COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF

CHICKAHOMINY PIPELINE, LLC

For a declaratory judgment

CASE NO. PUR-2021-00211

REPORT OF D. MATHIAS ROUSSY, JR., HEARING EXAMINER

November 15, 2021

This case involves whether Chickahominy Pipeline, LLC ("Chickahominy"), must obtain State Corporation Commission ("Commission") approval under the Utility Facilities Act for Chickahominy's planned construction, ownership, and operation of an intrastate pipeline across several counties within the Commonwealth. The pipeline, if constructed, would provide natural gas to fuel an electric generation facility that has not yet been constructed in Charles City County. This case does not involve issues associated with whether such a pipeline *should* be built, or other issues that could be considered in a subsequent proceeding if Commission approval under the Utility Facilities Act or other laws is required.

In my opinion, Chickahominy's planned pipeline would be subject to the Commission's jurisdiction under the Utility Facilities Act because Chickahominy would be a "public utility" under the plain language of the Utility Facilities Act. The plain language must be applied unless doing so would produce absurd results. While the Commission could reach a different conclusion, applying the plain language to require Commission review of Chickahominy's planned natural gas pipeline would not produce an absurd result in my opinion. Consequently, I recommend that Chickahominy's petition be denied.

PROCEDURAL BACKGROUND

On September 3, 2021, Chickahominy filed with the Commission a petition for a declaratory judgment ("Petition") pursuant to 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure. Chickahominy was formed to construct, own, and operate a pipeline that would transport natural gas that Chickahominy Power, LLC ("CPLLC"), would purchase for an electric generation facility in Charles City County, Virginia, from a third-party natural gas provider.[1] In its Petition, Chickahominy requested 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"[2] of the Code of Virginia ("Code").

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[1] Petition at 1-2; Chickahominy's Response to Motion at 5. The electric generation facility obtained a certificate of public convenience and necessity in Case No. PUR-2017-00033 for construction in a location that is within the natural gas service territory of Virginia Natural Gas, Inc., a certificated local distribution company. *See, e.g.*, Petition at 1; *Application of Chickahominy Power, LLC, For certification of an electric generating facility in Charles City County pursuant to § 56-580 D of the Code of Virginia*, Case No. PUR-2017-00033, 2018 S.C.C. Ann. Rep. 209, Final Order (May 8, 2018).

[2] Petition at 9. The Petition also requested that the Commission: (1) expedite consideration of the Petition and issue an order no later than November 1, 2021; and (2) grant such further relief as the Commission deems appropriate. *Id.*

Chickahominy subsequently clarified that its request pertains only to the Commission's jurisdiction under the Utility Facilities Act[3] of Title 56.[4]

On September 16, 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, for the Commission's Staff ("Staff") and any respondent to file responses to the Petition, and for Chickahominy to file its reply to any such response. The Procedural Order also, among other things, assigned a Hearing Examiner to conduct this proceeding and to file a report containing the Hearing Examiner's findings and recommendations.

On September 21, 2021, Louisa, Henrico, and Hanover Counties (collectively, "Respondent Counties") filed separate motions seeking extensions of the procedural schedule. Louisa and Hanover Counties requested that the filing deadlines for respondent responses and Chickahominy's reply be extended to October 8, 2021, and October 22, 2021, respectively. Henrico County requested the same procedural extensions, and further requested that the notice of participation deadline be extended to October 8, 2021.[5]

Also on September 21, 2021, Staff filed a motion. Staff concurred with the relief requested by the Respondent Counties and moved to extend the dates for filing notices of participation, responses to the Petition, and Chickahominy's reply accordingly.

On September 22, 2021, Virginia Natural Gas, Inc. ("VNG"), filed a response to the motions filed by Louisa and Henrico Counties. VNG stated that it 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.

A Hearing Examiner's Ruling issued on September 22, 2021, granted Staff's motion and extended the notice of participation, response, and reply dates accordingly.

On September 23, 2021, Chickahominy filed proof of notice and service, as directed by the Procedural Order.

The following filed timely notices of participation and responses to the Petition: Concerned Citizens of Charles City County, Hanover Citizens Against A Pipeline, Appalachian Voices, and Chesapeake Bay Foundation (collectively, "Environmental Respondents"); Respondent Counties, and VNG.

In response to the Petition, Henrico County and Hanover County also each requested, among other things, a ruling to schedule discovery and an evidentiary hearing regarding the

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[3] Code § 56-265.1 *et seq.*

[4] Transcript ("Tr.") at 24-25 (Murphy), 44-45 (Page).

[5] All three Respondent Counties indicated that they conferred with Chickahominy and were authorized by Chickahominy to represent that Chickahominy did not oppose their respective motions.

factual assertions in the Petition.[6] A Hearing Examiner's Ruling issued on October 6, 2021, expedited the time for filing any responses to the requests for discovery and an evidentiary hearing and any reply thereto. Louisa County concurred and joined in the requests by Henrico County and Hanover County.[7] On October 15, 2021, Chickahominy and VNG filed responses recommending that this matter not be set for hearing. In their response to the Petition filed on October 8, 2021, the Environmental Respondents recommended that the Petition be summarily dismissed without an evidentiary hearing.[8]

On October 22, 2021, the Respondent Counties filed a joint reply in which they renewed the requests for discovery and an evidentiary hearing.

A Hearing Examiner's Ruling issued on October 25, 2021, scheduled a virtual oral argument on the Petition.

On November 3, 2021, the oral argument was convened, as scheduled, using Microsoft Teams. Eric M. Page, Esquire, and Cody T. Murphey, Esquire, represented Chickahominy. William H. Chambliss, Esquire, William H. Harrison, IV, Esquire, and Aaron Campbell, Esquire, represented Staff. J.T. Tokarz, County Attorney, and Ryan P. Murphy, Assistant County Attorney, represented Henrico County. Elaine S. Ryan, Esquire, and Joseph K. Reid, III, Esquire, represented VNG. Helen E. Phillips, County Attorney, and Sean Hutson, Assistant County Attorney, represented Louisa County. Dennis A. Walter, County Attorney, and Rebecca B. Randolph, Deputy County Attorney, represented Hanover County. Gregory D. Buppert, Esquire, and Claire Horan, Esquire, represented the Environmental Respondents.

SUMMARY OF THE PARTIES' POSITIONS

The Petition asserted that Chickahominy's planned pipeline is not subject to Commission jurisdiction because: (1) Chickahominy would not provide "non-utility gas service" pursuant to Code § 56-265.4:6;[9] and (2) Chickahominy is not a "public utility" within the meaning of Code § 56-265.1(b).[10] Code §§ 56-265.4:6 and 56-265.1(b) are part of the Utility Facilities Act.

