

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF

CHICKAHOMINY PIPELINE, LLC

For a declaratory judgment

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CASE NO. PUR-2021-00211

RESPONSE TO PETITION

On September 3, 2021, Chickahominy Pipeline, LLC ("Chickahominy" or "Company"), filed with the State Corporation Commission ("Commission") a petition for a declaratory judgment ("Petition") pursuant to 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure ("Rules of Practice").¹ In its Petition, the Company seeks a 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 [{"Facility"}] to be constructed by Chickahominy Power, LLC ("CPLLC")² is not subject to the Commission's jurisdiction pursuant to Title 56 of the Code of Virginia ("Code")."³ Staff of the Commission ("Staff") hereby responds to the Petition.

Chickahominy is a "public utility" as defined by § 56-265.1 (b).

The Company assert that it is not a utility because the Pipeline will not transport natural gas "for sale." Staff disagrees.

Section 56-265.1 (b) states

"Public utility" means any company that owns or operates facilities within the Commonwealth of Virginia for the generation, transmission, or distribution of

¹ 5 VAC 5-20-10 *et seq.*

² According to the Clerk of the Commission's Information System, CPLLC and Chickahominy share the same principal office address, as well as the same resident agent who is noted as a member or manager of each of the entities.

³ Petition at 1.

electric energy for sale, for the production, storage, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas or geothermal resources for sale for heat, light or power, or for the furnishing of telephone service, sewerage facilities or water.

The Pipeline proposing to be constructed by Chickahominy or any of its affiliates will be used for the sale of gas within Virginia and is a public utility facility within the meaning of § 56-265.1. As proposed, CPLLC will purchase gas from a third-party supplier, and Chickahominy will transport that gas from the supplier to its end use.

Chickahominy asserts that for the Utility Facilities Act ("Act") to apply, a mercantile relationship must exist between a purchasing customer and the owner or operator of facilities for transmission or distribution of natural gas.⁴ The Company asserts that since "Chickahominy will not take ownership of the natural gas, nor will the natural gas be sold after reaching the Facility, the natural gas flowing though the proposed pipeline is not for 'sale.'"⁵ In other words, the Company has established an affiliate of itself to insulate the Pipeline from being the "purchasing customer," and thereby seeks to subvert the Act.

Confusingly, the Company relies upon a past Commission proceeding involving Montvale Water ("Montvale") to support its position. In the Montvale case, a proceeding involving well water at a nursing home facility, the Commission adopted the Hearing Examiner's report which found that § 56-265.1 (b) required a mercantile relationship between the public utility providing electric energy or gas to its customers,⁶ and the Commission found there was

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Petition of Montvale Water, Inc., For declaratory judgment*, Case No. PUE-2002-00249, 2004 S.C.C. Ann. Rept. 326, 328, Final Order (June 10, 2004). In this case, evidence established that the nursing home had provided water from a system of wells on its property to its residents since before Montvale had been organized and had never been a customer of Montvale.

not a mercantile relationship between a nursing home and its residents, because the nursing home had no separate volumetric metering system by which the amount of water used by a tenant could be precisely known and charges therefore assessed.⁷ The Commission further found that if the nursing home

meters water usage at individual rental premises, we find that a presumption arises that a volumetric charge for water usage will be made even though it may be rolled into a periodic charge. The sale of water would thus become a distinct business, and not merely an amenity incidental to . . . [the] nursing home.⁸

In the instant case, logic dictates that there will be metering of the natural gas that flows to the Facility. The typical configuration in Virginia of such a pipeline would be to have meters on both ends of the pipeline to account for any loss of gas while being transported. Presumably, the gas being purchased from the supplier will have to be metered so that CPLLC can be billed for its natural gas usage. Therefore, a mercantile relationship will necessarily exist between CPLLC and its potential supplier. Certainly, there is no assertion in the Petition that CPLLC is obtaining, from anyone, a stupendous volume of unmetered natural gas for free.

It is clear from the filings with the Clerk of the Commission and maintained in the Clerk's Information system that CPLLC and Chickahominy are affiliated entities and share a member/manager who also acts as both entities' registered agent. The two also share the same principle office address. The question then becomes, does the law permit an entity that would otherwise be considered a public utility, to subvert regulatory oversight by simply creating a shell corporation to hold its utility assets? Staff thinks not. CPLLC would purchase gas from a

⁷ *Id.*

⁸ *Id.*

third-party supplier, and Chickahominy would transport the gas from the supplier to the Facility. Pursuant to the plain meaning of § 56-265.1, the proposed Pipeline would be used in the sale of natural gas because Chickahominy is facilitating CPLLC's purchase of gas from the supplier. A mercantile relationship exists between Chickahominy, CPLLC, and the supplier because but for this proposed Pipeline, the sale of natural gas would not take place. Moreover, since the Facility's main purpose is to convert natural gas into electricity, the purchase and transport of gas to a gas fired electric generating unit cannot be considered an incidental use of the property. Chickahominy proposes to build a natural gas pipeline what will transport natural gas for sale and therefore, requires a Certificate of Public Convenience and Necessity ("CPCN").

Virginia Natural Gas has an Obligation to Serve Chickahominy.

The power plant Facility at issue is located in the certificated service territory of Virginia Natural Gas, Inc ("VNG"). The Code requires that "it shall be the duty of every public utility to furnish reasonably adequate serve and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring the same."⁹ Therefore, VNG has a legal duty to provide service to the Facility at just and reasonable rates.

The Company asserts that "[a]s 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."¹⁰ However to date, these 26 words represent the totality of the evidence currently in the record regarding VNG's ability to provide "an adequate supply of natural gas" to serve the Facility.

Moreover, in CPLLC's Application in Case No. PUR-2017-00033, CPLLC stated that the site of the Facility in question is already traversed by an existing 16-inch natural gas

⁹ Code § 56-234 A.

