

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, SEPTEMBER 10, 2013

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2013 SEP 10 P 3: 11

PETITION OF

ELIZABETH RIVER CROSSINGS OPCO, LLC

v.

CASE NO. PUE-2013-00071

CITY OF PORTSMOUTH, VIRGINIA

ORDER DISMISSING PETITION

On June 26, 2013, Elizabeth River Crossings OpCo, LLC ("ERC"), filed a petition ("Petition") with the State Corporation Commission ("Commission"), pursuant to § 56-570 of the Public-Private Transportation Act of 1995 ("Act"),¹ requesting the Commission to determine how ERC's Midtown Tunnel/Downtown Tunnel/MLK Expressway Project ("Midtown Tunnel Project") should cross or relocate five water and sewer lines owned and operated by the City of Portsmouth ("City"). In support of its Petition, ERC alleges, among other things, that the City is a "public utility" subject to the Commission's jurisdiction under § 56-570 of the Code;² that the City has failed to cooperate fully with ERC in planning how the Midtown Tunnel Project will cross or relocate the City's water and sewer lines as required by § 56-570 of the Code;³ and that § 56-570 of the Code grants the Commission jurisdiction to determine the manner in which the Midtown Tunnel Project will cross or relocate the City's water and sewer lines when an

¹ § 56-556 *et seq.* of the Code of Virginia ("Code").

² Petition at 2, 5-6. While the Petition acknowledges that the term "public utility" is defined in certain portions of Title 56 of the Code to specifically exclude municipally-owned utilities from the Commission's jurisdiction, ERC argues the application of such restrictive definitions does not apply to the Act because: (1) the term "public utility" is not defined by the Act, and (2) § 56-558 D of the Code requires that the Act be liberally construed to accomplish the policy of the Commonwealth set forth therein.

³ *Id.* at 2-6.

agreement cannot be reached between the parties.⁴ Accordingly, ERC requests the Commission to grant its Petition, declare the manner in which the public utility crossings and relocations described therein shall be accomplished, and issue such a declaration within 90 days of the filing of ERC's Petition.⁵

On July 1, 2013, the Commission entered an Order Docketing Petition that, among other things, directed the City to file an answer or other responsive pleading to ERC's Petition on or before July 17, 2013; allowed ERC to file a reply to the City's answer or other responsive pleading on or before August 5, 2013; and continued the case pending further orders of the Commission.

On July 17, 2013, the City filed a Motion to Dismiss ("Motion") ERC's Petition, including a narrative response to the allegations in the Petition and an affirmative defense to the Petition. In its Motion, the City requests that ERC's Petition be dismissed "on the ground that the Commission lacks jurisdiction to grant the relief requested" by the Petition.⁶ The City argues that contrary to ERC's assertion in its Petition, the City is not a "public utility" as that term is used in § 56-570 of the Code, and the Commission, therefore, lacks jurisdiction to determine how ERC's Midtown Tunnel Project will cross or relocate the City's water and sewer lines.

The City argues that when interpreting the term "public utility," the Commission must give the term its "plain or ordinary meaning, reading the language as a whole and *in pari materia* with other relevant authorities."⁷ According to the City, the plain meaning of "public utility"

⁴ *Id.* at 1-2, 5-6.

⁵ *Id.* at 6.

⁶ Motion at 1.

⁷ *Id.* at 2-3, citing *Falls Church v. Protestant Episcopal Church in the U.S.*, 285 Va. 651, 665, 740 S.E.2d 530, 538 (2013); *Belew v. Commonwealth*, 62 Va. App. 55, 62-63, 741 S.E.2d 800, 803 (2013), citing *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007), *Hubbard v. Henrico Ltd. Partnership*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998).

does not include the City because "[t]he exclusion of municipally-owned entities from Commission jurisdiction is well-established and fundamental."⁸ In support of its claim, the City refers to Article IX, § 7 of the Constitution of Virginia, which expressly excludes municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth from the corporations and companies regulated and supervised by the Commission. That exclusion, according to the City, is also carried through a number of definitions of the term "public utility" in Title 56 of the Code.⁹

The City further argues that when the General Assembly intends to subject a governmental entity to the Commission's jurisdiction, it does so expressly and for a particular and limited purpose, citing as examples § 56-265.4:4 (expressly authorizing the Commission to grant any county, city, or town operating an electric distribution system a certificate of public convenience and necessity to provide interexchange and local exchange telephone services); § 56-265.4:1 (expressly authorizing the Commission to issue a certificate of public convenience and necessity to a municipal corporation or other governmental body seeking to provide electric service or construct or acquire electric utility facilities outside of their political boundaries); and § 56-576 (expressly including a municipality in the definition of "electric utility" in the Virginia Electric Utility Regulation Act).¹⁰ Since the General Assembly has not expressly subjected municipalities or other governmental entities to the Commission's jurisdiction under § 56-570 of

⁸ *Id.* at 3.

