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NATURE OF PROCEEDINGS

This is an appeal from the Superior Court's Opinion and Order in C.A. No. K20A-09-003 WLW dismissing the Delaware Association of Alternative Energy Providers, Inc.'s ("DAAEP) appeal from an order of the Public Service Commission ("PSC"). The PSC, in Order No. 9635 (August 19, 2020), PSC Docket No. 20-0357, dismissed a Complaint filed by the DAAEP against Chesapeake Utilities Corporation, the Public Advocate, and the PSC Staff. A1239-42. As will be explained below, the DAAEP attempted to file the Complaint in PSC Docket No. 19-0529, which involved an application by Chesapeake Utilities Corporation to have the PSC assert regulatory jurisdiction over the sale and distribution of propane. The DAAEP's members are engaged in the propane business, and the PSC does not have subject matter jurisdiction to regulate propane. The PSC refused to allow the DAAEP to file its Complaint in Docket No. 19-0529. PSC Docket No. 19-0529 was addressed separately by Commission Order No. 9594 on June 17, 2020. A1243-77.

SUMMARY OF ARGUMENT

- I. The Superior Court erred when it concluded that the DAAEP did not have standing to file its Complaint with the PSC.

- II. The Superior Court erred when it failed to apply the correct standard of review in granting dismissal.

- III. The Superior Court erred when it followed its previous Order holding that the DAAEP could never be a party to PSC proceedings involving Chesapeake because competitors of regulated public utilities lack standing.

- IV. The Superior Court abused its discretion by failing to enter a full briefing schedule that allowed for a fair and adequate presentation of the arguments on the issues presented by the appeal and by failing to address the DAAEP's motion to require the PSC to comply with the Citation on Appeal.

- V. The DAAEP was not required to seek leave to intervene in Docket No. 19-0529 and according to Chesapeake, it had no right to do so.

- VI. The PSC lacked subject matter jurisdiction to enter Order No. 9594 in Docket No. 19-0529 and approve the Hearing Examiner's Report and the Settlement Agreement, as those actions involved the regulation of propane.

- VII. The issue of Delaware's public policy toward the expansion of fossil fuel natural gas infrastructure in Delaware was not fairly or adequately addressed in Docket No. 19-0529, PSC Order No. 9594, or by the Superior Court.

STATEMENT OF FACTS

The Delaware Association of Alternative Energy Providers, Inc. (“DAAEP”) is a Delaware incorporated association, whose members provide propane service to residential and commercial customers in Delaware. A347. The DAAEP operates numerous propane Community Gas Systems (“CGSs”) for residential developments, which involves supplying propane through underground pipelines to homes in each community. A347.

Chesapeake Utilities Corporation (“Chesapeake”) is a public utility engaged in the natural gas industry and regulated by the Public Service Commission (“PSC”). A348-9. The PSC does not have jurisdiction to regulate propane. A351-2. Yet, the PSC permitted Chesapeake to create an unregulated affiliate, Sharp Energy, Inc. (“Sharp Energy”), which operates more than forty residential propane CGSs in Delaware, and competes with the DAAEP’s members. A349-53. Chesapeake has used Sharp Energy to set up the more than forty “anchor” residential propane CGSs with the long-term plan of building a natural gas pipeline to serve those communities and convert them from propane to natural gas. A349-54. Chesapeake plans to take propane customers from other Delaware businesses, including the DAAEP’s members, and convert them to natural gas, allowing Chesapeake to greatly expand its natural gas pipeline system. A350.

DAAEP'S Party Status in Previous PSC Proceedings

For years, the PSC granted DAAEP leave to intervene in proceedings filed by Chesapeake, which frequently involved issues related to the Sharp Energy propane CGSs. A353-8. DAAEP was permitted to intervene in a Chesapeake proceeding opened July 6, 2008, PSC Docket No. 07-186. A354-8. The docket was resolved by PSC Order No. 7434 (Sept. 2, 2008), which includes the Report of the Hearing Examiner (dated August 25, 2008), and the Parties' Settlement Agreement, to which the DAAEP was a signatory. A354-8. The PSC-approved Settlement Agreement included the following provision:

(vii) Propane Conversions. The settlement agreement does not address how the cost of any future acquisition by the Company [Chesapeake] of a community propane distribution system will be treated for ratemaking purposes. Rather, the issue is left until another day. However, in the case of any future consumers who elect to convert from propane to the Company's natural gas services, the settlement agreement does call for the customer to be responsible for paying the cost of converting any of the customer's appliances or HVAC equipment from propane to natural gas, *and that any such costs paid by the customer will not be included in the Company's rate base.* (Emphasis added.) A355.

PSC Order No. 7434 binds Chesapeake, the Division of the Public Advocate ("Public Advocate"), the PSC Staff ("Staff"), and the DAAEP as parties to the Settlement Agreement. A353-8. The Settlement Agreement approved by Order No. 7434 constitutes a contract binding upon Chesapeake, the Public Advocate, the Staff, and the DAAEP, and provides:

23. Except as otherwise provided under the Company's tariff, with respect to any future customers who elect to convert from propane to natural-gas; - the Company agrees that the customer shall be responsible for paying the cost of converting any of the customer's appliances or HVAC equipment from propane to natural gas (including costs related to the internal piping located with the customer's residence or building or costs associated with the replacement of appliances), *and any costs paid by the customer shall not be included in the Company's rate base.* Settlement Agreement p. 8. (Emphasis added.) A355-6.

Paragraph 32 of the Settlement Agreement (p. 11) provides:

32. The Settling Parties may enforce this Proposed Settlement through any appropriate action before the Commission or through any other available remedy. The Settling Parties shall consider any final Commission order related to the enforcement or interpretation of this Proposed Settlement as an appealable order to the Superior Court of the State of Delaware. This shall be in addition to any other available remedy at law or in equity. A356.

In paragraph 6, Chesapeake, the Public Advocate, and Staff agreed that its provisions “will serve the interests of the public and the Company....” A356-7. In paragraph 34, the parties agreed that the Settlement Agreement would serve as an admission if a party attempted to abrogate its provisions. A356-7.

The Settlement Agreement and Order 7434 serve many purposes. They prevent Chesapeake from using its unregulated subsidiary to unfairly compete with private propane companies, like the DAAEP's members. It protects the financial interests of Chesapeake's natural gas customers, so that they are not forced to bear the costs of converting propane CGSs to natural gas to support Chesapeake's

expansion plans, and thus the prohibition against including those costs in rate base. A547-8.

The DAAEP has been a party to other proceedings and written Settlement Agreements approved by PSC Orders, which involved: a) applications by Chesapeake for approval of Natural Gas Expansion and related service offerings; and b) Chesapeake's Code of Conduct. A357-8. *See, e.g.*, PSC Order No. 8479 (Nov. 5, 2013), *In the Matter of the Application of Chesapeake Utilities Corporation for Approval of Natural Gas Expansion Service Offerings* (Filed June 25, 2012) PSC Docket No. 12-292. A357-8.

