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Betty S.W. Graumlich
Direct Phone: +1 804 344 3456
Email: bgraumlich@reedsmith.com

Reed Smith LLP
Riverfront Plaza - West Tower
901 East Byrd Street, Suite 1900
Richmond, VA 23219-4068
+1 804 344 3400
Fax +1 804 344 3410
reedsmith.com

January 11, 2022

By Hand Delivery

Mr. Bernard J. Logan, Clerk
Virginia State Corporation Commission
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1300 East Main Street
Richmond, VA 23219

RE: Case No. PUR-2021-00211
Motion of Chickahominy Pipeline, LLC for Reconsideration and Notice of Appearance

Dear Mr. Logan:

Enclosed please find a Motion of Chickahominy Pipeline, LLC for Reconsideration and Notice of Appearance in the above matter.

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

Sincerely,

Betty S.W. Graumlich

BSG/sr

Enclosures

cc: William Henry Harrison, IV, Esquire (*via Email and US Mail*)
Joseph K. Reid, III, Esquire (*via Email and US Mail*)
Elaine S. Ryan, Esquire (*via Email and US Mail*)
C. Meade Browder, Jr., Esquire (*via Email and US Mail*)
Helen E. Phillips, Esquire (*via Email and US Mail*)
Sean Hutson, Esquire (*via US Mail*)
Elizabeth B. Wade, Esquire (*via Email and US Mail*)
J. T. Tokarz, Esquire (*via US Mail*)
Ryan P. Murphy, Esquire (*via Email and US Mail*)
Dennis A. Walter, Esquire (*via Email and US Mail*)
Rebecca B. Randolph, Esquire (*via Email and US Mail*)
Gregory Buppert, Esquire (*via Email and US Mail*)

ReedSmith

Claire Horan, Esquire (*via Email and US Mail*)
Eric M. Page, Esquire (*via Email and US Mail*)
Cody T. Murphey, Esquire (*via Email and US Mail*)

COMMONWEALTH OF VIRGINIA
Before the
STATE CORPORATION COMMISSION

PETITION OF	)	
	)	
CHICKAHOMINY PIPELINE, LLC	)	**CASE NO. PUR-2021-00211**
	)	
For a declaratory judgment	)	

MOTION OF CHICKAHOMINY PIPELINE, LLC FOR RECONSIDERATION

Pursuant to the Rules of Practice and Procedure of the State Corporation Commission ("Commission"), 5 VAC § 5-20-220, Chickahominy Pipeline, LLC ("Chickahominy") hereby files its motion for reconsideration of the Commission's Final Order issued on December 22, 2021, in the above-captioned docket. Specifically, Chickahominy seeks reconsideration of the Commission's finding that it is a "public utility" pursuant to Section 56-265.1(b) of the Code of Virginia (the "Utility Facilities Act"). In support of this motion, Chickahominy states the following.

I. STATEMENT OF FACTS

Chickahominy commenced this proceeding by filing a Petition for Declaratory Judgment and Request for Expedited Consideration ("Petition") on September 3, 2021. Chickahominy sought a Commission order finding that it is (1) not providing non-utility gas service under § 56-265.4:6 of the Utility Facilities Act, and (2) not a "public utility" under § 56-265.1(b) of the Utility Facilities Act. The Commission's Final Order agrees with the Hearing Examiner's determination that Chickahominy would not provide "non-utility gas service." This motion only challenges the Commission's ruling and determination on the second issue raised in the Petition: Whether Chickahominy is a "public utility" as defined in § 56-265.1(b) of the Utility Facilities Act.

In the Petition, Chickahominy stated that it plans to construct a pipeline in central Virginia to transport gas to Chickahominy Power, LLC ("CPLLC"), a natural gas-fired electric generation facility to be constructed and operated in Charles City County, Virginia.[1] Chickahominy will transport gas purchased by CPLLC from a third-party supplier ("Supplier") and will neither own nor sell any of the gas it transports. In addition, Chickahominy will provide service solely to CPLLC. The Petition asserted that Chickahominy will not be a "public utility" under § 56-265.1(b) of the Code of Virginia because it will not "own or operate facilities within the Commonwealth of Virginia for the . . . transmission or distribution of natural . . . gas . . . ***for sale*** for heat, light or power . . ." (emphasis added).

Chickahominy cited *Petition of Montvale Water, Inc.* in support of its claim that it will not be a public utility. In *Montvale,* the Commission found that a nursing home could drill wells on its property to provide water service to its facility without becoming a public utility because the nursing home did not have a mercantile relationship with customers for the provision of water.[2] In particular, the Commission noted that the nursing home was not installing meters to measure water consumption upon which it could assess charges.[3] Chickahominy claimed that, like the nursing home in *Montvale*, it has no mercantile relationship to sell gas to CPLLC.