⁹ *See, e.g.*, § 56-88 (definitions of "Company" and "Public utility" exclude a municipal corporation or county from the Utility Transfers Act); §56-232 A (definition of "public utility" excludes a municipality from the Commission's jurisdiction over rates, services, and terms and conditions of service when a municipality provides utility services); and § 56-265.1 (a) and (b) (definitions of "Company" and "Public utility" exclude a municipal corporation or county from the Utility Facilities Act unless the municipal corporation or county has obtained a certificate to provide interexchange or local exchange telephone services under § 56-265.4:4).

¹⁰ Motion at 3.

the Code, the City argues that the plain meaning of "public utility" must be applied, which excludes municipalities such as the City.

The City's Motion also raises several additional arguments in support of its claim that the City is not subject to the Commission's jurisdiction in this matter, including: (1) municipal entities cannot be added to § 56-570 of the Code in the guise of a liberal construction of the statute;¹¹ (2) the language of § 56-570, read as a whole and with reference to the other entities subject to the Commission's jurisdiction under the statute (*i.e.*, "public service company, public utility, railroad, and cable television provider"), "shows that the section applies to privately owned and operated utilities, not municipalities;"¹² (3) if ERC's argument is accepted, it would effectively extend the Commission's jurisdiction to virtually all utility facilities in Virginia, rendering the last sentence of § 56-570 "superfluous and without any effect," contrary to the rules of statutory construction;¹³ (4) related provisions of Title 56, which must be read *in pari materia* with § 56-570,¹⁴ support the conclusion that the General Assembly considers a "public utility" and a utility owned and operated by a county, city, or town to be separate and distinct entities;¹⁵ and (5) the Commission has no jurisdiction over the City because the Commission has

¹¹ *Id.*, citing *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004).

¹² *Id.* at 3-4, citing *Cuccinelli v. Rector & Visitors of the University of Virginia*, 283 Va. 420, 432, 722 S.E.2d 626, 633 (2012); *Newbury Station Homeowners Association, Inc. v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013).

¹³ *Id.* at 5, citing *Commonwealth v. Zamani*, 256 Va. 391, 507 S.E.2d 608 (1998). The last sentence of § 56-570 provides that the Commission shall make a determination within 90 days of notification by the private developer that it will cross "utilities subject to the Commission's jurisdiction."

¹⁴ *Id.* at 5-6, citing *Yamaha Motorcorp., USA v. Quillan*, 264 Va. 656, 665, 571 S.E.2d 122, 126-127 (2002) (quoting *Richmond v. Sutherland*, 114 Va. 688, 691, 77 S.E. 470, 471 (1913)); *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d 246, 249 (2003) (citing *Kole v. City of Chesapeake*, 247 Va. 51, 56, 439 S.E.2d 405, 408 (1994)) in support of the City's argument that the Commission must interpret "public utility" by reference to the Act itself and other acts in Title 56 *in pari materia*.

¹⁵ *Id.*, citing § 56-1.2 of the Code.

no inherent power of its own, and its jurisdiction must be found either in constitutional grants or in statutes which do not contravene that document.¹⁶

On July 29, 2013, ERC filed its response to the City's Motion ("Response"). In its Response, ERC argues that "[i]t is well-established in Virginia that a municipality that holds itself out to provide a service to the public and that operates its facilities for public use is, in fact, a 'public utility.'"¹⁷ According to ERC, the City is a "public utility" because it renders service for a public purpose; it holds itself out to provide water and sewer service; and it directly or indirectly operates or manages its plant for a public use.¹⁸

ERC further argues that § 56-570 of the Code does not limit the Commission's review under § 56-570 to private business entities as the City alleges. According to ERC, if the General Assembly had intended to limit § 56-570 of the Code to private business entities as the City argues, the statute's use of the term "public service company" would have been sufficient. By adding the term "public utility," ERC argues that the General Assembly did not intend to limit the statute to private business entities as the City alleges in its Motion.¹⁹

Finally, ERC disputes the City's argument that granting ERC's Petition would create an extraordinary change in the Commission's jurisdiction. ERC contends that the Commission's jurisdiction over "public utilities" is explicitly established by § 56-570; that the City's

¹⁶ *Id.* at 7, citing *VYVX of Virginia, Inc. v. Cassell*, 258 Va. 276, 290-291, 519 S.E.2d 124, 131 (1999) (citing, *City of Norfolk v. Virginia Electric & Power Co.*, 197 Va. 505, 514, 90 S.E.2d 140, 146 (1955); *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 528, 201 S.E.2d 758, 762 (1974); *see also Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 11-12, 34 S.E.2d 364, 366, *cert. denied*, 326 U.S. 760 (1945); *City of Richmond v. Chesapeake & Potomac Telephone Co.*, 127 Va. 612, 619, 105 S.E. 127, 129 (1920).