In 2015, Chesapeake filed a proceeding with the PSC, and the DAAEP was granted intervention over Chesapeake's objection. *See discussion in Chesapeake Utilities Corp. v. Delaware Public Service Commission*, 2017 WL 2480804 (Del. Super. Ct. June 7, 2017)(“*Chesapeake*”). A483-99. The parties reached a settlement of all issues except the DAAEP's standing to intervene, and Chesapeake filed an appeal limited to the intervention issue. *Id.* The Superior Court ruled that the PSC did not have the statutory authority to grant intervention to the DAAEP. *Id.* The ruling was not appealed.

Chesapeake's First Propane CGS Application

On June 29, 2018, Chesapeake filed an application with the PSC asking it to regulate the manner in which it would acquire the Sharp Energy propane CGSs and

convert them to natural gas, Docket No. 18-0933. A35-90. The DAAEP moved to intervene, arguing that the Superior Court's order in *Chesapeake, infra*, was wrongly decided and not controlling. A92-146. The Public Advocate and Staff moved to dismiss Chesapeake's application arguing that the PSC lacked jurisdiction to regulate propane. A1235-8. The PSC never acted on the DAAEP's motion to intervene, and the DAAEP filed public comments arguing that Chesapeake's application should be dismissed for lack of jurisdiction. A161-76.

On December 20, 2018, the PSC dismissed Chesapeake's application saying that it lacked jurisdiction to regulate the sale and distribution of propane even if such activities were carried out by a regulated public utility. *In re Chesapeake Utilities Corp.*, No. 18-0933, Order No. 9297 (Dec. 20, 2108). A1235-8. The PSC Order expressly acknowledged that it considered the written public comments submitted by "non-parties," including the DAAEP. *Id.* The PSC Order also noted that, given the dismissal, the DAAEP's intervention petition was moot. *Id.*

Chesapeake's Second Propane CGS Application

On August 20, 2019, a mere eight months later, Chesapeake filed an essentially identical application to the one dismissed in Docket No. 18-0933, and again asked the PSC to regulate its conversion of Sharp Energy's propane CGSs to natural gas systems to be acquired and operated by Chesapeake. A187-230. It was assigned Docket No. 19-0529. Although presenting the identical subject matter

jurisdiction question about propane regulation as the preceding Docket 18-0933, the Staff and Public Advocate did not move to dismiss. The PSC referred the application to a Hearing Examiner. A234-64. In May 2020, the parties reached a Settlement Agreement in Docket No. 19-0529 and the Public Advocate's counsel sent an information copy to the DAAEP's counsel. A253-64. However, the Settlement Agreement was still subject to review and a recommended decision by the Hearing Examiner. A234-64. The Hearing Examiner's Report was apparently issued on May 18, 2020, but was not publicly available to the DAAEP due to problems with public access to Delafile, the PSC's notoriously unreliable electronic filing system. A338-42, 937-8.

DAAEP Seeks to File a Complaint

On June 9, 2020, the DAAEP attempted to file a Complaint in PSC Docket No. 19-0529 pursuant to 26 *Del. C.* § 206. A338-42, 347-421. The Delafile electronic filing system could not be accessed. A338-42. The DAAEP was unable to download filings from Docket No. 19-0529, or upload its Complaint. A338-42. That day, the DAAEP contacted the PSC's Executive Director and informed him. A338. The DAAEP did provide the Complaint by email to the parties in Docket No. 19-0529. A338. Given the problems with the Delafile system, the PSC Executive Director sent a June 9, 2020 email to all parties explaining "*how we are going to deal with the DAAEP Complaint in Docket 19-0529 filed today.*"

(Emphasis added) A342. Among other things, the email informed all parties to Docket No. 19-0529 that a PSC Staffer “will upload DAAEP’s complaint to Delafile under the same docket (19-0529).” A342. It explained that the PSC would address the DAAEP’s Complaint at its next meeting on June 17, 2020, and would take action on it before any hearing on Docket No. 19-0529, which presumably would address the Hearing Examiner’s report and the parties’ Settlement Agreement. A342.

On June 10, 2020, the PSC’s Executive Director sent a letter contradicting his written statements sent a day earlier saying that, while the Complaint was filed “with reference to Docket No. 19-0529, the Complaint would be assigned a new docket number, 20-0357....” A420-1.

DAAEP Seeks to File Public Comments

After the Executive Director reversed course and declined to file the DAAEP’s Complaint in Docket 19-0529, the DAAEP attempted to make a six-page public comment filing in the docket. A268-73. On June 15, 2020, the PSC Acting Secretary rejected the filing on the ground that the deadline for public comments had passed on March 6, 2020, and refused to forward the public comments to the Commissioners. A344-6. In response, the DAAEP argued that only the Commission, itself, had the power to reject filings as untimely. A344-6. The DAAEP also noted that, if the deadline for public comment expired on March

6, 2020, the public was afforded no opportunity to comment on the Hearing Examiner's report and Settlement Agreement, because they did not even exist and thus were not available to the public until May-June 2020. A344-6. The DAAEP's Public Comments were never provided to the Commission or docketed. All of this transpired during the worst pandemic crisis in a century, with thousands of Delawareans attempting to work remotely. A346.

The DAAEP appeared at the June 17, 2020 PSC Public Hearing (held remotely due to Covid) in Docket 19-0529. A257-301. However, the DAAEP's counsel was not permitted to offer public comment until after the PSC voted unanimously to approve Order No. 9594, the Hearing Examiner's Report, and the Settlement Agreement. A284-6, 1243-77.

The PSC Dismisses the DAAEP's Complaint

After the PSC Executive Director declared that the DAAEP's Complaint would be handled as a separate docket and designated it Docket No. 20-0357, the respondents moved to dismiss. A422-59, 460-499. The DAAEP submitted the Declaration of its Treasurer Brian Reynolds in support of its Complaint. A698-706. The parties engaged in extensive briefing of the motions to dismiss. A500-82, 422-59, 460-99, 634-72.

The DAAEP Complaint and the Reynolds Declaration establish how Chesapeake's application in Docket No. 19-0529 is intended to cause economic

injury to the DAAEP and its members. A347-421, 698-706. Chesapeake's goal is to use its economic power and that of its affiliate Sharp Energy to take over the propane CGSs owned and operated by members of the DAAEP, convert them to Chesapeake natural gas, and cause economic injury to the DAAEP and its members. A347-54.

On August 19, 2020, the PSC entered Order No. 9635 in Docket No. 20-0357, dismissing DAAEP's Complaint. A1239-42.

**PSC Order No. 9594 and The Settlement Agreement Conflict with Previous
PSC Orders and Settlement Agreements, Including PSC
Order No. 7434**

The DAAEP was a party to several prior PSC proceedings filed by Chesapeake, which involved the Sharp-owned CGSs. A354-5. They include *In The Matter of The Application of Chesapeake Utilities Corp. For a General Increase In Its Natural Gas Rates* (Opened July 6, 2007), PSC Docket No. 07-186. A354-5. That docket resulted in PSC Order No. 7434 (Sept. 2, 2008), which includes the Hearing Examiner's Report (dated August 25, 2008) and the Parties' Settlement Agreement. A354-5. PSC Order No. 7434 approved the Hearing Examiner's Report and the parties' Settlement Agreement, which included the DAAEP as a party. A355.