¹⁰ Petition at 2.

transmission pipeline owned by VNG, and that a VNG compressor station abuts the site of the Facility on the east.¹¹

In the instant case, there is simply insufficient evidence contained in the record for the Commission to determine that VNG cannot serve the Facility. In fact, it appears, that VNG has significant facilities in extreme proximity to the proposed Facility. Should VNG be able to fulfill its legal obligation to serve the Facility through existing infrastructure, its likely many environmental and economic impacts may be avoided.

Further, § 56-265.4 of the Code states:

Except as provided in § 56-265.4:4, no certificate shall be granted to an applicant proposing to operate in the territory of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission that the service rendered by such certificate holder in such territory is inadequate to the requirements of the public necessity and convenience; and if the Commission shall be of opinion that the service rendered by such certificate holder in such territory is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate in such territory.

Pursuant to the plain meaning of this statute, the Commission cannot grant a certificate to an applicant "proposing to operate in the territory of any holder of a certificate . . . until it shall be proved . . . that the service rendered by such certificate holder is inadequate to the requirements of the public necessity and convenience[.]" Even if the Commission makes such a finding, it has to grant the original certificate holder adequate time to "remedy such inadequacy." Therefore, since the proposed Pipeline is a public utility facility used in the sale of natural gas, it cannot be built and operated without a CPCN from the Commission. Further, the Commission

¹¹ See *Application of Chickahominy Power, LLC, For certification of an electric generating facility in Charles City County pursuant to § 56-580 of the Code of Virginia*, Case No. PUR-2017-00033, Doc. Con. Cen. No. 170320034, Application at Ex. 1, p.5 (Mar. 13, 2017).

cannot grant a CPCN for the proposed Pipeline until VNG has been found to be unable to provide service adequate to the requirements of the public necessity and convenience.

In Case No. PUE-1996-00295 ("PGEC Case"),¹² the Commission considered petitions for declaratory judgments from Prince George Electric Cooperative ("PGEC") and RGC Mineral Sands, Inc. ("RGC"). In the PGEC Case, RGC planned to build a mineral processing facility in PGEC's certificated service territory. RGC wished to take electric service from Virginia Electric Power Company ("Dominion"), so purchased a strip of land connecting the parcel in which the mineral facility was to be constructed to Dominion's service territory. This was done so that a meter could be placed in Dominion's territory allowing RGC to build its own distribution system and therefore take service from Dominion.¹³

In the PGEC Case, although in a distinguishable set of facts, the Commission held that: "the law is designed to provide protection and certainty for service territories," and that the case was to be decided "in a manner that is consistent with, and effectuates, the policy established by the General Assembly of ensuring and maintaining the integrity of service territories embodied in the Utility Facilities Act."¹⁴

In the instant case, the CPCN is designed to provide protection and certainty for VNG's certificated service territory. The General Assembly promulgated § 56-265.4:4, to ensure and maintain service territories, such as VNG's, embodied in the Utility Facilities Act.

Chickahominy, while not seeking a CPCN, is seeking a declaration from the Commission that it

¹² *Petition of Prince George Electric Cooperative, For a Declaratory Judgment, and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. For a Declaratory Judgment*, 1998 S.C.C. Ann. Rept. 344, Order on Petitions for Declaratory Judgment (June 25, 1998).

¹³ *Id.*

¹⁴ *Id.* at 349.

can build and operate public utility facilities within the certificated service territory of VNG. This would be an impermissible intrusion in the statutorily protected service territory as well as a perversion of those protections established by the General Assembly.

Conclusion.

Chickahominy is seeking to construct and operate public utility facilities, as defined by § 56-265.1 (b) in the certificated service territory of VNG. CPLLC's attempt to subvert the Utility Facilities Act and escape regulation by creating a shell corporation to own its public utility facilities, does not mean that the facilities are not used in the sale of natural gas. To proceed with the proposed Pipeline, Chickahominy must seek a CPCN from the Commission and the record must be developed on whether VNG is unable to meet its legal duty to provide natural gas to the customers in its certificated service territory.

Respectfully submitted,

STAFF OF THE STATE CORPORATION
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CERTIFICATE OF SERVICE

I certify that on the 8th of October, a copy of the foregoing "Response to Petition" was e-mailed to: Eric M. Page, Esquire, and Cody T. Murphey, Esquire, Eckert Seamans Cherin & Mellott, SunTrust Center, Suite 1300, 919 E Main Street, Richmond, Virginia 23219; epage@eckertseamans.com, and cmurphey@eckertseamans.com; Helen E. Phillips, County Attorney and Sean M. Hutson, Assistant County Attorney, Louisa County, 1 Woolfolk Avenue, Suite 306, Louisa, Virginia 23093, hphillips@louisa.org, and shutson@louisa.org; Elizabeth B. Wade, Esquire, Southern Company Gas, 10 Peachtree Place, NE, Atlanta, Georgia 30309, ewade@southernco.com; Joseph K. Reid, III, Esquire, and Elaine S. Ryan, Esquire, McGuireWoods LLP, Gateway Plaza, 800 E Canal Street, Floor 14, Richmond, Virginia 23219, jreid@mcguirewoods.com, and eryan@mcguirewoods.com; Dennis A. Walter, County Attorney, and Rebecca B. Randolph, Senior Assistant County Attorney, Hanover County, PO Box 470, Hanover, Virginia 23069, DAWalter@hanovercounty.gov, and RBRandolph@hanovercounty.gov; J.T. Tokarz, County Attorney, and Ryan P. Murphy, Assistant County Attorney, Henrico County, PO Box 90775, Henrico, Virginia 23273, tok@henrico.us and mur047@henrico.us.

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