VNG argued that Chickahominy is a "public utility" under the Utility Facilities Act and requires a certificate of public convenience and necessity ("CPCN") to construct Chickahominy's planned pipeline.[11] VNG argued further that the Commission may not issue a CPCN for Chickahominy's pipeline because doing so would violate VNG's exclusive service territory and there has been no finding that VNG's service is inadequate.[12]

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[6] Answer and Motion for Ruling of Henrico County, Virginia ("Henrico County's Response") at 11; Answer and Motion for Ruling of Hanover County, Virginia ("Hanover County's Response") at 2.
[7] Motion for Ruling of Louisa County, Virginia at 1.
[8] Response in Opposition to Petition by Environmental Respondents ("Environmental Respondents' Response") at 5.
[9] Petition at 3-5.
[10] *Id.* at 5-8.
[11] VNG's Response at 5-8.
[12] *Id.* at 9-10.

Staff asserted that Chickahominy is a "public utility" as defined by Code § 56-265.1(b).[13] Staff also contended that VNG has an obligation to serve CPLLC's generation facility.[14]

Louisa County summarized public comments received on the pipeline during two recent meetings of the Louisa County Board of Supervisors.[15] Louisa County attached to its response written communications that were included in the record of one of these meetings.[16] Louisa County characterized attempts to obtain information regarding the pipeline as unproductive.[17] In response to discovery requests in the instant proceeding seeking information about the contractual relationships between Chickahominy, CPLLC, and a natural gas supplier, Louisa County indicated that it received either no answer or an indication that such information was irrelevant.[18]

Hanover County and Henrico County both requested: (1) that discovery and an evidentiary hearing be scheduled regarding the factual assertions in the Petition; (2) an order declaring that the Commission has authority pursuant to Code § 56-257.2 to regulate the safety of the planned pipeline; and (3) denial of the Petition to the extent it seeks relief beyond the scope of the questions presented in the Petition.[19]

Henrico County expressed concern about the process undertaken by Chickahominy and the level of information available to the public.[20] Henrico County also asserted that the outcome of the instant proceeding will not directly affect local authority over matters including zoning.[21]

Hanover County described Commission regulation under the Utility Facilities Act as "much needed oversight of the design, location, construction, and operation of natural gas pipelines and related facilities."[22] Hanover County opposes any request that would eliminate or reduce such oversight through the use of a private business arrangement or corporate structure.[23]

The Environmental Respondents argued the planned pipeline may not be constructed without a CPCN because Chickahominy is a "public utility," as defined by Code § 56-265.1.[24] The Environmental Respondents also argued that the pipeline is an "associated facility" under Code § 56-580 D that the Commission must evaluate.[25] The Environmental Respondents argued

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[13] Staff's Response at 1-4.
[14] *Id.* at 4-7 (citing, among other things, Code §§ 56-234 A, 56-265.4).
[15] Louisa County's Response at 2-4.
[16] *Id.* at 4 and attached Ex. A.
[17] *Id.* at 1-2. *See also id.* at 4-5.
[18] Tr. at 29-30 (Hutson).
[19] Hanover County's Response at 2; Henrico County's Response at 11; Tr. at 25 (Murphy).
[20] Tr. at 23-24 (Murphy).
[21] Tr. at 24 (Murphy).
[22] Tr. at 26 (Walter).
[23] Tr. at 26 (Walter). If Chickahominy is not a public utility, Hanover County believes Chickahominy would need to acquire all property rights and obtain zoning approval for 150 parcels, based on information provided by Chickahominy. Mr. Walter indicated that applicable zoning regulations or conservation easements on some of these parcels do not permit a pipeline to be constructed. Tr. at 27-28 (Walter).
[24] Environmental Respondents' Response at 5-9; Tr. at 33-42 (Buppert).
[25] Environmental Respondents' Response at 9-12; Tr. at 42-46 (Buppert).

that if the Commission does not summarily dismiss the Petition, discovery and an evidentiary hearing would be necessary to determine whether Chickahominy's corporate veil should be pierced.[26]

Charles City County, which did not intervene, filed comments to "wholeheartedly support the project."[27] These comments indicate, among other things, that Chickahominy "is not a 'regulated utility' as [Charles City County] understand[s] that definition."[28]

In its reply, Chickahominy recognized that neither Staff nor respondents disputed the Petition's interpretation of the "non-utility gas service" provisions of Code § 56-265.4:6.[29] Chickahominy stood by its interpretation of Code § 56-265.1(b),[30] asserting that "since Chickahominy is not selling natural gas," Chickahominy falls outside of the statutory definition of "public utility."[31] Chickahominy also asserted, among other things, that construction of its pipeline would not violate VNG's exclusive franchise.[32] On this issue, Chickahominy argued that "[t]he applicability of ... Code §§ [56-]265.3 and [56-]265.4 rest on a determination that Chickahominy is a public utility under § [56-]265.1(b)."[33]

ANALYSIS

The Petition asserted that Chickahominy's planned pipeline is not subject to Commission jurisdiction because: (1) Chickahominy would not provide "non-utility gas service" pursuant to Code § 56-265.4:6 of the Utility Facilities Act; and (2) Chickahominy is not a "public utility" within the meaning of Code § 56-265.1(b) of the Utility Facilities Act. This declaratory judgment case therefore involves the applicability of the Utility Facilities Act.

As the Petition only requested declaratory relief regarding the applicability of Utility Facilities Act provisions and Commission jurisdiction thereunder,[34] whether the Commission must evaluate the planned pipeline as an associated facility under Code § 56-580 D of the Virginia Electric Utility Regulation Act appears beyond the scope of this case.[35] Similarly, whether the planned pipeline must comply with Code § 56-257.2, a provision outside of the

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[26] Environmental Respondents' Response at 12-13; Tr. at 46-47 (Buppert).
[27] Charles City County's Comments at 1. After the oral argument, Sarah Jordan, a Warrenton resident, submitted comments urging denial of the Petition. While aspects of both comments involved issues beyond the narrow scope of this declaratory judgment proceeding, the substantive issues presented by the Petition are discussed below.
[28] *Id.* at 2. The Procedural Order did not expressly provide for public comment.
[29] Chickahominy's Reply at 4.
[30] *Id.* at 3-5, 7-10.
[31] *Id.* at 3. *See also, e.g.,* Tr. at 12-15, 61-68 (Page).
[32] Chickahominy's Reply at 10-13.
[33] *Id.* at 13. *See also, e.g.,* Tr. at 69 (Page) ("[S]ince Chickahominy is not a public utility, VNG's exclusive service territory is not an issue.").
[34] Tr. at 44-45 (Page) (clarifying that the Petition pertains only to the Commission's jurisdiction under the Utility Facilities Act).
[35] *See, e.g.,* Environmental Respondents' Response at 9-12; Tr. at 42-46 (Buppert). I also note that CPLLC, the generation CPCN holder, is not a party to this proceeding.