¹⁷ Response at 3-4.

¹⁸ *Id.* at 4, citing *Light v. Danville*, 168 Va. 181, 205, 190 S.E. 276, 285 (1937); *Stoneleigh Group, Inc. v. Town of Round Hill*, 50 Va. Cir. 42 (1999); *Augusta Cnty. Farmers Mut. Tel. Co. v. Staunton Mut. Tel. Co.*, 134 Va. 291, 300, 114 S.E. 600, 603 (1922).

¹⁹ *Id.* at 5-6, citing *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 701-702 (2001); *Cuccinelli v. Rector & Visitors of the University of Virginia*, 283 Va. 420, 722 S.E.2d 626 (2012).

Department of Public Utilities is such a "public utility," and that the exclusion of municipalities from the definition of "public utility" in other sections in Title 56 of the Code does not mean that the City is not a "public utility" under § 56-570 of the Act.²⁰

On August 1, 2013, the City filed a Motion for Leave to File a Reply in Support of Motion to Dismiss, if necessary, and a Reply of City of Portsmouth in Support of Motion to Dismiss ("Reply").²¹ The City's Reply claims that ERC "misstates and misquotes the City's Motion," "cites inapposite and irrelevant legal authorities to support its position" that the City is a "public utility," and "simply asserts that the mere mention of the words 'public utility' in § 56-570 of the Virginia Code gives the Commission jurisdiction in this case."²²

NOW THE COMMISSION, having considered this matter, the applicable law, and the pleadings filed herein, is of the opinion, and finds, that § 56-570 of the Code does not convey to the Commission jurisdiction to grant the relief requested in ERC's Petition. Accordingly, the Commission finds the Petition should be dismissed.

When a term in a statute is not defined, the general rule of statutory construction is to infer legislative intent from the plain meaning of the language used.²³ The Commission finds that the plain meaning of the term "public utility" does not include municipalities such as the City.

²⁰ *Id.*

²¹ The Commission finds it unnecessary to rule on the City's Motion for Leave to File a Reply in Support of Motion to Dismiss. Rule 5 VAC 5-20-110 of the Commission's Rules of Practice and Procedure authorizes the City to file a response in support of its Motion to Dismiss.

²² Reply at 1.

²³ *Hubbard v. Henrico Ltd. Partnership*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); *City of Virginia Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 473-474 (1996); *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987).

While the Act does not define "public utility," other acts and statutes in Title 56 demonstrate that the plain meaning of the term "public utility" refers to a company providing utility services regulated by the Commission, not a governmental body, such as the City, providing utility services within its political boundaries. The Commission, for example, has no jurisdiction over a municipality's construction, location, or operation of its electric, natural gas, water or sewer facilities under Chapter 10.1 of Title 56 because a municipality is not deemed to be a "public utility" under the Utility Facilities Act unless it has obtained a certificate of public convenience and necessity pursuant to § 56-265.4:4 of the Code.²⁴ Likewise, the Commission has no jurisdiction over a municipality's charges, rates, and terms and conditions for providing utility services to its customers because a municipality is not deemed a "public utility" under Chapter 10 of Title 56 of the Code.²⁵ This distinction between a "public utility" and a municipality is also recognized in Chapter 3 of Title 56 of the Code, the Utility Transfers Act.²⁶ The General Assembly has thus drawn a distinction in Title 56 of the Code between a "public utility," subject to the Commission's jurisdiction, and municipalities which are not normally subject to the Commission's jurisdiction.²⁷

Moreover, in those specific and limited cases where the General Assembly intends to subject a governmental entity to the Commission's jurisdiction, it does so expressly and for

²⁴ § 56-265.1 (a) and (b) (the definitions of "Company" and "Public utility" exclude a municipal corporation or a county from the Utility Facilities Act unless the municipal corporation or county has obtained a certificate to provide interexchange or local exchange telephone services under § 56-265.4:4).

²⁵ § 56-232 A (the definition of "public utility" excludes a municipality from the Commission's jurisdiction over rates, services, and terms and conditions of service when a municipality provides utility services).