In their Joint Motion to Dismiss before the PSC, the Public Advocate and the Staff made two admissions. First, they admitted that, under the Settlement

Agreement approved in PSC Order No. 9594, the PSC decided “*to allow Chesapeake to pay some (not all) of the costs that CGS customers will incur in converting to natural gas and to allow Chesapeake to include those costs in its rate base.*” (Emphasis added.) A442. Thus, the Public Advocate and Staff conceded that the Settlement Agreement violates key provisions of PSC Order No. 7434 and the contractually binding Settlement Agreement approved there. Second, the Motion says that: “*The DPA and Staff do not dispute that the Settlement Agreement in Docket No. 07-186 is a contract, and that its approval in Order No. 7434 bound the signatories thereto.*” (Emphasis added.) A438.

Paragraph 32 of the Settlement Agreement approved in Order No. 7434 provides:

32. The Settling Parties may enforce this Proposed Settlement through any appropriate action before the Commission or through any other available remedy. The Settling Parties shall consider any final Commission order related to the enforcement or interpretation of this Proposed Settlement as an appealable order to the Superior Court of the State of Delaware. This shall be in addition to any other available remedy at law or in equity. A356.

Therefore, Chesapeake, the Public Advocate, and the Staff agreed that the DAAEP could enforce the Settlement Agreement in an appropriate action before the PSC. A356. The filing of a complaint docket with the PSC is expressly permitted by 26 *Del. C.* § 206 and the PSC’s Rules of Practice and is therefore “an appropriate action before the Commission.”

In paragraph 6 of the Settlement Agreement approved in Order No. 7434, the parties agreed that its provisions “will serve the interests of the public and the Company....” A356-7. In paragraph 34, the same parties agreed that the Settlement Agreement would serve as an admission if a party attempted to abrogate its provisions. A356-7. In Order No. 7434, the PSC found that the Settlement Agreement served the public interest. *See* Order No. 7434, p. 1. A357.

Paragraph 17 of the Settlement Agreement approved in Order No. 9594, PSC Docket No. 19-0529, expressly states, in part: “Any party may challenge Chesapeake’s request to recover CGS acquisition and conversion costs in the base rate case in which the Company seeks recovery of those costs.” A357. This provision opens the door for Chesapeake to recover acquisition and conversion costs in base rates. A357. The provision directly contradicts the Settlement Agreement approved in PSC Order No. 7434 to which the DAAEP was a party. A357.

The Hearing Examiner’s Report approved in Docket No. 19-0529, Order No. 9594, acknowledges Chesapeake’s admission that its proposal involves Chesapeake paying for the behind-the-meter costs for conversions: “Chesapeake, by paying for and performing the behind-the-meter conversions, the Company will increase the number of residents converting to natural gas because the new customers will not face the up-front cost of converting their appliances and

equipment to natural gas service, which typically costs approximately \$1,500.”
(Footnote omitted.) A313, 1243-77.

The DAAEP has been a party to other PSC proceedings and written Settlement Agreements approved by PSC orders which involved: a) applications by Chesapeake for approval of Natural Gas Expansion and related service offerings; and b) Chesapeake’s Code of Conduct. A357-8. *See, e.g.*, PSC Order No. 8479 (Nov. 5, 2013), *In the Matter of the Application of Chesapeake Utilities Corporation for Approval of Natural Gas Expansion Service Offerings* (Filed June 25, 2012) PSC Docket No. 12-292. A357-8.

Chesapeake’s Code of Conduct and Waiver of the Asymmetric Pricing Rule

Paragraph 19 of the Settlement Agreement in Docket 19-0529 required the PSC to enter an order approving the waiver of the asymmetric pricing rule for purposes of Chesapeake’s acquisition and conversion of Sharp Energy propane CGSs. A369-71. The PSC expressly approved the waiver provision in Order No. 9594, par. 3, along with other provisions of the Settlement Agreement. A369-71, 1243-77. Chesapeake’s Code of Conduct was approved in PSC Order No. 5828 (Nov. 6, 2001) in Docket No. 00-523. A352. The Settlement Agreement offers no explanation, legal analysis, or legal support for the waiver provision, its approval by the PSC, or the legal basis for the Public Advocate and Staff to agree, in advance, to its waiver. The Settlement Agreement directly contradicts a key

provision of Chesapeake's Code of Conduct without any legal or factual justification.

The Code of Conduct expressly prohibits Chesapeake from giving preference to Sharp Energy propane CGSs or its customers. A369-71.

Chesapeake's Application conceded that the asymmetric pricing rule in its Code of Conduct requires it to purchase Sharp CGSs at the lower of the affiliate's cost (*i.e.*, its net book value) or the market value of the asset. A370-1. Given the age of the Sharp CGSs, the cost would undoubtedly be the net book value. A370-1.

Chesapeake's Application cites PSC Order No. 5828 (Nov. 6, 2001) in that docket, which provides:

Pricing Principles. The Settling Parties agree that ... for transfer of assets between Regulated Activities ("Chesapeake") and Non-Regulated Activities, ("Affiliate") asymmetric pricing principles (*i.e.* for transfers from Chesapeake to the Affiliate, the higher of fully allocated cost or market price; for transfers from the Affiliate to Chesapeake, the lower of fully allocated cost or market price) shall apply. Asymmetric pricing principles shall also apply to the provision of services, exclusive of shared services or common support services, provided however that if the market price of such service is not reasonably ascertainable, fully allocated costs will be used. Chesapeake Application, p. 9, n.26. A370-1.

A major purpose of the Code of Conduct, including the asymmetric pricing rule, was to prevent Chesapeake from using Sharp Energy to gain an unfair advantage over its unregulated competitors, including propane providers like the DAAEP. A370-1. In the Settlement Agreement, the Public Advocate and the Staff

agreed that they would not oppose a waiver of the asymmetric pricing rule in future proceedings involving the conversion of Sharp Energy's propane CGSs. A382, par. 19. However, the Settlement Agreement offers no rationale for their agreement, which will clear the way for Chesapeake to obtain a waiver of this key, longstanding provision. In addition, it will completely undercut a major purpose of the Code of Conduct by allowing Chesapeake to use its unregulated Sharp Energy propane business to gain unfair advantages over the DAAEP's members. A369-71.

Delaware's Recognized Public Policy About the Environment and Energy

While the Hearing Examiner's Report in Docket No 19-0529 discussed Delaware public policy, it does not contain a meaningful discussion and analysis of the subject. A306-23. Indeed, it does not appear that the Public Advocate or the Staff offered any independent, objective evidence, current information, or up-to-date analysis of the subject. Chesapeake's Settlement Agreement is contrary to Delaware's stated public policy, which favors renewable energy over fossil fuel resources for Delaware's future. A362.

