BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition by Peninsula Pipeline Company, Inc. for declaratory statement concerning recognition as a natural gas transmission company.

050584-GP

MEMORANDUM OF LAW

Peninsula Pipeline Company, Inc., (PPC or the Petitioner), by and through its undersigned counsel, pursuant to Section 120.565, Florida Statutes and Rules 28-105.001, Florida Administrative Code, et seq., hereby files its Memorandum of Law in support of its Petition for declaratory statement concerning recognition as a natural gas transmission company:

1. Section 368.103(4), Florida Statutes, defines "(n)atural gas transmission company" in pertinent part as

> any person owning or operating for compensation facilities located wholly within this state for the transmission or delivery for sale of natural gas, but shall not include any person that owns or operates facilities primarily for the local distribution of natural gas or that is subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. ss 717 et seq.... Sec. 368.103(4), Fla. Stat.

2. The Act further defines the term "person" as "a natural person, corporation, partnership, association or other legal entity and its lessee, trustee, or receiver." Sec. 368.103(5), Fla. Stat.

3. The fundamental question presented in the Petition is whether the fact that a parent corporation through certain divisions (most pertinently Chesapeake's Florida

Division) "owns or operate facilities primarily for the local distribution of natural gas" or, through its subsidiary, Eastern Shore Natural Gas Company, is in some aspects "subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. ss 717 et seq." would pose an impediment to Petitioner, a separate wholly-owned subsidiary of Chesapeake, qualifying under the NGTPIRA as a natural gas transmission company.

4. It is Petitioner's position that Sec. 368.103(4), Florida Statutes, does not include any prohibition against a corporation through its divisions engaged in part in business as LDCs, or through a subsidiary subject to FERC jurisdiction, from creating a wholly-owned subsidiary that would qualify as a natural gas transmission company under NGTPIRA.

5. It is axiomatic that a statute is to be given its plain meaning. With this in mind, it is worth examining the title of Sec. 368.103, "Definitions." According to The American Heritage Dictionary of the English Language, Fourth Edition (2000), the definition of "definition" is given variously as

    (1) A statement conveying fundamental character;

    (2) A statement of the meaning of a word, phrase, or term;

    (3) The act or process of stating a precise meaning or significance; formulation of a meaning; and

    (4) The act of making clear and distinct.

6. Hence, by its plain meaning, § 368.103 should be read as intended only to give clear and distinct meaning to words and phrases used in Part II of Chapter 368–not

to outline powers, procedures, or prohibitions (which the Legislature clearly includes throughout the Florida Statutes in sections bearing such names). Petitioner is unaware of any definitional section anywhere else in the Florida Statutes that serves to outline powers, procedures, or prohibitions.

7. In order to more squarely discern the plain meaning of 368.103(4) in the context of the instant petition, it is helpful to look at the definition of "Person" in § 368.103, which states

> (5) "Person" means a natural person, corporation, partnership, association, or other legal entity and its lessee, trustee, or receiver.

8. Since corporations are "persons" as defined by § 368.103(5), and Chesapeake is a corporation that operates as an LDC and, through Petitioner, would operate as a natural gas transmission company, the word "corporation" may be substituted for "person" in § 368.103(4) to more squarely read that subsection under our facts, the result being

> (4) "Natural gas transmission company" means any corporation owning or operating for compensation facilities located wholly within this state for the transmission or delivery for sale of natural gas, but shall not include any corporation that owns or operates facilities primarily for the local distribution of natural gas....

9. As Chesapeake "owns or operates facilities primarily for the local distribution of natural gas," and as Petitioner, would "own[ ] or operat[e] for compensation facilities located wholly within this state for the transmission or delivery for sale of natural gas," these entities, for purposes of further analysis of § 368.103(4), may be substituted therein for the phrases applicable to each entity, the result reading

> (4) "Natural gas transmission company" means PPC, but shall not include Chesapeake....

10. Thus, the plain meaning of the statute is manifest: PPC *falls within the definition* of "natural gas transmission company," though Chesapeake *does not* (as it is an LDC, *expressly* excluded from the *definition* of natural gas transmission company)–hence, the two entities would be regulated differently by the PSC, just as a "dentist" would be regulated differently than a "dental hygienist"–though both would be regulated by DBPR. The definition of "natural gas transmission company" is just that: a definition intended to be used when reading Part I of Chapter 368. The language "but shall not include" simply narrows the definition, i.e., it says only that an LDC is not a natural gas transmission company -it does <u>not</u> say that an LDC cannot be a parent of a wholly-owned subsidiary acting as a natural gas transmission company.

11. This leads to another basic tenet of statutory construction: where the Legislature has elected to omit language from a statute, no such language should be read into it. Thus, it should be noted that, beyond the Legislature's providing the definitions in § 368.103 for the *explicit* purpose of clarifying those terms as they are used in Part II of Chapter 368, no other purpose is given. Moreover,§ 368.103(4) *does not include any* prohibitory language such as "a natural gas transmission company may not be owned by an LDC"–though the Legislature easily could have included such a prohibition in the statutes had it so chosen. Hence, by the basic rules of statutory construction, no such prohibitive language should be read into § 368.103.