Several parties submitted motions to intervene and responses to the Petition. A number of parties and Commission Staff asserted that Chickahominy falls within the definition of "public utility" because it will own and operate facilities used to transport or distribute natural gas for sale for the use for light, heat or power.[4] Specifically these parties claim that the Public Utilities Act

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[1] Chickahominy and CPLLC are separate entities who are corporate affiliates.
[2] *Petition of Montvale Water, Inc. for Declaratory Judgment*, Case No. PUE-2002-00249, Final Order at pp. 7-8 (2004).
[3] *Id.* at p. 8.
[4] *See, e.g., Response in Opposition to Petition by Environmental Respondents* (Oct. 8, 2021) at pp. 5-9; *Response to Petition*, Commission Staff (Oct. 8, 2021) at pp. 1-4.

does not require that the owner or operator of the pipeline facilities be the entity that sells the natural gas; instead, the statute requires only that the natural gas be sold by some entity for heat, light or power.[5] In response, Chickahominy noted that this interpretation of § 56-265.1(b) nullifies the words "for sale," as all natural gas transported by any entity for use for heat, light or power will be sold at some point during the chain of transactions.[6] That is, no entity will supply natural gas to an electric generator for free. Thus, under the statutory interpretation supported by several parties, Commission jurisdiction attaches to any entity that transports or distributes natural gas for use in heat, light or power, because at some point, a supplier will sell the gas to the entity using it for heat, light or power.

The Hearing Examiner issued his Report ("Report") on November 15, 2021. The Report found that, despite the fact that certain parties raised additional issues, the only two questions at issue in this proceeding are those raised in the Petition: is Chickahominy (1) providing non-utility gas service, and (2) a "public utility" under the Utility Facilities Act. The Report noted that no party challenged Chickahominy's claim that it will not provide non-utility service and concluded that Chickahominy will not do so, as it will provide service to only one customer.

The Report found, however, that Chickahominy will be a "public utility" under § 56-265.1(b). The Report found that § 56.265.1(b) states that entities that own or operate facilities used to transport or distribute natural gas for sale for use for heat, light or power are "public utilities." The Report states that the statute contains "no jurisdictional limitation in the plain language . . . based on ownership of a transmitted or distributed *commodity*."[7] Instead, according to the Report, "the relevant definition ties jurisdiction to a company's ownership or operation of

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[5] *Id.*

[6] *Response in Opposition to the Motions for Ruling of the Counties of Henrico and Hanover*, Chickahominy Pipeline, LLC, (October 15, 2021) at p. 4.

[7] Report at p. 12 (emphasis in original).

specified *facilities* within the Commonwealth," and states that the gas to be transported over the pipeline "is for sale" and will be consumed for heat, light or power.[8] The Report further rejects Chickahominy's claim that this interpretation of the Utilities Facilities Act renders the words "for sale" superfluous.[9] The Report states that "the 'for sale' language in the natural gas clause describes the natural gas produced, stored, transmitted, or distributed by public utility facilities."[10] With respect to the applicability of the decision in *Montvale Water*, the Report noted that the water and sewage clause of § 56-265.1(a) does not include the words "for sale."[11] The Report pointed out that the Commission's Final Order in *Montvale Water* appears to focus on the fact that the nursing home was developing water wells and lines on its own property to provide water service to its tenants without separate charge.[12] The Report notes that the references to a "mercantile relationship" requirement do not appear in the statutory definition of "public utility" and that the *Montvale Water* can be distinguished from the instant case.[13]

Following the submission of responses to the Report, the Commission issued the Final Order. The Final Order concurs with the Report's conclusions that Chickahominy will not provide non-utility gas service and will be a public utility. With respect to Chickahominy's claim that it will not be the seller of the gas transported through the pipeline, the Commission quotes from the Report's findings that the owner and operator of the pipeline need not be the seller of the natural gas commodity to fall within the definition of "public utility" in § 56-265.1(b).[14] The Final Order

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[8] *Id.* (emphasis in original).
[9] *Id.*
[10] *Id.*
[11] *Id.* at p. 15.
[12] *Id.*
[13] *Id.*
[14] Final Order at pp. 6-7.

also finds that *Montvale Water* can be distinguished from this case for the reasons cited in the Report.[15]

II. LEGAL STANDARD

The Utility Facilities Act provides, in § 56-265.1(b) of the Code of Virginia:

> "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, sewage facilities, or water.

In the Final Order, the Commission found Chickahominy to be a "public utility" under this definition, despite the fact that Chickahominy is not engaged in sales of natural gas and that the gas it transports is not "for sale" but rather is owned and used by the entity on whose behalf Chickahominy transports it.

