

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

AT RICHMOND, DECEMBER 22, 2021

SOC-CLERK'S OFFICE  
REGULATORY CONTROL CENTER

2021 DEC 22 P 2: 00

PETITION OF

CHICKAHOMINY PIPELINE, LLC

For a declaratory judgment

CASE NO. PUR-2021-00211

FINAL ORDER

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").<sup>1</sup> In its Petition, the Company is seeking 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")<sup>2</sup> is not subject to the Commission's jurisdiction pursuant to Title 56 of the Code of Virginia [{"Code"}]."<sup>3</sup>

The Company states that the Facility will require a significant volume of gas per day, and "CPLLC has determined that it is impracticable and unfeasible to procure an adequate supply of natural gas from [Virginia Natural Gas, Inc. ("VNG")]."<sup>4</sup> The Company states that Chickahominy will design, construct, own, and operate the interconnect to deliver natural gas to

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<sup>1</sup> 5 VAC 5-20-10 *et seq.*

<sup>2</sup> 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.

<sup>3</sup> Petition at 1. Counsel for Chickahominy clarified that the Company seeks a decision that the Pipeline is not subject to the Commission's jurisdiction pursuant to the Utility Facilities Act, Chapter 10.1 of Title 56, Code § 56-265.1 *et seq.* Tr. 10.

<sup>4</sup> Petition at 2.

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the Facility and that 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 the Pipeline's interconnect to the Facility.<sup>5</sup> According to the Petition, the Facility will not engage in the retail sale of electricity or provide retail electric service to customers within the Commonwealth.<sup>6</sup>

On September 16, 2021, the Commission entered a Procedural Order that, among other things, docketed the Petition; established a procedural schedule for Staff of the Commission ("Staff") to file an answer or other responsive pleading, and Chickahominy's reply thereto; directed Chickahominy give notice of its Petition to VNG and to local officials in each county, city, and town through which the Pipeline is proposed to be built; provided interested persons an opportunity to file responses to and request a hearing on the Petition, or participate in the proceeding as a respondent by filing a notice of participation; and appointed a Hearing Examiner to conduct all further proceedings in this matter.

Timely notices of participation and responses to the Petition were filed by Louisa County, Virginia ("Louisa"); Henrico County, Virginia ("Henrico"); Hanover County, Virginia ("Hanover"); VNG; and Concerned Citizens of Charles City County, Hanover Citizens Against A Pipeline, Appalachian Voices, and Chesapeake Bay Foundation (collectively, "Environmental Respondents"). Chickahominy timely filed its reply.

Henrico and Hanover also each requested, among other things, a ruling to schedule discovery and an evidentiary hearing regarding the factual assertions in the Petition. Louisa

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

concurring with, and joined in, these requests. 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. Chickahominy and VNG filed responses. On October 22, 2021, Henrico, Louisa, and Hanover filed a joint reply.

On October 25, 2021, a Hearing Examiner's Ruling was issued directing that an oral argument commence on November 3, 2021, at 12 p.m., via Microsoft Teams, with no party present in the Commission's courtroom. On the appointed date, the Hearing Examiner convened oral arguments as scheduled. Chickahominy, Henrico, Hanover, Louisa, Environmental Respondents, VNG, and Staff participated in the oral argument.

On November 15, 2021, the Report of D. Mathias Roussy, Jr., Hearing Examiner ("Report"), was filed. In his Report, the Hearing Examiner found 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*<sup>7</sup> 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

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<sup>7</sup> *Petition of Montvale Water, Inc., For declaratory judgment*, Case No. PUE-2002-00249, 2004 S.C.C. Ann. Rept. 326, Order (June 10, 2004) ("*Montvale Water*").

(6) A hearing is not necessary to enter a declaratory ruling in this case.<sup>8</sup>

The Hearing Examiner recommended the Commission enter an order that denies the Petition and dismisses the case from the Commission's docket of active case.<sup>9</sup>

On November 23, 2021, VNG, Environmental Respondents, Chickahominy, and Staff each filed comments on the Report.

NOW THE COMMISSION, upon consideration of the matter, is of the opinion and finds as follows. Chickahominy seeks a Commission ruling that (i) pursuant to Code § 56-265.4:6, Chickahominy would not provide "non-utility gas service"; and (ii) Chickahominy is not a "public utility" as defined by Code § 56-265.1(b).<sup>10</sup> Because we find that Chickahominy is a public utility within the meaning of Code § 56-265.1(b), the Commission denies the Petition.

#### APPLICABLE LAW

Under Code § 56-265.1(b), a "public utility" is:

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. . . .<sup>11</sup>

Code § 56-265.2 provides:

A. 1. 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

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<sup>8</sup> Report at 21.

<sup>9</sup> *Id.*

<sup>10</sup> Petition at 2.

<sup>11</sup> Following this section are twelve exceptions to the definition of "public utility." Chickahominy does not contend that it would fall within any of these exceptions, and VNG specifically argues that none of the exceptions apply. Report at 12; *see also, e.g.*, Environmental Respondents' Response at 5 n.16; Tr. 52.