Utility Facilities Act, appears beyond the scope of the instant proceeding – notwithstanding the paramount importance of pipeline safety.[36]

This case is not a CPCN proceeding, which, if required, would be conducted under the applicable provision(s) of the Code. Consequently, the analysis below does not involve, much less address, whether the planned pipeline *should* be built or other issues that would come before the Commission in a CPCN case.[37]

Whether Code §§ 56-265.3 and 56-265.4 have a place in this case is more nuanced. The Petition is not an application under Code § 56-265.4 and has not sought to establish any finding thereunder to begin natural gas operations in VNG's service territory. Consequently, the adequacy of VNG's service is not before the Commission. However, VNG and Staff have argued that Code §§ 56-265.3 and 56-265.4, although not identified by the Petition, establish regulatory prerequisites under the Utility Facilities Act that are applicable to Chickahominy's planned pipeline operations. The Commission could decide to address this issue, although it appears on the periphery of this case.

Accordingly, the Utility Facilities Act analysis below begins with the specific issues raised by the Petition. Namely, Section 1 discusses whether Chickahominy would provide "non-utility gas service" pursuant to Code § 56-265.4:6,[38] and Section 2 discusses whether Chickahominy would be a "public utility" within the meaning of Code § 56-265.1(b). Next, Section 3 of the analysis below discusses the peripheral issue raised concerning Code §§ 56-265.3 and 56-265.4 of the Utility Facilities Act. Finally, Section 4 addresses the Respondent Counties' request for an evidentiary hearing and discovery.

1. Non-Utility Gas Service

Code § 56-265.2 of the Utility Facilities Act states in part that:

> Subject to the provisions of subdivision 2, it shall be unlawful for any 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, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege....[39]
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> ...
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> Whenever a certificate is required under this section for a pipeline for the transmission or distribution of natural or manufactured gas, the Commission may issue such a certificate only after compliance with the provisions of § 56-265.2:1....[40]

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[36] *See, e.g.*, Henrico County's Response at 10-11; Tr. at 25 (Murphy).
[37] *See generally* Charles City County's Comments.
[38] Petition at 3-5.
[39] Code § 56-265.2 A 1.
[40] Code § 56-265.2 D.

Code § 56-265.1 states in parts as follows:

> (b) ... "the term "public utility" does not include any of the following:
> ...
> (11) A company, other than an entity organized as a public service company, that provides non-utility gas service as provided in § 56-265.4:6.

The Petition asserted that Chickahominy would not provide "non-utility gas service" as provided in Code § 56-265.4:6.[41] Subsection A of Code § 56-265.4:6 states in part (with emphasis added) that:

> "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.

As shown above, the definition of "public utility" in Code § 56-265.1(b) expressly excludes "a company, other than an entity organized as a public service company, that provides non-utility gas service as provided in [Code] § 56-265.4:6."[42] To provide such "non-utility gas service" in the Commonwealth, a person, individually or with its affiliated interests, must seek and obtain Commission approval.[43] "Non-utility gas service" is defined as "the sale and distribution of ... natural ... gas to two or more customers by way of underground or above ground 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 [Code] § 56-1.2."[44]

Chickahominy argued that it would not provide "non-utility gas service" because it would "not be engaging in the sale of natural gas, nor [would] it be providing natural gas service to two or more customers."[45] Chickahominy asserted that the Commission recognized a similar jurisdictional exemption in its 2015 *Xpress* decision.[46] *Xpress* involved a petitioner's plan to draw gas from an interstate pipeline and interconnection facilities constructed and owned by a pipeline company; compress, and otherwise prepare the gas at a fueling station the petitioner would construct adjacent to a pipeline; connect the new interconnection and fueling station with a new pipe; deliver the compressed gas by container truck; then sell the compressed gas to retail customers at locations where the petitioner would build and own decompression units before the

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[41] Petition at 3-5.
[42] Code § 56-265.1(b)(11).
[43] Code § 56-265.4:6 B.
[44] Code § 56-265.4:6 A.
[45] Petition at 4.
[46] *Id.* at 4-5 (discussing *Petition of Xpress Natural Gas, LLC*, For a declaratory judgment, Case No. PUE-2015-00004, Doc. Con. Cen. No. 150410046, Order (April 2, 2015) ("*Xpress*")).

meter.[47] The Commission found that the *Xpress* facilities and services were not jurisdictional under the Utility Facilities Act based in part on the petitioner's "representation that it will not provide service to more than one customer from a single meter or decompression unit and that the service will not be provided through a distribution system."[48]

Upon consideration of the facts presented by the Petition, and based on my reading of the Code, I agree with Chickahominy that it would not provide "non-utility gas service," as defined by the Utility Facilities Act. The statutory definition and parameters of such service expressly contemplate specified activities involving more than one customer,[49] whereas Chickahominy's pipeline would serve only one customer. No party or Staff contested Chickahominy's legal conclusion on this issue.

While I agree that Chickahominy would not provide "non-utility gas service," this conclusion does not mean that Chickahominy and its planned pipeline fall outside of the Commission's Utility Facilities Act jurisdiction.[50] Chickahominy did not suggest that its Petition could be granted on this basis alone. I also note that the Commission expressly limited any jurisdictional determination in *Xpress* to the specific facts presented in that particular case.[51] Among other things, the *Xpress* petitioner planned to distribute natural gas by truck.[52]

2. A Public Utility

Code § 56-265.2 of the Utility Facilities Act provides in part that:

> Subject to the provisions of subdivision 2, it shall be unlawful for any 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, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege.[53]
> ...

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[47] *Xpress* at 1-2, 5.
[48] *Id.* at 6.
[49] Code § 56-265.4:6(A) ("'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."). *See also* Code § 56-265.4:6(B).
[50] Companies that obtain non-utility gas service provider status by satisfying the statutory process set forth in Code § 56-265.4:6 for Commission approval are excluded from the "public utility" definition by Code § 56-265.1(b)(11). That Chickahominy would *not* provide such service makes the Commission approval process for such service under Code § 56-265.4:6 inapplicable or unavailable.
[51] *Xpress* at 6.
[52] *Id.* at 5. VNG's discussion of *Xpress* emphasized the importance in that case of language in Code § 56-265.1(b) that VNG indicated excludes companies delivering natural gas in enclosed portable containers from the definition of "public utility." VNG's Response at 6.
[53] Code § 56-265.2 A 1.