The Delaware General Assembly has made the following findings:

- “(1) There is growing scientific consensus that the increased anthropogenic emissions of greenhouse gases are enhancing the natural greenhouse effect and causing changes in the Earth's climate.
 - (2) Climate change poses serious potential risks to human health and terrestrial and aquatic ecosystems globally, regionally and in the State.”
- 7 Del. C. § 6043.* A362.

The General Assembly has recognized that “[p]roviding affordable, reliable, and clean energy for all consumers in Delaware is in the public interest and will yield social, economic, and welfare benefits for generations to come.” *26 Del. C. § 1500(b)(3)*. A362-3. Furthermore, the General Assembly expressly encourages the use of renewable energy resources over legacy fossil fuel sources by acknowledging the benefits to the public of using renewable energy resources to produce electricity, including improved regional and local air quality and improved public health. *26 Del. C. § 351(b)*. A362-3.

Ten years ago, the Delaware General Assembly recognized that a “community-owned energy generating facility” offers advantages for Delawareans, as compared to centralized, large-scale energy distribution systems. *77 Del. Laws c. 453; 26 Del. C. Ch. 10*. A362-3. Chesapeake’s strategy in 2019-2020 is out-of-date, and at odds with Delaware’s public policy and the long-term environmental and economic interests of its citizens, as repeatedly recognized by the Delaware General Assembly in existing legislation approved by Delaware’s Governors. A363. Delaware’s legislative public policy supporting renewable energy for its future is a reflection of national and global business trends and consumer attitudes. A364-9.

PSC Order No. 9594, the Settlement Agreement, and the Environment

The Hearing Examiner's Report and the Settlement Agreement approved in PSC Order No. 9594 acknowledge that "Chesapeake proposed to acquire CGSs, one community at a time, at their replacement cost and to pay for and capitalize the CGS residents' behind-the-meter conversion costs" with an amortization period of thirty years. A312-3, 326, 1243-77. The Hearing Examiner's Report further notes that "Chesapeake is expanding within eastern Sussex County due to the new customer growth and projects to have natural gas main at or near the entrance of approximately 12 Sharp-owned CGS systems, representing over 5,000 residential units, within the next five (5) years." (Footnotes omitted.) A313-4.

Chesapeake's plan to convert Sharp Energy propane CGSs to natural gas offers no timetable, except an approximation that about twelve of the more than forty Sharp Energy propane CGSs may be able to be converted to natural gas over the next five years. A363-4. Chesapeake's past experience, its evidence, the Hearing Examiner's Report, and the Settlement Agreement demonstrate that the conversion plan will take decades. A363-4. Systems that are converted to natural gas in five years will be operating in 2055 and 2060. A363-4. Chesapeake's plan for a fossil fuel future for thousands of Delawareans is self-serving, and short-sighted both economically and environmentally. A363-4.

Natural gas is a non-renewable, carbon dioxide-generating fossil fuel, and a major contributor to pollution and climate change in the United States and Delaware. A363. While, as a practical matter, the United States and Delaware must rely upon natural gas and propane to a substantial degree to meet current energy needs, locking Delaware into greater and greater long-term reliance on natural gas for decades to come is not an environmentally or economically sound strategy. A3633. Furthermore, such a strategy is at odds with Delaware's public policy, as repeatedly recognized by the Delaware General Assembly in existing legislation approved by Delaware's Governors. A363.

Fifty-one members of the public submitted written comments in support of the DAAEP's Complaint. A584-633, 695-6. The public comments expressed concerns for the environmental impact of Chesapeake's plan to expand its natural gas infrastructure, and instead called for support for community-based renewable energy. A584-633, 695-6.

The Superior Court Appeal

The DAAEP filed its appeal to the Superior Court stating twenty-three grounds for appeal. A710-24. On October 28, 2020, the Superior Court issued a briefing schedule under Rule 107(b), with the opening brief due on November 23, 2020. A732. On October 30, 2020, Chesapeake, the Public Advocate, and the PSC filed a joint six-page motion to dismiss. A733-38. On November 12, 2020, the

Court issued a letter instructing the DAAEP to respond to the six-page motion.

A739. On November 16, 2020, the DAAEP filed a motion requesting a new briefing schedule and an extension of the word limits for its briefs. A740-807. In response, the Court indicated that the six-page motions to dismiss were to be resolved before the Court issued a revised briefing schedule. A739.

At the DAAEP's request, the Superior Court issued a Citation on Appeal, which directed the PSC to send certified copies of the records in Docket Nos. 19-0529 and 20-0357 to the Superior Court. A870-1. On October 26, 2020, the PSC, without seeking relief from the Court, declined to forward the certified copy of the record in 19-0529 stating that the DAAEP "was not a party to that proceeding and no appeal was taken by any party to the Commission's decision in that matter." A873. The DAAEP filed a motion to compel the PSC to comply with the Citation and the Superior Court never addressed it. A808-76.

ARGUMENT

I. THE DAAEP HAD STANDING TO FILE ITS COMPLAINT WITH THE PSC.

A. Question Presented

Whether the Superior Court erred when it concluded that the DAAEP lacked standing to file its Complaint with the PSC. A717, 892-98.

B. Scope of Review

The issues related to standing involve both questions of law that this Court can consider *de novo*, and mixed questions of law and fact.

C. Merits of Argument

In granting the motion to dismiss, the Superior Court said that the “issue in this case is how the PSC interprets its statutory authority under 26 Del. C. § 503....” Ex. A. *Op.* p. 7. The Court then said: [T]his appeal is going to rest on whether the DAAEP was a party to the hearing for Docket No. 19-0529.” *Id.* These conclusions are erroneous as a matter of law and fact. Section 503 provides:

(a) All hearings before the Commission, or its designated representative, shall be public, and shall be conducted in accordance with the rules of practice and procedure prescribed by the Commission. In the conduct of such hearings, the Commission shall not be bound by the technical rules of evidence. A full and complete record shall be kept of all proceedings had before the Commission, or its representative, in any formal hearing, and all testimony shall be either recorded or taken down by a reporter designated by the Commission, and a verbatim transcript prepared and the parties shall be entitled to be heard in person or by attorney, and to introduce evidence.

Section 503 does not define the subject matter jurisdiction of the PSC. Section 503 is found in Subchapter V of Title 26, the Public Utility Code, which concerns the conduct of hearings, not jurisdiction. Section 503 does not say that *only* parties may be heard at a PSC hearing. Indeed, the PSC frequently allows non-parties and members of the public to be heard at its hearings. The PSC allowed the DAAEP to be heard at the June 17, 2019 hearing in Docket 19-0529, although belatedly. Therefore, if being permitted to be heard at a PSC hearing confers party status, the DAAEP was, according to the Superior Court's rationale, a party to Docket 19-0529. The Court's Section 503 and its "party" analysis are flawed.

DAAEP's Complaint was filed pursuant to 26 Del. C. § 206, which provides:

The Commission may investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility.