The Virginia Supreme Court has held that statutory interpretation requires courts or other bodies to "ascertain and give effect to the intention of the legislature."[16] Because that "intent is usually self-evident from the words used in the statute . . . courts apply the plain language of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result."[17] Moreover, "[r]ules of statutory construction prohibit adding language to or deleting language from a statute."[18]

III. ARGUMENT

The Commission should grant reconsideration of the Final Order. As shown below, the Final Order does not properly apply the Commonwealth's rules of statutory construction and

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[15] *Id.* at pp. 7-8.
[16] *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003).
[17] *Boynton v. Kilgore,* 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006) (citations omitted).
[18] *Appalachian Power Co. v. State Corp. Comm'n,* 284 Va. 695, 706, 733 S.E.2d 250, 256 (2015) (citations omitted).

interpretation. Proper application of those rules clearly demonstrates that Chickahominy is not a "public utility" within the meaning of the Utility Facilities Act. In addition, to the extent that the Commission believes additional facts are necessary to reach a decision regarding the Petition, it should have established evidentiary hearing procedures to obtain those facts.

1. The Final Order Incorrectly Interprets the Definition of "Public Utility" in the Utility Facilities Act.

The Final Order accepts the Report's conclusions that there is "no jurisdictional limitation in the plain language of Code § 56-265.1(b) that is based on ownership of a transmitted or distributed *commodity.*"[19] The Final Order goes on to accept the Report's findings that jurisdiction under the Utility Facilities Act depends upon Chickahominy's ownership and operation of pipeline facilities within the Commonwealth.[20] Nowhere does the Final Order, or the Report upon which the Final Order is based, clearly respond to Chickahominy's claim that, by interpreting the Utility Facilities Act in this manner, the Commission has deleted the words "for sale" from the statute. The Commission's overly broad interpretation of the words "for sale" dramatically expands its jurisdiction, which now apparently would cover a pipeline transporting gas sold outside of the Commonwealth. Under this interpretation, all pipelines in Virginia are likely to be public utilities subject to Commission regulation.

The facts of the case are undisputed. Chickahominy will not sell natural gas to CPLLC. CPLLC plans to purchase its supply of natural gas from a third-party supplier before the gas is transported by Chickahominy and to pay Chickahominy to transport the already owned gas to its generation facility by means of Chickahominy's pipeline facilities. The terms and conditions of the third party's sale of natural gas to CPLLC are wholly outside of Chickahominy's knowledge

[19] Final Order at p. 6.
[20] *Id.* at pp. 6-7.

and control. Chickahominy will have no customers other than CPLLC, and therefore will not sell gas to any entity. Chickahominy's operations will be limited to the transportation of gas owned by CPLLC to CPLLC's electric generation facility in Charles City County.

In attempting to respond to Chickahominy's claims that the words "for sale" in § 56-265.1(b) preclude a finding that Chickahominy is a public utility, the Report states:[21]

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

The Final Order appears to accept this reasoning.[22] Neither the Report nor the Final Order, however, explain why the legislature would have found it necessary to describe the natural gas that is being transmitted as being "for sale." As Chickahominy has noted, the vast majority, if not all, natural gas burned by gas-fired electric generators in this country was, at some point, sold by a supplier to the electric generator. In other words, the legislature would have had no reason to describe the natural gas commodity as being for sale unless it intended that language to have meaning.

The only reasonable interpretation of the words "for sale" in the natural gas clause is that the natural gas must be for sale by the company owning or operating the facilities used to produce, transport, transmit, or distribute that gas. That company is Chickahominy – not CPLLC. The Final Order, therefore, incorrectly interprets § 56-265.1(b) by finding that the words "for sale" mean that the natural gas transported over Chickahominy's facilities was sold to CPLLC by some entity at some point during a chain of transactions, rather than sold by Chickahominy, as the

[21] Report at p. 12.
[22] *See* Final Order at pp. 6-7.

purported "public utility." As a result of this erroneous interpretation, the Commission has essentially claimed jurisdiction over all pipelines regardless of whether those pipelines are involved in sales of natural gas.

The facts of this case buttress Chickahominy's interpretation of the words "for sale" in the statutory definition of "public utility." Chickahominy will not be able to sell the gas being transported while it is in Chickahominy's pipeline or after it is transported to CPLLC. CPLLC will purchase and thus own the natural gas transported or distributed over Chickahominy's pipeline facilities before the gas is introduced into those facilities. As it is owned by CPLLC, the natural gas that Chickahominy will transport to the CPLLC generation facility is ***not*** for sale by Chickahominy. Nor could CPLLC sell it to another entity while it is being transported or after it is received by CPLLC, as Chickahominy plans to build and operate its pipeline facilities for the sole purpose of delivering the natural gas to CPLLC. CPLLC, therefore, would have no party to which it could sell the gas. Therefore, the gas that will be transported or distributed over Chickahominy's facilities will not be for sale by any party. As a result, Chickahominy will not fall within § 56-265.1(b)'s definition of "public utility," because it will not be a "company that owns or operates facilities within the Commonwealth of Virginia . . . for the production, storage, transmission, or distribution . . . of natural . . . gas . . . for sale for heat, light or power . . ."