> Whenever a certificate is required under this section for a pipeline for the transmission or distribution of natural or manufactured gas, the Commission may issue such a certificate only after compliance with the provisions of § 56-265.2:1....[54]

The Petition asserted that Chickahominy is not subject to Commission jurisdiction because Chickahominy is not a "public utility" within the meaning of Code § 56-265.1 of the Utility Facilities Act.[55] Code § 56-265.1 states in part as follows (with emphasis added):

> (b) "*Public utility" means any company that owns or operates facilities within the Commonwealth of Virginia* for the generation, transmission, or distribution of 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. ...

Following this introductory definition of "public utility", Code § 56-265.1(b) lists twelve different exceptions to the definition.[56]

As shown above, Code § 56-265.2 requires a public utility to obtain a CPCN from the Commission prior to the construction of facilities for use in public utility service, except ordinary extensions of improvements in the usual course of business.[57] Chickahominy asserted that this CPCN requirement is inapplicable to the construction of its planned pipeline because Code § 56-265.1(b) defines "public utility" 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."[58] Chickahominy contended it is not a "public utility" for purposes of the Utility Facilities Act because the planned pipeline would not transport natural gas "for sale."[59] On this point, Chickahominy asserted that:

> The Utility Facilities Act requires the existence of a mercantile relationship (*i.e.*, sale) for an entity to fall within the definition of "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 [CPLLC's generation 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,

[54] Code § 56-265.2 D.
[55] Petition at 5-8.
[56] Code § 56-265.1(b)(1) through (12). One of these twelve exceptions is the "non-utility gas service" exception discussed above. Code § 56-265.1(b)(11).
[57] Code § 56-265.2 A 1.
[58] Petition at 5-6 (quoting Code § 56-265.1(b)) (emphasis added by the Petition).
[59] *See, e.g.*, Petition at 6; Tr. at 13-14 (Page).

> 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.[60]

Chickahominy asserted that its understanding of a requisite "mercantile relationship" is consistent with the Commission's 2004 *Montvale Water* decision.[61]

VNG responded that Chickahominy's argument fails because the natural gas being transported by the pipeline to the generation facility "is gas sold by the supplier to [CPLLC] for heat, light or power."[62] According to VNG, "[t]he delivery of gas through a pipeline to an end use customer is what renders the Pipeline a public utility subject to the Commission's jurisdiction; a sale of gas by the Pipeline to the [generation] [f]acility is not needed to trigger this definition."[63] VNG characterized Chickahominy's statutory interpretation as "narrow and tortured" and unsupported by the plain language of the Code.[64]

Staff differentiated the facts in *Montvale Water* and the instant case[65] and argued that:

> Pursuant to the plain meaning of § 56-265.1, the proposed [p]ipeline 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 the proposed [p]ipeline, the sale of natural gas would not take place. Moreover, since the [generation 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.[66]

Staff further argued, among other things, that the law does not permit "an entity that would otherwise be considered a public utility to subvert regulatory oversight by simply creating a shell corporation to hold its assets[.]"[67] Staff asserted that documents on file with the Commission's Clerk's Office indicate 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 [sic] address."[68]

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[60] Petition at 6.
[61] *Id.* at 6-8 (discussing *Petition of Montvale Water, Inc., for declaratory judgment*, Case No. PUE-2002-00249, 2004 S.C.C. Ann. Rep. 326, Order (June 10, 2004) ("*Montvale Water*")).
[62] VNG's Response at 8.
[63] *Id.*
[64] *Id.*
[65] Staff's Response at 2-4.
[66] *Id.* at 4.
[67] *Id.* at 3.
[68] *Id.*

The Environmental Respondents asserted that the definition of "public utility" explicitly includes facilities "for all stages involved in the sale of natural gas for power – whether part of 'production, storage, transmission or distribution.'"[69] In the Environmental Respondents' view:

> of course the gas would be "for sale." The gas is "for sale" by the third-party supplier to Chickahominy Power, LLC. It would not be supplied *gratis*, or consumed by the same party that produced it. The Company attempts to include gas ownership, as well as sale timing and location requirements, that are not present in the statute.[70]

The Environmental Respondents further argued, among other things, that not applying the plain language of the Code would lead to absurd results.[71] The Environmental Respondents found Chickahominy's legal interpretation problematic in that it equates "for sale" in Code § 56-265.1(b) with ownership of the natural gas commodity, which is determined by contract.[72] The Environmental Respondents pointed out that the only mention of ownership in Code § 56-265.1(b) relates to the ownership of facilities, not a commodity.[73]

Staff, VNG, and Environmental Respondents argued that their interpretations of Code § 56-265.1(b) do not render its "for sale" language superfluous.[74]

Henrico County expressed concern that Chickahominy's argument "[t]aken to its logical conclusion ... would allow a 'build first and ask later' approach in which a shell entity constructs a pipeline ... to a single related customer without Commission oversight and approval only to subsequently seek to add customers to a now-constructed pipeline."[75]

In its reply, Chickahominy reiterated the view that it is not a "public utility" because Chickahominy will not sell gas to CPLLC.[76] Chickahominy indicated there is "no mercantile relationship between Chickahominy and the natural gas."[77] Chickahominy argued that any affiliate relationship with CPLLC makes no difference in interpreting Code § 56-265.1(b) and would not subvert regulatory oversight.[78] Chickahominy found Henrico County's likening of Chickahominy's approach as "build first and ask later" to be odious and unfounded.[79] According to Chickahominy, had the General Assembly intended to regulate companies like Chickahominy, it would have deleted the words "for sale" from Code § 56-265.1(b) "because it would have been clear that any company whatsoever that transports natural gas is to be considered a public

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[69] Environmental Respondents' Response at 6 (quoting Code § 56-265.1(b)).
[70] Environmental Respondents' Response at 6.
[71] *Id.* at 7.
[72] *See, e.g.,* Tr. at 35-36 (Buppert).
[73] Tr. at 36 (Buppert).
[74] Tr. at 41-42 (Buppert); Tr. at 51 (Ryan); Tr. at 57-58 (Harrison).
[75] Henrico County's Response at 2.
[76] Chickahominy's Reply at 4-5.
[77] *Id.* at 5.
[78] *Id.* at 5-7.
[79] *Id.* at 5-6.