Section 206 is found in Subchapter II of the Public Utility Code, which contains provisions establishing the jurisdiction of the PSC. While the PSC has no authority to regulate propane, it has broad jurisdiction to investigate written complaints concerning a public utility, including the DAAEP's Complaint against Chesapeake. The enabling statute, Section 206, is broad, and does not require that a complaint be filed by a utility customer or the "consuming public." It does not

restrict who may file a complaint. Instead, the complaint must relate to “any matter concerning any public utility.”

The General Assembly’s decision not to limit complaints against public utilities to their customers makes sense. Assume hypothetically that Chesapeake had a leaking natural gas pipeline that runs directly past several Delaware business locations and is failing to repair it. Assume that the Delaware business owners use only solar electric power, have never been Chesapeake customers, and become aware of the gas leak, and that Chesapeake will not correct the dangerous condition. If a threatened business files a written complaint with the PSC, should it be dismissed without action for lack of standing? Of course not.

The Superior Court’s opinion does not discuss or cite Section 206, even though it was expressly raised in the DAAEP’s opposition. A892-948, at 893, 896. Indeed, the DAAEP complained that the movants’ papers did not mention Section 206. A896. The Superior Court ignored the seminal jurisdictional statute cited to it. Instead, the Superior Court cited a statute about the conduct of hearings, and ruled that the DAAEP did not petition to intervene and was not a party to Docket No. 19-0529. Ex. A *Op.* p. 8. The Superior Court proceeded to analyze what it means to be a “party” under the definition in § 10102(6) of the Administrative Procedures Act, 29 Del. C. Ch. 101:

(6) “Party” means each person or agency named or admitted in an agency proceeding as a party, or properly seeking and entitled as of right to be admitted as a party to an agency proceeding. Ex. A *Op.* p. 8.

Nothing in the definition limits party status to customers of regulated utilities, or requires a complaining party to be a member of the “consuming public.” The Superior Court agreed that the DAAEP was a person. However, the Court said that, to be a party, the DAAEP must also be “aggrieved” and incorrectly concluded that the term “aggrieved” means “that a person or entity [is] subject to the regulations of the agency or commission with whom the complaint is filed.” Ex. A *Op.* at 8 and n. 22. The Court then reasoned that the DAAEP was not “aggrieved,” “because DAAEP is not subject to regulations that PSC may issue regarding the conversion of Systems from propane to natural gas.” Ex. A *Op.* at 9.

Respectfully, neither Docket 19-0529 nor 20-0357 were regulation-making dockets. Chesapeake did not call for the promulgation of regulations, and the PSC entered Order No. 9594 in Docket 19-0529 without any mention of regulations. A1243-77. The cases cited by the Superior Court are inapposite as they involved regulation-making proceedings.

That aside, the Superior Court failed to properly address the DAAEP’s assertions of harm. It ignored the fact that the PSC ruled upon the DAAEP’s Complaint in the context of a motion to dismiss, which required the PSC to accept all well pled facts in the Complaint as true, which the PSC failed to do. For its

part, the Superior Court generally acknowledged the standards for its review, but then failed to *apply* the appropriate standard to the motion to dismiss. The Superior Court was, in turn, required to accept as true the allegations in the DAAEP's Complaint, and it never mentioned the supporting Reynolds Declaration. Instead, the Superior Court ignored the standard of review and reached factual conclusions with no reference to, or support in, the record.

Under Delaware law, an association may bring an action on behalf of its members. *See, e.g., Delaware State Sportsman Association v. Garvin*, 196 A.3d 1254, 1264-1265 (Del. Super. 2018) and authorities cited therein. In addition, a party does not have to suffer an actual injury or immediate damages before having a legal right to bring a claim, if, for example, an agency action violates its rights or threatens future injury. *Id.* at 1262-1263. *See also Public Service Company of Colorado v. Trigen-Nations Energy Co.*, 982 P.2d 316, 324 (Colo. Supr. 1999)(In the context of agency action, the injury-in-fact element of standing does not require that a party undergo actual injury, as long as the party can demonstrate that the administrative action threatens to cause an injury.). The Complaint alleged that the DAAEP itself, its members, employees, and customers will be directly affected by the Settlement Agreement. A353-4. They are legally "aggrieved" and their allegations should have been accepted as true.

There are additional reasons to conclude that DAAEP had standing. First, Chesapeake's application and evidence make clear that it is Chesapeake's plan to use Order No. 9594 as the basis to establish the terms by which it will acquire and convert propane CGSs that are owned by its competitors, including members of the DAAEP. Chesapeake's conversion plan will take years to complete and the DAAEP and its members will be continually threatened with injury.

Second, Chesapeake's filings and the Hearing Examiner's Report establish that Order No. 9594 and the Settlement Agreement that it approved will have direct and substantial effects on the DAAEP and its members. Citing the testimony of Chesapeake's Shane Breakie, the Hearing Examiner noted that the propane conversion program is not only intended to affect the Sharp Energy propane CGSs, but also "residents in the communities surrounding the communities being converted, current and potential businesses, [and] builders/developers, as well as existing Chesapeake customers." (Footnote omitted) A316. Relying further on Breakie's testimony, the Hearing Examiner observed: "Additionally, once Chesapeake installs distribution mains to reach these customers it will be easier for Chesapeake to reach and convert other residents and businesses near those lines which are unable to be economically reached today." (Footnote omitted.) A317. Indeed, it is a key premise of the Settlement Agreement that providing large scale, natural gas infrastructure service to community residents

and businesses is allegedly superior to the propane service provided by the DAAEP's members.

The Hearing Examiner acknowledged that a principal purpose of the Settlement Agreement is to allow Chesapeake to acquire and "convert" the propane systems maintained by the DAAEP's members to natural gas. Thus -- in the long run -- Chesapeake's intent is take as many customers from the DAAEP members as possible with the potential to put them out of business. Order No. 9594 and the Hearing Examiner's Report establish that the Settlement Agreement is intended to have direct effects on the DAAEP and its members, who provide propane service to communities and businesses in Delaware. Therefore, the DAAEP has a substantial vested economic interest in the issue of the PSC's jurisdiction to regulate propane.

In *Smith v. Delaware Coach Co.*, 70 A.2d 257 (Del.Ch. 1949), the Court of Chancery held that an individual taxpayer could maintain an action to enjoin the PSC from allowing a bus company to charge increased fares to passengers, because the individual and his family used buses and would be subject to the higher bus fares. The Court held that the obligation to pay a higher bus fare is a sufficient financial impact to afford standing to an individual Delaware taxpayer to challenge a PSC order. The DAAEP, as an incorporated Delaware association of propane businesses that pay taxes and maintain and operate propane systems in Delaware,

must have standing when the PSC asserts extra-jurisdictional authority to regulate propane, and approves a Settlement Agreement intended to adversely affect their businesses and financial interests.