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. Any certificate required by this section shall be issued by the Commission only after opportunity for a hearing and after due notice to interested parties. The certificate for overhead electrical transmission lines of 138 kilovolts or more shall be issued by the Commission only after compliance with the provisions of § 56-46.1.

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Code § 56-265.4:6 A provides the following definitions instructive to this case:

"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.

"Non-utility gas service provider" means a person, other than a natural gas utility, providing non-utility gas service.

Code § 56-265.4:6 B states as follows:

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.

## DISCUSSION

The Hearing Examiner found, based upon the facts presented in the Petition and his reading of the Code, that Chickahominy would not provide "non-utility gas service," noting, "The statutory definition and parameters of such service expressly contemplate specified activities involving more than one customer, whereas Chickahominy's [P]ipeline would serve only one customer."<sup>12</sup> The Hearing Examiner also noted that no party or Staff contested Chickahominy's legal conclusion on this issue.<sup>13</sup> We agree with this finding.

As to whether Chickahominy is a "public utility," and therefore must obtain a certificate of public convenience and necessity ("CPCN") from the Commission before constructing facilities for use in public utility service, the Commission is informed by the definition of "public utility" in Code § 56-265.1(b). Chickahominy's argument that it is not a public utility is based on its representation that it would not be the seller of the gas flowing through the Pipeline to CPLLC.<sup>14</sup> Nevertheless, the Hearing Examiner found that "natural gas that would be transmitted or distributed by the [P]ipeline is for sale and the consumptive purpose for such sale is among those ('for heat, light or power') identified by" Code § 56-265.1(b). The Hearing Examiner found "no jurisdictional limitation in the plain language of Code § 56-265.1(b) that is based on ownership of a transmitted or distributed *commodity*."<sup>15</sup> The Hearing Examiner agreed with Environmental Respondents that the definition at issue "ties jurisdiction to a company's

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<sup>12</sup> Report at 8.

<sup>13</sup> *Id.*

<sup>14</sup> *See generally* Report at 9-12 for a summary of this discussion.

<sup>15</sup> Report at 12.

ownership or operation of specified facilities within the Commonwealth."<sup>16</sup> Thus, Chickahominy is "any company that owns or operates facilities within the Commonwealth of Virginia . . . for the . . . transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas . . . for sale for heat, light or power . . ." and meets the definition of "public utility" in Code § 56-265.1(b).<sup>17</sup> We agree with this finding as well.<sup>18</sup>

Further, the Commission concludes that its *Montvale Water* decision, cited by Chickahominy, is readily distinguished from the facts in this case. In *Montvale Water*, a nursing home had provided water service to its residents (and a few on-site businesses) for many years prior to the organization of Montvale Water, Inc. ("Montvale").<sup>19</sup> Water was provided via a spring water source on the nursing home's property.<sup>20</sup> When the nursing home expanded its operations, it proposed to expand its water service correspondingly.<sup>21</sup> Montvale objected, arguing that the nursing home should not be permitted to provide water to its expansion area but that the expansion area should be forced to take service from Montvale.<sup>22</sup> This we refused to do. The nursing home was not selling water to its residents, but providing it as an incident to its

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<sup>16</sup> *Id.*; Tr. 36. ("The definition only mentions—the only mention of ownership in the definition in 265.1 B is of a company owning or operating facilities. The definition never says that the commodity must be owned.")

<sup>17</sup> Report at 12; Code § 56-265.1(b).

<sup>18</sup> We likewise agree with the Hearing Examiner that this application of the statutory plain language does not (contrary to Chickahominy's assertion) fail to give meaning to the words "for sale" as contained in the statute. This phrase requires a mercantile relationship, which is present in this instance.

<sup>19</sup> *Montvale Water*, 2004 S.C.C. Ann. Rept. at 326 and n.2.

<sup>20</sup> *Id.* at 326 and n.3.

<sup>21</sup> *Id.* at 326.

<sup>22</sup> *Id.* at 326-327.

other residential services.<sup>23</sup> We declined to decide, in essence, that a commercial relationship could be ordered between the nursing home and Montvale under the facts of the *Montvale Water* case.<sup>24</sup>

Taken together, these findings support Chickahominy being a "public utility" within the definition of Code § 56-265.1(b) and therefore subject to the CPCN requirement of Code § 56-265.2. Given this determination, we also agree with the Hearing Examiner that applying the Utility Facilities Act to the Pipeline would not produce an absurd result; that the Commission need not address whether Code §§ 56-265.3 and 56-265.4 are within the scope of this proceeding; and that a hearing is not necessary to enter a declaratory ruling in this case.<sup>25</sup>

Accordingly, IT IS ORDERED THAT:

(1) The findings and recommendations of the Hearing Examiner, to the extent discussed herein, hereby are adopted.

(2) Chickahominy is a public utility under Code § 56-265.1(b) and subject to the CPCN requirement of Code § 56-265.2.

(3) This matter hereby is dismissed.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission.

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<sup>23</sup> *Id.* at 328.

<sup>24</sup> *Id.*

<sup>25</sup> Report at 21.