utility."[80] Chickahominy maintained that *Montvale Water* is instructive and applicable to this issue and asserted that Staff illogically imputes a mercantile relationship between Chickahominy and CPLLC.[81]

Plain Language

As described by the Petition, Chickahominy would own or operate a pipeline in Virginia that would transmit or distribute natural gas to CPLLC's planned natural-gas-fired electric generation facility.[82] The gas that would flow on the pipeline would be sold to CPLLC through an arrangement between a natural gas supplier and CPLLC.[83] Therefore, under the facts presented by Chickahominy, I find that the natural gas that would be transmitted or distributed by the pipeline is for sale and the consumptive purpose for such sale is among those ("for heat, light or power") identified by the statute. Specifically, Chickahominy would be a "company that owns or operates facilities within the Commonwealth ... for the ... transmission, or distribution ... of natural ... gas ... for sale for heat, light or power."[84]

While Chickahominy apparently would not take ownership of the transmitted gas,[85] I see no jurisdictional limitation in the plain language of Code § 56-265.1(b) that is based on ownership of a transmitted or distributed *commodity*. Rather, I agree with the Environmental Respondents[86] that the relevant definition ties jurisdiction to a company's ownership or operation of specified *facilities* within the Commonwealth ("any company that owns or operates facilities..."[87]). The company that would own or operate such facilities in this case is Chickahominy.

I disagree that the plain language reading discussed above renders the "for sale" language in the natural gas clause superfluous, as suggested by Chickahominy.[88] While Chickahominy asserts that "a company transporting natural gas will always involve a 'sale' at some point,"[89] the "for sale" language in the natural gas clause describes the natural gas produced, stored, transmitted, or distributed by public utility facilities.[90]

As recognized by the Environmental Respondents, the Petition does not contend that Chickahominy would fit within any of the twelve exceptions listed in Code §§ 56-265.1(b)(1) through (12).[91] VNG asserted none of these twelve exceptions apply.[92]

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[80] *Id.* at 8-9.
[81] *Id.* at 9-10.
[82] Petition at 2.
[83] *See, e.g.,* Chickahominy's Response to Motion at 5.
[84] Code § 56-265.1(b).
[85] *See, e.g.,* Petition at 6.
[86] Tr. at 36 (Buppert).
[87] Code § 56-265.1(b).
[88] Chickahominy's Reply at 8-9.
[89] *Id.* at 8.
[90] The "for sale" requirement in the natural gas clause was included in the original enactment of the Utility Facilities Act in 1950, which applied to "facilities for production, transmission, or distribution... of natural ... gas for sale for heat, light or power...". 1950 Va. Acts ch. 327. A subsequent amendment added storage facilities to this clause.
[91] *See, e.g.,* Environmental Respondents' Response at 5, n.16.
[92] *See, e.g.,* Tr. at 52 (Ryan).

The Environmental Respondents believe the exception in Code § 56-265.4(b)(4) confirms that Chickahominy would be a "public utility:"

> (b) ... The term "public utility" does not include any of the following:
> ...
> (4) Any company, or affiliate thereof, making a first or direct sale, or ancillary transmission or delivery service, of natural or manufactured gas to fewer than 35 commercial or industrial customers, which are not themselves "public utilities" as defined in this chapter, or to certain public schools as indicated in this subdivision, for use solely by such purchasing customers at facilities which are not located in a territory for which a certificate to provide gas service has been issued by the Commission under this chapter....

The Environmental Respondents asserted that this exception describes the ancillary transmission or delivery service Chickahominy would provide.[93] However, the Environmental Respondents and VNG recognized that this exception is unavailable to Chickahominy because the relevant gas customers for this exception cannot be located within a certificated service territory.[94] The Environmental Respondents argued that there would be no need for this exception if Chickahominy did not fall within the definition of "public utility."[95] Chickahominy responded that the introductory "public utility" definition of Code § 56-265.1(b) establishes the exception Chickahominy falls within.[96]

Absent a statutory exception under Code §§ 56-265.1(b)(1) through (12), the introductory definition of "public utility" in Code § 56-265.1(b) applies. As discussed above, Chickahominy did not seek an exception under Code §§ 56-265.1(b)(1) through (12) and would be a "public utility" within the plain language of the introductory definition.

Having considered all the arguments, and based on my reading of the Code, I conclude that Chickahominy would be a "public utility" within the plain language of Code § 56-265.1(b) of the Utility Facilities Act.

Montvale Water Applicability

Montvale Water warrants further discussion on this issue. *Montvale Water* involved a nursing home's ability to continue supplying onsite water to satisfy the nursing home's onsite needs. After the spring the nursing home had used since 1960 for water became problematic, and negotiations to interconnect with the certificated public utility failed, the nursing home's owner planned to switch its water source by constructing wells, a water tank, pump and

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[93] Tr. at 40 (Buppert).
[94] VNG's Response at 5-6; Tr. at 40 (Buppert).
[95] Tr. at 40 (Buppert).
[96] Tr. at 72 (Page).

chlorination building, and approximately 2,100 feet of water line – all of which would be located onsite. With such construction, the nursing home planned to expand its residential and commercial facilities.[97] The petition in *Montvale Water* was filed in 2004 by the (objecting) public utility certificated to provide water in the subject area.[98]

The aspect of *Montvale Water* on which Chickahominy focused is the enunciation of a "mercantile relationship" requirement for Code § 56-265.1(b). The impetus for this aspect of *Montvale Water* was that while Code § 56-265.1(b) has "for sale" language in its electric and gas clauses (identified below as clauses [1] and [2]), no such language is included in the water and sewerage clause (identified below as clause [3]).

> (b) "Public utility" means any company that owns or operates facilities within the Commonwealth of Virginia [1] for the generation, transmission, or distribution of electric energy *for sale*, [2] 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 [3] for the furnishing of telephone service, sewerage facilities or water. ...[99]

The Commission ultimately ruled in the nursing home's favor, after finding that a literal interpretation of Code § 56-265.1's water and sewerage clause (which, as shown above, has no "for sale" language) would lead to absurd results, such as hotels, apartments, and offices becoming public utilities.[100]

In the instant case, Chickahominy focused on the Chief Hearing Examiner's Report ("Report") in *Montvale Water* and the Commission's treatment of it.[101] In summarizing the Report, the *Montvale Water* order indicated, among other things, that "the Chief [Hearing] Examiner deduced that [Code § 56-265.1(b)] requires a mercantile relationship between the public utility providing electric energy or gas to its customers, but only requires that a water and sewerage company to [sic] furnish water and sewer service fall within the definition of public utility."[102] The *Montvale Water* order also summarized the Report's discussion of two prior water and sewerage cases involving a trailer park and a mobile home park.[103]

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[97] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 326. The commercial expansion included, among other things, an on-site pharmacy, banking center, and barber/beauty shop. *Id.*

[98] *Id.*

[99] Code § 56-265.1(b) (emphasis added). As shown, the clause referred to herein as the "water and sewerage clause" also encompasses telephone service.