Third, the DAAEP is a party to prior proceedings and settlement agreements approved by PSC orders, and thus has contractual, legal, and regulatory standing to challenge PSC Order No. 9594, which impairs and undermines its pre-existing contractual and legal rights. For example, a principal reason for the PSC imposing a Code of Conduct upon Chesapeake was to prevent it from using its unregulated Sharp Energy subsidiary to give it an unfair economic advantage over its competitors. However, that is precisely what is happening with Order No. 9594. PSC Order No. 9594 is the equivalent of a revocation of the asymmetric pricing rule in Chesapeake's Code of Conduct, which was intended to afford a measure of protection to the DAAEP's members and maintain a level playing field in the provision of energy in Delaware. Now that Chesapeake has realized the fruits of that propane business, it is being relieved of the very restrictions that served as the rationale for allowing it to get into the propane business in the first place.

The DAAEP is a party to a number of binding contractual Settlement Agreements approved by PSC Orders, including PSC Order No. 7434 (Sept. 2, 2008). A354-8. There, the PSC approved a Settlement Agreement which guaranteed that: a) Sharp Energy's propane customers would be responsible for

paying the costs of converting appliances and equipment to natural gas; and b) Those costs would not be included in Chesapeake's rate base. PSC Order No. 9594 violates both of those provisions. In their moving papers before the PSC, the Public Advocate and Staff admitted that the Settlement Agreement approved in PSC Order No. 9594, would "allow Chesapeake to pay some (not all) of the costs that CGS customers will incur in converting to natural gas and to allow Chesapeake to include those costs in its rate base." A442. These substantial, material new provisions directly contradict the contractual and legal rights of the DAAEP as a party to the prior proceeding that resulted in Order No. 7434. Chesapeake, the Public Advocate, and the Staff were willing parties to those contracts and proceedings. They were represented by counsel and knew full well that they were making binding contractual commitments to the DAAEP. The Public Advocate and the Staff admit that the Settlement Agreement approved in PSC Order No. 7434, Docket No. 07-186 is a contract and that it "bound the signatories thereto." A438. The PSC approved the contract, thereby adding its legal imprimatur.

The DAAEP does not contend that the PSC is locked into all provisions of its previous orders and approved settlement agreements. Rather, the DAAEP contends that the PSC cannot change substantial material provisions without allowing the parties to those contracts and final PSC Orders to file a complaint and

obtain redress, when the settlement agreements are being overturned and violated. Similarly, the DAAEP does not argue that Chesapeake, the Public Advocate and Staff could never seek material changes to their prior settlement agreements. However, they cannot do so unilaterally and deny the DAAEP any avenue to oppose those changes.

Fourth, the PSC's action is state-sponsored and an unlawful impairment of the DAAEP's contractual rights. See *U.S. Constitution, Article I, Section 10*. The provisions of this latest Settlement Agreement among Chesapeake, the Public Advocate, and the Staff constitute a breach of the DAAEP's contractual rights. Paragraph 32 of the Settlement Agreement approved in PSC Order No. 7434 expressly gives standing to the DAAEP to bring an action for relief. And as alleged in its Complaint, the DAAEP is a party to other PSC proceedings and Settlement Agreements which are violated by Order No. 9594, further giving the DAAEP standing. See, e.g., PSC Order No. 8479 (Nov. 5, 2013), *In the Matter of the Application of Chesapeake Utilities Corporation for Approval of Natural Gas Expansion Service Offerings* (Filed June 25, 2012) PSC Docket No. 12-292. A357-8.

Fifth, the DAAEP is an association incorporated in Delaware, and its members are Delaware businesses. For these reasons, the DAAEP has standing to seek redress, and the right to have its voice heard on matters related to Delaware

energy policy, particularly where the PSC acknowledges that the policy at issue, as framed by the Hearing Examiner's Report and the Settlement Agreement, is intended to affect the DAAEP and its members. According to the U.S. Supreme Court, incorporated entities have rights that are protected by the U.S. Constitution. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The only reasonable conclusion is that the DAAEP had standing to bring its Complaint.

Sixth, Chesapeake, the Public Advocate, and Staff entered into the Settlement Agreement in Docket No. 07-186 with advice of counsel and knowledge of the material facts related to that settlement. Those parties knowingly waived any rights they may have had to challenge the filing of the DAAEP's Complaint.

II. THE SUPERIOR COURT ERRED BECAUSE IT FAILED TO APPLY THE CORRECT STANDARD OF REVIEW IN GRANTING DISMISSAL.

A. Question Presented

Whether the Superior Court committed an error of law because it failed to apply the correct legal standard of review in dismissing the DAAEP's appeal. A892-8.

B. Scope of Review

Whether the Superior Court committed an error of law by applying an incorrect legal standard of review to the DAAEP's appeal is a question of law. On appeal of an administrative agency's adjudication, this Court must determine whether the agency's decision is supported by substantial evidence and free from legal error. Questions of legal error are reviewed *de novo*.

C. Merits of Argument

Under Super. Ct. Civ. R. 72, an appeal from a PSC Order may be dismissed only if the appellant fails to set forth any semblance of a legal argument upon which relief can be granted. *Woodruff v. Foulk Manor North*, 2016 Lexis 4, p.4 (Del. Super. Ct. Jan. 6, 2016). Indeed, dismissal may be granted only if the appellant fails to articulate even the barest modicum of evidence or legal argument in favor of its position. *Goubeaud v. County Environmental Co.*, 2013 WL 3001489, p. 3 (Del. Super. June 7, 2013). DAAEP's Notice of Appeal states twenty-three separate grounds for appeal.

The Superior Court failed to address the many substantial legal and factual issues raised by the appeal. Instead, the Court abused its discretion by failing to allow adequate briefing with appropriate word limits for addressing the issues presented, even the issue of standing. Relying upon an inapplicable statute, its own incorrectly decided prior order denying the DAAEP intervention in a PSC proceeding, and a flawed legal and factual analysis, the Court dismissed the DAAEP's appeal without an adequate opportunity to even brief the issues.

**III. THE SUPERIOR COURT ERRED WHEN IT FOLLOWED ITS
PREVIOUS ORDER HOLDING THAT THE DAAEP COULD NEVER
BE A PARTY TO PSC PROCEEDINGS INVOLVING CHESAPEAKE
BECAUSE COMPETITORS OF REGULATED PUBLIC
UTILITIES LACK STANDING.**

A. Question Presented

Whether the Superior Court committed an error of law when it followed its previous order in *Chesapeake Utilities Corp. v. Delaware Public Service Commission*, 2017 WL 2480804 (Del. Super. June 7, 2017) ruling that the DAAEP, as a competitor of Chesapeake, could not be a party to Commission proceedings. A896-7.

B. Scope of Review

Whether the Superior Court correctly decided *Chesapeake Utilities Corp. v. Delaware Public Service Commission*, 2017 WL 2480804 (Del. Super. June 7, 2017) is a question of law that this Court should consider *de novo*.