12. Based upon the above, Petitioner submits that § 368.103(4) includes no prohibition

against a corporation engaged in business as an LDC creating a wholly-owned subsidiary to engage in business as a natural gas transmission company.

13. It is clear that a corporation–whether or not it is wholly owned by another corporation–is a separate "person" under applicable law. See, e.g., § 1.01(3), Fla. Stat. ("Construction of Statutes; Definitions") ("The word 'person' includes...**corporations**...."); § 368.103(5) Fla. Stat., ("Gas Transmission and Distribution; Definitions") ("'Person' means a natural person, corporation, partnership, association, or other legal entity and its lessee, trustee, or receiver.").

14. Though Petitioner is unable to find any case with a fact pattern identical to that presented herein–to wit, involving a court's evaluating a subsidiary's separate corporate existence from a regulated parent in terms of the two enterprises being subject to differing regulatory schemes administered by the same agency, the cases that appear most helpful in determining when the parent and subsidiary would be considered one and the same entity (i.e., that the corporate existence of the subsidiary is to be ignored) are "piercing the corporate veil" cases.

15. First, it must be noted that only under extreme circumstances is the separate existence of a corporate entity to be avoided under the law. In In re Homelands of DeLeon Springs, 190 B.R. 666, 669 (M.D. Fla 1995), the court stated

> The seminal case on the sanctity of the corporate form is Moline Properties, Inc. v. Comm'r of Internal Revenue, 319 U.S. 436, 438-439, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943) in which the court explained that,
>
> > The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose

> be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, **so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate...entity.** (Emphasis Supplied.)

16. In Dania Jai-Alai Palace v. Sykes (Dania II), 450 So.2d 1114 (Fla. 1984), the Florida Supreme Court overruled Dania Jai-Alai Palace v. Sykes (Dania I), 425 So.2d 594 (Fla. 4th DCA 1982), in which the 4th DCA had cited the "mere instrumentality" doctrine and employed a ten-point, piercing-the-veil, "control" analysis from Church of Scientology v. Blackman, 446 So.2d 190, 192 (Fla. 4th DCA 1984) (*a pre-Dania II case*) to determine liability. However, as stated by the Dania II court in its decision, the Dania I court applied the wrong test, as it had omitted any requirement of "improper use" of the corporation. The Dania II court bolstered its opinion by citing Biscayne Realty & Insurance Co. v. Ostend Realty Co., 148 So. 560, 564 (1933) for the proposition that, "So long as **a proper use** is made of the fiction that a corporation is an entity apart from its shareholders, **it** is harmless, and, because, convenient, **should not be called in question**...." Dania II stated further that

> The corporate veil **will not** be penetrated either at law or in equity **unless** it is shown that the corporation was organized or employed **to mislead creditors or to work a fraud upon them.** Every corporation is organized as a business organization to create **a legal entity that can do business in its own right** and on its own credit **as distinguished from the credit and assets of its individual stockholders. The mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the**

> **conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders** to the extent that the debts of the corporation should be imposed upon them personally. **If this were the rule, it would completely destroy the corporate entity as a method of doing business and it would ignore the historical justification for the corporate enterprise system.** (Emphasis supplied.)

17. The Dania II court's strong disapproval of the Dania I decision could be no more clear than is seen in the Supreme Court's statement

> We conclude that the district court decision directly and expressly conflicts with decisions of this Court which hold that **the corporate veil may not be pierced absent a showing of improper conduct. We decline to recede from these cases. The district court holding is quashed on this point.** (Emphasis supplied.)

18. More recently, DeLeon Springs included an analysis of Dania II, explaining the circumstances under which the corporate structure of a subsidiary may be disregarded, stating

> Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984) is the oft-cited case setting the standard as to when the corporate veil may be pierced in Florida. After a long analysis of the line of cases on piecing the corporate veil in Florida, the Supreme Court made it clear that the corporate veil could not be pierced in Florida absent a showing of **improper conduct**[1].... "The rule is that the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them.... **In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the**

[1] As for what constitutes "proper" conduct of a corporation, § 607.0302, Fla. Stat. ("Corporations; General Powers") governs and states, "Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has **the same powers as an individual to do all things necessary or convenient to carry out its business and affairs....**"

> **corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate" the corporate veil will not be pierced.** Id. at 1119-1120, quoting, Riley v. Fatt, 47 So. 2d 769, 773 (Fla. 1950). (Emphasis supplied.)

19. Unless a subsidiary is organized for an illegal purpose, the subsidiary's corporate structure should not be ignored and it is properly considered a separate "person" under the law. As the creation and operation of a natural gas transmission company is a "lawful purpose," it, thus, appears that Petitioner, as Chesapeake's wholly-owned subsidiary, should be able to operate as a natural gas transmission company in Florida.

Respectfully submitted,

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