[100] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.

[101] *See, e.g.,* Petition at 7; Tr. at 14 (Page).

[102] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 327. *See* Chickahominy's Reply at 9.

[103] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 327 (discussing *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. PUE-1980-00097, 1981 S.C.C. Ann. Rep. 188, Opinion (Sep. 15, 1981); *Application of The Joline K. Gleaton Family Trust et al., For authority to transfer utility assets under Chapter 5, Title 56 of the Code of Virginia*, Case No. PUE-2004-00005, 2004 S.C.C. Ann. Rep. 420, Order Dismissing Application (Mar. 15, 2004)).

The *Montvale Water* order ultimately adopted the Report "with modifications."[104] The Commission's discussion focused on whether sale of the nursing home's well water was a "distinct business", or merely an "amenity incidental to [the] nursing home, assisted living and senior home business."[105] The Commission concluded that the nursing home, "using water from sources within its property and furnishing the same incidental to the nursing home and related uses, is not a public utility if water meters are not used to measure water usage by individual tenants to whom it rents."[106] In this regard, the Commission appeared to rely on the landlord-tenant relationship and the absence of water meters to measure usage by, or charge, the renting tenants.[107]

Chickahominy argued that *Montvale Water* is instructive and applicable to the instant case.[108] The Environmental Respondents and VNG disagreed,[109] while Staff found the Petition's reliance on *Montvale Water* confusing.[110]

In my view, several aspects of *Montvale Water* call into question its reach. In *Montvale Water,* the "mercantile relationship" was an extratextual standard used to implement Code § 56-265.1(b)'s water and sewerage clause in a way that would avoid absurd results for onsite water and sewerage usage.[111] While the Report "deduced that [Code § 56-265.1(b)] requires a mercantile relationship between the public utility providing ... gas to its customers,"[112] no party in the instant case identified (nor could I find) a natural gas case in which such a requirement was applied by the Commission.[113] Absent such caselaw, the contours of any "mercantile relationship" requirement for natural gas facilities are unclear and may not be readily transferrable to the instant case. In contrast to the facts of *Montvale Water*, Chickahominy's Petition does not involve CPLLC's onsite usage of its own resource. Rather, Chickahominy would transport natural gas that is remote from CPLLC's electric generation facility through a pipeline for CPLLC to use. The "mercantile relationship" in *Montvale Water* necessarily focused on the nursing home because – unlike the instant case – the water supply, delivery, and facilities in question were not unbundled in any way. On this point, I note Staff's argument in the instant case that a mercantile relationship exists between Chickahominy, CPLLC, and the natural gas supplier "because but for the proposed [p]ipeline, the sale of natural gas would not take place."[114] Whether a "mercantile relationship" could involve three parties did not need to be explored in *Montvale Water* because there simply was no third party in the scenario of that case. Consequently, I question whether *Montvale Water* offers a definitive statutory interpretation of the natural gas clause in Code § 56-265.1(b) that is applicable to the instant case.

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[104] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *See, e.g.*, Chickahominy's Reply at 9-10; Tr. at 14, 66-68 (Page).
[109] *See, e.g.*, Environmental Respondents' Response at 8; Tr. at 34 (Buppert); Tr. at 55-56 (Ryan).
[110] Staff's Response at 2.
[111] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.
[112] *Id.* at 327. *See* Chickahominy's Reply at 9.
[113] *See, e.g.*, Tr. at 15-16.
[114] Staff's Response at 4.

Montvale Water Analysis

If *Montvale Water* is instructive in the instant case, different aspects of that order could support different outcomes – ranging from granting Chickahominy's Petition, denying the Petition on the merits, or dismissing the Petition.

As discussed above, the *Montvale Water* order generally endorsed the Report (*i.e.*, adopted with modifications), and the Report "deduced that [Code § 56-265.1(b)] requires a mercantile relationship between the public utility providing ... gas to its customers...."[115] Chickahominy argued that because it is not selling natural gas to CPLLC or any other party, no "mercantile relationship" under *Montvale Water* "exists to trigger the 'for sale' requirement" in Code § 56-265.1(b).[116] If the Commission agrees with Chickahominy that the "for sale" requirement in Code § 56-265.1(b) is only triggered by a commodity sale in which an otherwise jurisdictional facility owner and an end-use customer are counterparties to a natural gas sales transaction,[117] then Chickahominy's Petition could be granted, subject to consideration of any further requirements of Code §§ 56-265.3 and 56-265.4 discussed below.

In contrast, the Commission's focus in *Montvale Water* on whether sale of the nursing home's well water was a "distinct business", or merely an "amenity incidental to [the] nursing home, assisted living and senior home business"[118] could support dismissal of the Petition on the merits. There is no contention in the instant case that the transactions involving the pipeline, or the relevant property, may be incidental to some other primary business that falls outside of the bounds of utility regulation, as was the case with providing water to residents as part of nursing home transactions and services in *Montvale Water*. Indeed, Chickahominy acknowledged that it was formed specifically to construct and operate its planned natural gas pipeline to transport gas to CPLLC's certificated generation facility.[119] Chickahominy downplayed the significance of metering in the instant case, arguing that the question in *Montvale Water* was whether metering was *indicia* of a sale rather than whether a mercantile relationship existed.[120] I do not see these two concepts as neatly compartmentalized in *Montvale Water* as Chickahominy suggests. The nature and details of the nursing home's mercantile activity appear to be part of the mercantile relationship analysis,[121] although the Commission can explain its own order, if appropriate.

The presence of more comprehensive facts in *Montvale Water* could support dismissal of the Petition as a matter of discretion. Unlike *Montvale Water*, some basic details of Chickahominy's business model remain unclear or unknown. In *Montvale Water*, the Commission considered whether customers would pay a volumetric charge for water service.[122]

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[115] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 327. *See* Chickahominy's Reply at 9.
[116] Chickahominy's Reply at 10.
[117] As discussed above, I do not read the plain language of the Code to include such a limitation.
[118] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.
[119] Petition at 2; Chickahominy's Response to Motion at 5.
[120] Tr. at 21-22 (Page).
[121] As discussed above, the impetus of the "mercantile relationship" discussion in *Montvale Water* was the presence of the "for sale" language in the natural gas and electric clauses of Code § 56-265.1(b), but not in the water and sewerage clause.
[122] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.

