplier and CPLLC will use to produce electricity. Chickahominy is neither providing "non-utility gas service" nor is it a "public utility" pursuant to the Utility Facilities Act, and therefore the Commission need not approve the construction of the natural gas pipeline.

⁵ *Petition of Montvale Water, Inc. for declaratory judgment*, Case No. PUE-2002-00249, Final Order at 7–8 (June 10, 2004).

⁶ *Id.* at 8.

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 Title 56 of the Virginia Code; that the Commission consider this Petition on an expedited basis and issue an order no later than November 1, 2021; and that the Commission grant such further relief as the Commission deems appropriate.

Respectfully submitted,

CHICKAHOMINY PIPELINE, LLC

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