C. Merits of Argument

Public utility law is state-specific. There are states, like Delaware, that have allowed parties like the DAAEP to intervene in public utility proceedings before a state commission. *Public Service Company of Colorado v. Trigen-Nations Energy Co.*, 982 P.2d 316, 323-6 (Colo. Supr. 1999)(Cogeneration facility operator and advocate for non-utility independent electric power generators have standing to contest Public Utilities Commission's (PUC) protective order.); *Re Columbia Gas*

of Maryland, Inc., 1990 WL 10702702, (Md. P.S.C. June 26, 1990)(Maryland Commission authorized competitor of public utility to intervene in Commission proceeding.). The DAAEP has standing to intervene in PSC proceedings which affect its interests. Likewise, it has standing to file a complaint with the PSC related to proceedings which affect its interests.

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION BY FAILING TO ENTER A FULL BRIEFING SCHEDULE THAT ALLOWED FOR A FAIR AND ADEQUATE PRESENTATION OF THE ARGUMENTS ON THE ISSUES PRESENTED BY THE APPEAL AND BY FAILING TO ADDRESS THE DAAEP'S MOTION TO REQUIRE THE PSC TO COMPLY WITH THE CITATION ON APPEAL.

A. Question Presented

Whether the Superior Court abused its discretion by failing to enter a full briefing schedule that allowed for a fair and adequate presentation of the argument on the issues on appeal and by failing to address the DAAEP's motion to require the PSC to comply with the Citation of Appeal. A892-8, 740-807.

B. Scope of Review

These issue involve mixed questions of law and fact. The scope of review is an abuse of discretion standard.

C. Merits of Argument

The DAAEP respectfully submits that, given the numerous, substantial, and important issues raised by the appeal, the Superior Court abused its discretion when it dismissed the case with limited six-page motions and similarly limited responses by the DAAEP, instead of allowing full briefing at least consistent with the word limitations in Rule 107. The Court also erred by failing to address the DAAEP's motion to require the PSC to comply with the Citation on Appeal and forward the record in Docket No. 19-0529.

V. THE DAAEP WAS NOT REQUIRED TO SEEK LEAVE TO INTERVENE IN DOCKET NO. 19-0529 AND ACCORDING TO CHESAPEAKE, IT HAD NO RIGHT TO DO SO.

A. Question Presented

Whether the DAAEP was required to file a motion to intervene in PSC Docket No. 19-0529 in order to bring its appeal. A719, 892-8.

B. Scope of Review

This issue is a mixed question of law and fact. This Court should consider the matter *de novo*.

C. Merits of Argument

Before the PSC, Chesapeake asserted that the DAAEP had no legal right to intervene in Docket No. 19-0529, citing the Superior Court's Order in *Chesapeake Utilities Corp. v. Delaware Public Service Commission*, 2017 WL 2480804 (Del. Super. June 7, 2017). It argued that the DAAEP's Complaint must be dismissed because it did not intervene in Docket No. 19-0529. Thus, according to Chesapeake, the DAAEP should be penalized for failing to do what Chesapeake says it had no legal right to do. This Court should not accept Chesapeake's "Catch-22" argument.

The Superior Court's unreported Order of June 17, 2017 in *Chesapeake Utilities Corp. v. Delaware Public Service Commission* ("the Chesapeake Order") is not a controlling precedent. It is a non-binding, advisory order only, it is

distinguishable, and it was incorrectly decided as a matter of law and fact. Furthermore, it is not a binding precedent because, under Delaware law, as a general proposition, only reported decisions are binding under the doctrine of *stare decisis*.

In *State v. Phillips*, 400 A.2d 299, 308, the Court of Chancery held: “The prerequisites necessary for the application of the doctrine of *stare decisis* are: a judicial opinion by the court, on a point of law, expressed in a final decision. Generally the decision or opinion must also be reported.” *See also Donovan v. Whitney*, 1992 WL 1368643, *3 (Del. Ch. Master’s Report, Oct. 16, 1992)(To arise to the level of *stare decisis*, an opinion must be reported, citing *State v. Phillips, supra*, and other authorities). The *Chesapeake* Order is unreported and it does not constitute an opinion of the Court. As a matter of Delaware law, the unreported *Chesapeake* Order does not qualify as *stare decisis*.

Moreover, the *Chesapeake* Order recognized that all of the issues in the underlying PSC case had been settled, with the sole exception of the DAAEP’s standing to intervene. Therefore, the Superior Court should not have decided the intervention issue, because there was no longer an underlying controversy that might be affected by its order. The settlement of the underlying case made the issue of intervention moot, and the Superior Court’s order was, in essence, an advisory opinion, which cannot be considered precedential. *Rollins International*,

Inc. v. International Hydronics Corp., 303 A.2d 660, 662 (Del. 1973)(Delaware courts do not entertain suits seeking an advisory opinion or an adjudication of hypothetical questions.).

The fact that the parties, including the DAAEP, agreed to preserve the intervention issue for appeal could not confer jurisdiction, because parties cannot confer jurisdiction upon a court by agreement, where it does not otherwise exist. *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

Next, Delaware law does not allow settling parties to preserve an issue for appeal within a settlement agreement. The unreported Delaware decision in *Maddox v. Justice of the Peace Court No. 19*, 1991 WL 215650 (Del Super. Ct. Sept. 24, 1991) appears to be the only Delaware case to address the issue head on, and it unequivocally rejected the argument that parties can carve out an issue for appeal from a case that has settled. *Maddox* arose out of a landlord/tenant dispute, and held that an appeal does not lie from a consent judgment. In doing so, the Court cited numerous authorities from other jurisdictions as persuasive. After the Superior Court issued its decision, the case was returned to the Delaware Supreme Court, which dismissed the appeal. *Maddox v. Justice of the Peace Court*, No. 19, 604 A.2d 418 (Del. 1991)(Table). In its order dismissing the appeal as moot, the Delaware Supreme Court panel noted that the appellant conceded that she was no

longer a tenant of the landlord/appellee, there was no real underlying dispute, and therefore no jurisdiction existed over the appeal because of mootness.

The issues addressed in the *Chesapeake* Order and Docket Nos. 19-0529 and 20-0357 are not identical. The rate case underlying the *Chesapeake* Order did not involve the issue of whether the PSC can assert jurisdiction over propane distribution systems, propane equipment and appliances, notices to propane customers, mandatory filings about propane systems with the PSC, and the provision of service to propane customers. In Docket No. 19-0529, Chesapeake is having the PSC regulate propane businesses, propane CGSs, and propane customers. The *Chesapeake* Order was not issued in the context of such a proceeding. This appeal involves the PSC's authority to entertain a complaint proceeding under Section 206 of Title 26.

The DAAEP's Complaint raises the question of the PSC's power to regulate the conversion of the forty-plus Sharp Energy-owned propane CGSs. Chesapeake asked the PSC, by implication, to overrule its own Order No. 9297 and determine that it has jurisdiction to regulate the conversion of privately-owned propane CGSs, propane distribution systems, propane appliances and equipment, the provision of service to propane customers, and other matters. Chesapeake's argument necessarily applies to privately owned propane CGSs, because the Sharp Energy systems are privately owned, and not operated by a public utility. These

issues were not squarely before the Superior Court in the prior case that led to the *Chesapeake* Order.