However, Chickahominy's Petition did not discuss, and counsel for Chickahominy did not know, how Chickahominy would be compensated for its pipeline service.[123] Additionally, while details about metering were important, if not determinative, in *Montvale Water*,[124] Chickahominy's Petition offered no information on metering, although counsel for Chickahominy assumes there will be some metering.[125] Counsel for Chickahominy acknowledged the Petition provided fewer facts than *Montvale Water*,[126] but characterized Chickahominy's situation as "chicken-and-egg" – with Chickahominy having to consider how far to proceed before obtaining a Commission decision on the legal issues raised by the Petition.[127] I find that the lesser detail set forth about Chickahominy's business operations moves the Petition closer to a request for an advisory opinion requiring speculation to resolve, if *Montvale Water* is applicable.[128]

Absurd Result

Finally, on Code § 56-265.1(b), I recognize that the Commission, as it did in *Montvale Water*, can consider and determine the circumstances when application of the Code's plain language would produce absurd results. In my opinion, applying the plain language of the Utilities Facilities Act to the factual scenario outlined by the Petition does not appear to produce an absurd result. The absurd result jurisprudence, as delineated by the Supreme Court of Virginia, "describes situations in which the law would be internally inconsistent or otherwise incapable of operation."[129] I see no internal inconsistency in applying the Utility Facilities Act to the planned pipeline. The Utility Facilities Act includes a provision specifically for the Commission's evaluation of intrastate natural gas pipeline construction.[130] And Chickahominy has invoked none of the twelve enumerated exceptions to the definition of "public utility" within which Chickahominy falls. Nor does it appear that the law would be otherwise incapable of operation. Applying the Utility Facilities Act to evaluate a lengthy pipeline that would transmit or distribute natural gas for sale to a certificated electric generation facility does not appear as sweeping as the nursing homes, hotels, apartments and offices that gave the Commission pause in *Montvale Water*.

3. Operation in VNG's Service Territory

VNG and Staff introduced arguments about Code §§ 56-265.3 and/or 56-265.4.[131] Code § 56-265.3 states in part that:

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[123] Tr. at 16-21 (Page).
[124] *Montvale Water*, 2004 S.C.C. Ann. Rep. at 328.
[125] Tr. at 21-22 (Page).
[126] Tr. at 20 (Page).
[127] Tr. at 19, 65-66 (Page).
[128] *See, e.g., City of Fairfax v. Shanklin*, 205 Va. 227, 229-30 (1964) ("the courts are not constituted . . . to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.") (citations omitted).
[129] *Covel v. Town of Vienna*, 280 Va. 151, 158 (2010).
[130] Code § 56-265.2:1.
[131] Staff also indicated that Code § 56-234 A obligates VNG to provide service to CPLLC's electric generation facility at just and reasonable rates. Staff's Response at 4. Code § 56-234 A states in part that "It shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same."

> No public utility shall begin to furnish public utility service within the Commonwealth without first having obtained from the Commission a certificate of public convenience and necessity authorizing it to furnish such service.[132]

Code § 56-265.4 states as follows:

> 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. For the purposes of this section, the transportation of natural gas by pipeline, without providing service to end users within the territory, shall not be considered operating in the territory of another certificate holder.

As shown above, Code § 56-265.3 of the Utility Facilities Act requires a CPCN from the Commission before a public utility may begin to furnish public utility service in the Commonwealth. For operations in a certificated service territory, Code § 56-265.4 specifies that such a CPCN cannot be granted to an applicant unless: (1) it is proven that the certificate holder's service is inadequate; and (2) the certificate holder is given reasonable time and opportunity to remedy such inadequacy.

The Petition asserted that "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."[133] However, VNG stated that it "remains willing ... to provide a proposal for service to [CPLLC] that is feasible, properly recovers the actual costs to serve this customer, and appropriately protects the utility and its other customers."[134]

As discussed above, I find that the adequacy of VNG's service is beyond the scope of the instant case. The Petition is not an application under Code § 56-265.4 and did not seek a ruling on the adequacy of VNG's service or any other finding pursuant to Code § 56-265.4.[135] Indeed, the Petition included no mention of Code §§ 56-265.3 or 56-265.4.

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[132] Code § 56-265.3 A.
[133] Petition at 2.
[134] VNG's Response at 5.
[135] VNG described Code § 56-265.4 as "a limited avenue requiring a separate application, evidence, and findings." Tr. at 54 (Ryan).

Staff argued that construction and operation of the pipeline requires a CPCN, but that Code § 56-265.4 prohibits the Commission from granting such a CPCN until VNG has been found to be unable to provide service adequate to the requirements of the public necessity and convenience.[136] Even if the Commission makes such a finding, Staff further argued that Code § 56-265.4 grants VNG adequate time to remedy such inadequacy.[137]

Similarly, VNG argued that the Commission may not issue a CPCN to the pipeline because it would violate VNG's exclusive service territory and there has been no finding that VNG's service is inadequate pursuant to Code § 56-265.4.[138] According to VNG, granting the Petition "would have dramatic implications for all utilities, gas and electric, and would create a gaping hole in the Commission's jurisdiction over utility facilities in the Commonwealth."[139] VNG also argued that the last sentence of Code § 56-265.4 infers that the transportation of natural gas by a pipeline that provides service to end users within a certificated service territory is operating in the territory of another holder.[140]

Chickahominy argued that "[t]he applicability of ... Code §§ [56-]265.3 and [56-]265.4 rest on a determination that Chickahominy is a public utility under § [56-]265.1(b)."[141]

Several facts relevant to these arguments appear indisputable or uncontested. The Petition recognized that the relevant end-use customer – CPLLC's planned generation facility – would be located within the certificated service territory of VNG.[142] No one contended that the Commission has previously found the service rendered by VNG is inadequate to the requirements of the public necessity and convenience. Nor could the Commission have identified a reasonable time or opportunity for VNG to remedy an inadequacy that has not been identified by the Commission.