²⁶ § 56-88 (definitions of "Company" and "Public utility" exclude a municipal corporation or county from the Utility Transfers Act)

²⁷ *See also*, Article IX, § 7 of the Constitution of Virginia, which provides that "[t]he term 'corporation' or 'company' as used in this Article shall exclude all municipal corporations, other political subdivisions, and public institutions owned or controlled by the Commonwealth."

limited purposes. The Commission, for example, is expressly authorized to issue a municipality a certificate of public convenience and necessity to (i) provide interexchange or local exchange telephone services or (ii) provide electric service or authorize the construction or acquisition of electric facilities outside of its political boundaries.²⁸ Unlike these statutes, which contain an express grant of authority to the Commission, § 56-570 of the Act does not expressly subject municipal corporations, such as the City, to the Commission's jurisdiction. Accordingly, the Commission finds that the plain meaning of the term "public utility" as used in Title 56 of the Code refers to a company providing services regulated by the Commission.²⁹

The Commission also finds that it cannot expand the term "public utility" to include the City under the guise of a "liberal construction" of the Act.³⁰ Such an interpretation would be contrary to the plain meaning of the term "public utility," as described above. In addition, while the General Assembly chose not to define "public utility" in this statute, it expressly defined the term "public entity" in the Act to include "any county, city, town and any other political subdivision of any of the foregoing, but shall not include any public service company."³¹ Thus, if the General Assembly intended to include a municipality within the Commission's jurisdiction

²⁸ See, e.g., § 56-265.4:4 (expressly authorizing the Commission to grant any county, city or town operating an electric distribution system a certificate of public convenience and necessity to provide interexchange and local exchange telephone services); § 56-265.4:1 (expressly authorizing the Commission to issue a certificate of public convenience to a municipal corporation or other governmental body seeking to provide electric service or construct or acquire electric utility facilities outside of their political boundaries); and § 56-576 (expressly including a municipality in the definition of "electric utility" in the Virginia Electric Utility Regulation Act).

²⁹ A finding that the plain meaning of "public utility" does not include municipal corporations is also supported in *Webster's II New Riverside University Dictionary*, which defines "public utility" as "[a] private business organization, subject to governmental regulation that provides an essential commodity or service, as water, electricity, or communication, to the public." Similarly, the *Merriam-Webster On-line Dictionary* defines "public utility" as "a business organization (such as an electric company) performing a public service and subject to special governmental regulation."

³⁰ See *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (2004) (holding that the term "members" in the Freedom of Information Act cannot be expanded to include "members-elect" of a city council under the guise of a "liberal construction" of the statute).

³¹ § 56-557 of the Code.

in § 56-570 of the Code, it had an explicitly defined term in which it could have done so, but did not. Finally, any grant of jurisdiction to the Commission to resolve the dispute between ERC and the City must be expressly granted to the Commission because the Commission has no inherent power and all grants of jurisdiction to the Commission must be found in either constitutional grants or in statutes which do not contravene that document.³²

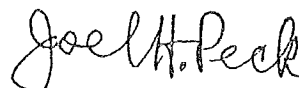
Accordingly, IT IS ORDERED THAT:

- (1) ERC's Petition is dismissed.
- (2) The papers filed herein be placed in the Commission's file for ended causes

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:

Marina J. Liacouras, Esquire, Elizabeth River Crossings OpCo, LLC, 152 Tunnel Facility Drive, Portsmouth, Virginia 23707; Robert M. Tata, Esquire, Hunton & Williams LLP, 500 East Main Street, Suite 1000, Norfolk, Virginia 23510; Richard D. Gary, Esquire, and Timothy E. Biller, Esquire, Hunton & Williams LLP, 951 East Byrd Street, Richmond, Virginia 23219-4074; George M. Willson, City Attorney, City of Portsmouth, 801 Crawford Street, P.O. Box 820, Portsmouth, Virginia 23705-8000; Anthony Gambardella, Esquire, H. Allen Glover, Jr., Esquire, and John K. Byrum, Esquire, Woods Rogers PLC, Riverfront Plaza, West Tower, 901 East Byrd Street, Suite 1550, Richmond, Virginia 23219; and a copy hereof shall be sent to the Commission's Office of General Counsel and Divisions of Energy Regulation, Utility and Railroad Safety, and Utility Accounting and Finance.

A True Copy
Teste:



Clerk of the
State Corporation Commission

³² *City of Richmond v. C & P Telephone Co.*, 127 Va. 612, 619, 105 S.E. 127, 129 (1920); *City of Norfolk v. Virginia Elec. & Power Co.*, 197 Va. 505, 514, 90 S.E.2d 140, 146 (1955).