VI. THE PSC LACKED SUBJECT MATTER JURISDICTION TO ENTER ORDER NO. 9594 AND APPROVE THE SETTLEMENT AGREEMENT.

A. Question Presented

Whether the PSC lacked subject matter jurisdiction to enter Order No. 9594 and approve the underlying Settlement Agreement given its lack of jurisdiction to regulate propane. A717, 892-8.

B. Scope of Review

This is a mixed question of law and fact. This Court should consider the issue *de novo*.

C. Merits of Argument

The powers of the PSC are wholly statutory. *Smith v. Delaware Coach Co.*, 70 A.2d 257, 261 (Del. Ch. 1949). If the PSC exceeds its authority, it acts without jurisdiction and its orders are of no effect and are subject to collateral attack. *Id.* As recently as December 20, 2018, the PSC entered Order No. 9297, in PSC Docket No. 18-0933, dismissing a petition filed by Chesapeake seeking to have the PSC regulate the conversion of its Sharp Energy propane CGSs. A1235-8. PSC Order No. 9594 regulates the propane business, propane systems, and propane customers of Sharp Energy. The regulatory requirements include the provision that Chesapeake must file its three-year CGS conversion plans with the PSC.

Chesapeake, the Public Advocate, and Staff made no attempt to address the PSC's lack of subject matter jurisdiction over propane in Docket No. 19-0529.

The Hearing Examiner's Report does not provide any analysis, and merely recites the following: "29. The PSC has jurisdiction over this Docket pursuant to Section 26 *Del.C.* § 201(a)." A319. The Hearing Examiner's Report, with its reliance on Section 201(a) of the Public Utilities Act, is in direct conflict with the PSC's holding in Order No. 9297, PSC Docket No. 18-0933. A1235-8. PSC Order No. 9297 acknowledged that Section 201(a) of the Public Utilities Act does not afford the PSC any jurisdiction whatsoever over the property rights, equipment, or facilities of propane companies or their customers. A1235-8. Yet, the Settlement Agreement approved by PSC Order No 9594 does precisely that and more.

The statutes governing the PSC's powers further indicate that Order No. 9594 and the Settlement Agreement improperly exceed the PSC's jurisdiction. Under 26 *Del. C.* § 217, a public utility can be penalized up to \$1,000 for failing to comply with a PSC order, which includes the accompanying, approved Settlement Agreement. Section 217 would allow the PSC to penalize Chesapeake, and its unregulated affiliate Sharp Energy, for propane-related activities, including the following: a) failing to provide temporary propane tanks to propane customers receiving propane service; b) failing to price the temporary propane tanks at cost; c) failing to capitalize the propane to natural gas conversion costs based upon the actual behind-the-meter cost to convert the home and appliances; d) failure of Sharp Energy to charge only market rates for natural gas conversion activities; e)

failing to submit the three-year CGS conversion plan; f) failing to timely amend the conversion plan; and g) failing to provide all CGS customers with a full disclosure of anticipated conversion costs and charges prior to obtaining any commitment from customers. Looking at the last example only, if a Sharp propane customer concluded that Chesapeake failed to provide the “full disclosure” of anticipated costs and charges, the customer would be able to bring a complaint with the PSC over violation of Order No. 9594. It would be a complaint by a Sharp Energy propane customer, not a Chesapeake natural gas customer, brought against Chesapeake. The Settlement Agreement is riddled with regulatory overreach.

In Order No. 9297, the PSC found: “Propane is clearly not a public utility, and we would exceed our legislatively-granted authority were we to find that we could regulate Chesapeake’s sale and delivery of propane to eventual new natural gas customers.” Order No. 9297 par. 3, pp. 2-3. A1236-7. The same principle applies to Order No. 9594 which, for example, purports to regulate the provision of temporary propane tanks and their cost, as well as the disclosures made to eventual new natural gas customers. A1243-77. And Chesapeake conceded that at least a small percentage of those Sharp Energy propane customers will *never* become its customers, but have rights and are subject to regulation under the Settlement Agreement. A57, 351-4, 359-61.

Whether the Commission exceeded its subject matter jurisdiction when it entered Order No. 9594 is an important public policy issue, and it was neither discussed nor a determination made in Order No. 9594. Therefore, it failed to satisfy the requirements for a case decision under the Administrative Procedures Act, including 29 *Del. C.* § 10128.

The DAAEP's Superior Court appeal raised substantial issues that were either not addressed at all, were not addressed fairly and properly, or were not addressed on adequate briefs and a complete record.

VII. THE ISSUE OF DELAWARE’S PUBLIC POLICY TOWARD THE EXPANSION OF FOSSIL FUEL NATURAL GAS INFRASTRUCTURE IN DELAWARE WAS NOT FAIRLY OR ADEQUATELY ADDRESSED IN DOCKET NO. 19-0529, PSC ORDER NO. 9594, OR BY THE SUPERIOR COURT.

A. Question Presented

Whether the PSC fairly and adequately addressed the issue of Delaware’s public policy toward the expansion of fossil fuel natural gas infrastructure in Delaware when it entered PSC Order No. 9594. A719, 892-8, 920.

B. Scope of Review

This issue is a mixed question of law and fact. This Court should consider the issue *de novo*.

C. Merits of Argument

Delaware’s public policy toward the expansion of fossil fuel natural gas infrastructure was not fairly or adequately addressed in Docket No 19-0529, despite its importance. Before the PSC, Chesapeake hung its hat primarily upon Senate Joint Resolution No. 7, adopted July 31, 2014, more than six years ago, which is a veritable generation in the renewable energy space. The General Assembly that passed SJR No. 7 ended years before 2019, and a resolution has no legal effect beyond the life span of the General Assembly that passed it. In the intervening years, renewable energy and its economics relative to fossil fuels have

undergone a revolution. The world changed, and Delaware public policy and public attitudes also changed.

The Public Advocate and the Staff did not submit any pre-filed testimony in Docket No. 19-0529. No effort was made to obtain updated information about the shifts in public policy and public opinion in Delaware, which are in keeping with clear national trends favoring solar and wind energy over natural gas as the long-term future for Delaware. No mention was made of the most recent legislative efforts to provide sustainable, renewable community-based energy systems for Delaware's towns and developments, which would include the local, distributed generation of solar power, as reflected, for example, by the introduction of Senate Bill No 250, in 2020.

The DAAEP's Complaint raised substantial, relevant issues about the environmental and energy-related issues raised by Chesapeake's application. A364-9.

CONCLUSION

The DAAEP respectfully submits that this Court should grant the following relief:

A. Overrule PSC Order No. 9594 in Docket No. 19-0529, because the PSC lacks subject matter jurisdiction to regulate the sale and distribution of propane.

B. Alternatively, the opinion of the Superior Court should be reversed and the matter remanded for further proceedings.

MURPHY & LANDON

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