While the applicability of Code §§ 56-265.3 and 56-265.4 to Chickahominy's planned operations appears on the periphery of this case, the Commission can consider whether the issue is within the scope of this proceeding. Chickahominy asked the Commission to decide that no CPCN is required under the Utility Facilities Act[143] and that the Commission lacks jurisdiction under the Utility Facilities Act.[144] Since Code §§ 56-265.3 and 56-265.4 are within the Utility Facilities Act, the issue raised by VNG and Staff arguably puts a finer point on the question presented by the Petition – can Chickahominy proceed to construct and operate its planned pipeline without *either* a CPCN pursuant to Code § 56-265.2:1 *or* a CPCN pursuant to Code § 56-265.4. Notably, if the Commission determines that Chickahominy would be a "public utility" under Code § 56-265.1(b), as discussed above, then the answer to Chickahominy's Petition is "no" regardless of whether the applicability of Code §§ 56-265.3 and 56-265.4 is within the scope of this declaratory judgment proceeding. Consequently, this case may not

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[136] Staff's Response at 5-6.
[137] *Id.* at 5.
[138] VNG's Response at 9-10.
[139] Tr. at 52 (Ryan).
[140] VNG's Response at 9.
[141] Chickahominy's Reply at 13. *See also* Tr. at 68-69 (Page).
[142] Petition at 1.
[143] *See, e.g.*, Tr. at 10-11 (Page).
[144] *See, e.g.*, Petition at 9; Tr. at 44-45 (Page).

require or warrant a sweeping conclusion about the applicability of Code §§ 56-265.3 and 56-265.4, including any apparent implication of the last sentence of Code § 56-265.4.

If Code §§ 56-265.3 and 56-265.4 are within the scope of this case, Chickahominy put all of the Petition's eggs in one basket, arguing that this issue turns on the applicability of Code § 56-265.1(b). As discussed above, I concluded that Chickahominy would be a "public utility" under Code § 56-265.1(b) based on the facts presented by the Petition. Therefore, if the applicability of Code §§ 56-265.3 and 56-265.4 turns on that definition (as Chickahominy asserted), I cannot conclude that Code §§ 56-265.3 and 56-265.4 are inapplicable to Chickahominy.

4. Requests for Hearing

Quoting *Prince George Electric Cooperative*,[145] the Respondent Counties request a hearing for the Commission to "'consider the practical realities of the situation' to determine that Chickahominy is simply a 'device' to allow [CPLLC] 'to do indirectly what clearly cannot be done directly' — operate a pipeline in the service territory of VNG for the transmission and distribution of natural gas from another natural gas supplier."[146] The Respondent Counties further assert that:

> several factual questions are relevant to whether Chickahominy is a "device" for CPLLC to circumvent the exclusive service territory of VNG: (1) whether it is actually "impracticable and infeasible" for CPLLC to obtain an adequate supply of natural gas from VNG (as Chickahominy claims), and (2) whether the business model and operations of Chickahominy, its legal relationship with CPLLC, and CPLLC's transactions with the third-party natural gas supplier demonstrate that Chickahominy is the alter ego of CPLLC doing indirectly what CPLLC cannot do directly.[147]

Henrico County asserted that a factual inquiry is required to determine whether CPLLC is a "purchasing customer" for purposes of the "exempt sale" exception to the "public utility" definition in Code § 56-265.1(b)(4).[148]

I agree with Chickahominy, Environmental Respondents, and VNG that a hearing is not necessary to enter a declaratory ruling in this case.[149] However, should a hearing be directed, Commission guidance on its scope would be important, given the breadth of issues raised in this case.

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[145] *In re: Petition of Prince George Electric Cooperative for declaratory judgment*, Case No. PUE-1996-00295, 1998 S.C.C. Ann. Rep. 344, 349, Final Order, June 25, 1998 ("*Prince George Electric Cooperative*"). Chickahominy argued that *Prince George Electric Cooperative* is distinguishable. Chickahominy's Reply at 11-13. *See also* Staff's Response at 6-7.

[146] Respondent Counties' Joint Reply at 3 (citing Code §§ 56-265.1(b), 56-265.1(b)(4), 56-265.4:5).

[147] Respondent Counties' Joint Reply at 3.

[148] Henrico County's Response at 9.

[149] Nor is any opportunity, or further opportunity, for discovery necessary.

FINDINGS AND RECOMMENDATIONS

Based on the Code, the facts presented by the Petition, and the arguments in this proceeding, and for the reasons set forth above, I find that:

(1) Chickahominy would not provide "non-utility gas service" pursuant to Code § 56-265.4:6 of the Utility Facilities Act;

(2) Chickahominy would be a "public utility" within the plain language of Code § 56-265.1(b) of the Utility Facilities Act, because Chickahominy would be a "company that owns or operates facilities within the Commonwealth ... for the ... transmission, or distribution ... of natural ... gas ... for sale for heat, light or power";

(3) It is questionable whether *Montvale Water* offers a definitive statutory interpretation of the natural gas clause in Code § 56-265.1(b) that is applicable to the instant case. However, if *Montvale Water* is applicable or instructive, different aspects of *Montvale Water* could support different outcomes in the instant case;

(4) Applying the Utility Facilities Act to the planned pipeline, which would transmit or distribute natural gas for sale to a certificated electric generation facility, would not produce an absurd result;

(5) If the Commission finds, as recommended herein, that Chickahominy would be a "public utility" under Code § 56-265.1(b), the Petition should be denied regardless of whether Code §§ 56-265.3 and 56-265.4 are within the scope of this proceeding; and

(6) A hearing is not necessary to enter a declaratory ruling in this case.

Accordingly, **I RECOMMEND** the Commission enter an order that:

(1) ***DENIES*** Chickahominy's Petition for declaratory judgment; and

(2) ***DISMISSES*** this case from the Commission's docket of active cases.

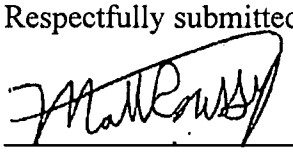
COMMENTS

Staff and parties are advised that, pursuant to Rule 5 VAC 5-20-120 C of the Commission's Rules of Practice and Procedure and Code § 12.1-31, any comments on this Report must be filed on or before November 23, 2021. In accordance with the directives of the Commission's *COVID-19 Electronic Service Order*[150] the parties are encouraged to file electronically. If not filed electronically, an original and fifteen (15) copies must be submitted in writing to the Clerk of the Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot

[150] *Commonwealth of Virginia, ex rel State Corporation Commission, Ex Parte: Electronic service among parties during COVID-19 emergency*, Case No. CLK-2020-00007, Doc. Con. Cen. No. 200410009, Order Requiring Electronic Service (Apr. 1, 2020) ("*COVID-19 Electronic Service Order*").

of such document certifying that copies have been sent by electronic mail to all counsel of record and any such party not represented by counsel.

Respectfully submitted,



D. Mathias Roussy, Jr.
Hearing Examiner

Document Control Center is requested to send a copy of the above Report to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, Tyler Building, First Floor, Richmond, VA 23219.