Moreover, *Montvale Water* further supports Chickahominy's Petition. While the facts of *Montvale Water* differ from those in this case, *Montvale Water* makes clear that the words "for sale" in § 56-265.1(b) require that an entity make some type of sale – or have a "mercantile relationship" – with its customers in order to fall within the definition of "public utility." Neither the Final Order, nor any party to this proceeding, have cited a case in which an entity was found to be a public utility without engaging in a commodity sale.

The conclusions in the Final Order and the Report to the contrary run contrary to the longstanding rule of statutory construction that prohibits the deletion of words from a statute.[23] The Commission should, therefore, grant this motion for reconsideration and conclude that Chickahominy is not a "public utility" under § 56-265.1(b).

2. The Commission Should Establish an Evidentiary Hearing if It Believes More Facts are Necessary to Issue a Complete Ruling on the Petition.

The Final Order expresses some skepticism as to whether the natural gas Chickahominy will transport over its pipeline facilities is "for sale," as required by § 56-265.1(b). The Final Order states:

> 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. 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 of such sale is among those ('for light, heat or power') identified by" Code § 56-265.1(b).

The Final Order and the Report err in finding that the natural gas that will be transported over Chickahominy's pipeline facilities is for sale. The gas will be owned by CPLLC at all times during transportation by Chickahominy. Chickahominy clearly cannot sell a commodity that it does not own. Furthermore, Chickahominy's facilities will transport gas for only one customer – CPLLC. CPLLC would have no ability to sell the gas flowing over Chickahominy's facilities to any other entity. The facts establish that the natural gas that will be transported or distributed by Chickahominy is not for sale.

While Chickahominy believes that the record plainly reflects that it will not sell the gas transported by Chickahominy to any entity, to the extent that the Commission or the Hearing Examiner have questions or concerns regarding the facts underlying the Petition, the proper

[23] *Appalachian Power Co. v. State Corp. Comm'n,* 284 Va. 695, 706, 733 S.E.2d 250, 256 (2015).

approach would have been to schedule an evidentiary hearing, as was requested by several parties in this case. If the Commission had held a hearing in this proceeding, parties would have been able to obtain evidence, among other issues, with respect to CPLLC's possible sources and suppliers of natural gas in order to determine whether the gas transported or distributed through Chickahominy's pipeline facilities is "for sale" within the meaning of the Utility Facilities Act.

IV. CONCLUSION

For the foregoing reasons, Chickahominy respectfully requests the Commission to grant this motion for reconsideration. On reconsideration, the Commission should find that Chickahominy is not a "public utility" as defined in § 56-265.1(b).

Respectfully submitted,

Betty S. W. Graumlich (VSB No. 30825)
Reed Smith LLP
Riverfront Plaza – West Tower
901 E. Byrd Street, Suite 1900
Richmond, VA 23219
Telephone: 804.334.3400
Facsimile: 804.334.3410
bgraumlich@reedsmith.com

Dated: January 11, 2022

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2022, a true copy of the foregoing was sent via electronic mail and U.S. First Class Mail, postage prepaid, to:

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

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

C. Meade Browder, Jr., Esquire
Sr. Assistant Attorney General
Division of Consumer Counsel
202 North 9th Street
Richmond, Virginia 23219
MBrowder@oag.state.va.us

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

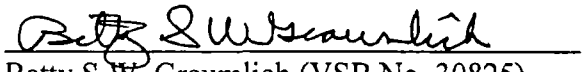
Elizabeth B. Wade, Esquire
Southern Company Gas
Ten Peachtree Place, NE
Atlanta, Georgia 30309
ewade@southernco.com

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

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

Eric M. Page, Esquire
Cody T. Murphey, Esquire
Eckert Seamans Cherin & Mellott, LLC
919 East Main Street, Suite 1300
Richmond, VA 23219
epage@eckertseamans.com
cmurphey@eckertseamans.com

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



Betty S.W. Graumlich (VSB No. 30825)
Reed Smith LLP
Riverfront Plaza – West Tower
901 E. Byrd Street, Suite 1900
Richmond, VA 23219
Telephone: 804.334.3400
Facsimile: 804.334.3410
bgraumlich@reedsmith.com