



**TABLE OF CONTENTS**

**PAGE**

**ARGUMENT ..... 1**

I. THE DAAEP HAD STANDING TO FILE ITS COMPLAINT WITH THE PSC ..... 1

The DAAEP met the Standards of Dover Historical Society and Oceanport ..... 3

The DAAEP had the right to file a Complaint under 26 Del. C. §206 ..... 12

DAAEP’s Complaint specifically pled that PSC Order No. 9594 and the Settlement Agreement violated prior Commission Orders and Settlement Agreements to which the DAAEP was a party ..... 13

II. THE SUPERIOR COURT ERRED BECAUSE IT FAILED TO APPLY THE CORRECT STANDARD OF REVIEW IN GRANTING DISMISSAL..... 15

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..... 18

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..... 19

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 ..... 20

VI. THE PSC LACKED SUBJECT MATTER JURISDICTION TO ENTER ORDER NO. 9594 AND APPROVE THE SETTLEMENT AGREEMENT ..... 23

VII. THE ISSUE OF DELAWARE’S PUBLIC POLICY TOWARDS THE EXPANSION OF FOSSIL FUEL NATURAL GAS INFRASTRUCTURE IN DELAWARE WAS NOT FAIRLY OR ADEQUATELY ADDRESSED IN DOCKET NO. 19-0529, COMMISSION ORDER NO. 9594, OR BY THE SUPERIOR COURT ..... 26

**CONCLUSION ..... 28**

## TABLE OF CITATIONS

	PAGE
<i>Constellation New Energy v. Public Service Commission</i> , 85 A.3d 872 (Del. Super. 2003) .....	13
<i>Delaware State Sportsman Association v. Garvin</i> , 196 A.3d 1254 (Del. Super. 2018) .....	4
<i>Dover Historical Soc. v. City of Dover Planning Comm'n</i> , 838 A. 2d 1103 (Del. 2003).....	3, 9, 11
<i>Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.</i> , 636 A.2d 892 (Del. 1994).....	3, <i>passim</i>

## STATUTES

26 Del. C. § 206.....	12, 21
26 Del. C. § 354.....	26
26 Del. C. § 503.....	13
26 Del. C. § 510.....	13
29 Del. C. Ch. 101.....	13
29 Del. C. § 10128.....	14

## OTHER CITATIONS

26 Del. C. Admin. C. §2.3.....	12
26 Del. C. Admin. C. §1001.2.3.....	21
26 Del. C. Admin. C. §1001.2.9.1.....	21
Section 10142(a) of the APA .....	13

## **ARGUMENT**

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

In deciding whether to dismiss the DAAEP's Complaint, the PSC was obligated to review and address the actual allegations in the Complaint, the documents referred to therein, and the attached exhibits. A347-419. The Superior Court had the same obligation. The Complaint consists of twenty-eight pages and exhibits A-C. A347-419. The Complaint was verified by Brian Reynolds, the Treasurer of the DAAEP. A419. The Complaint makes specific allegations about prior, related PSC proceedings to which the DAAEP was a party, quotes directly from those proceedings and PSC orders, and asks the PSC to take administrative/judicial notice of its prior proceedings. A354-6. Those proceedings include:

1) Docket No. 07-186 and Order No. 7434 (A354-7, administrative/judicial notice requested at A354-5, par. 16).

2) Docket No. 12-292 and Order No. 8479 (A357-8, administrative/judicial notice requested at A357, par. 23).

3) Docket No. 00-523 and Order No. 5828, involving approval of Chesapeake's Code of Conduct (A352, 369-71, administrative/judicial notice requested at A357, par. 23).

4) Docket No. 18-0933 and Order No. 9297, where Chesapeake's previous Propane Community Gas Systems ("CGS") conversion application was dismissed for lack of subject matter jurisdiction (A358-62, administrative/judicial notice requested at A357, par. 23).

The DAAEP submits that the PSC was *required* to take judicial/administrative notice of its prior proceedings under DRE 201 and 202. The PSC was also *required* to accept the allegations about those proceedings in the Complaint as true on motions to dismiss. DAAEP further submits that the Superior Court was required to do the same. And it was proper to cite the PSC's previous orders, just as it is proper to cite other precedents. The "Statement of Facts" in the DAAEP's opening brief and its Appendix materials about those proceedings are appropriate.

On June 9, 2020, the DAAEP sought to electronically file its Complaint with the PSC in Docket 19-0529, but was prevented from doing so because the e-filing system was not operating properly. Consequently, the PSC's Executive Director agreed that the PSC Staff would file the DAAEP's Complaint in Docket 19-0529. According to PSC Rules 1.6.3 and 1.6.4, if e-filing is unavailable, an email of the filing shall be provided to the service list and the Secretary, and the DAAEP complied. A338-9. Given these facts, the DAAEP's Complaint should have been considered filed in Docket 19-0529. However, the next day, the Executive

Director informed the parties in Docket No. 19-0529 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. Because of the problems with the Delafile system, as of June 9, 2021, the DAAEP had not even been able to review the Hearing Examiner’s Report in Docket No. 19-0529, even though the PSC’s June 17, 2020 hearing was only about a week away. A338.

**The DAAEP met the Standards of *Dover Historical Society* and *Oceanport*.**

In its Complaint, the DAAEP adequately alleged both economic and environmental injury sufficient to meet the standards set forth in the standing cases cited by the Superior Court, *Dover Historical Soc. v. City of Dover Planning Comm’n*, 838 A. 2d 1103 (Del. 2003) and *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994).

In *Dover Historical Society*, this Court held:

The degree and manner of evidence that is required to establish standing varies as the successive stages of any litigation proceeds. At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is “presume(d) that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* 838 A.2d. 1103 at 1109-1110. (Footnotes omitted.).

To plead standing, a plaintiff must demonstrate first, that it sustained an injury-in-fact, and second, that the interests it seeks to protect are within the zone of interests to be protected. *Id.* at 1110. To demonstrate an injury-in-fact, the

plaintiff must have suffered an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* It is not necessary that the event about which the plaintiff complains to have actually occurred, only that it not be so conjectural as to be more creative imagination than fact. *Oceanport*, 636 A.2d 892 at 905-906; *Delaware State Sportsman Association v. Garvin*, 196 A.3d 1254, 1262-3 (Del. Super. 2018)(A party does not have to suffer an actual injury or immediate damages to have standing, if agency action violates its rights or threatens future injury.) A plaintiff's asserted claim to standing may include both economic and environmental injury. *Oceanport* at 905.

The DAAEP's Complaint adequately pled an economic injury-in-fact. A347-419. The DAAEP is a Delaware incorporated association, whose members provide propane and propane services to citizens, residents, and commercial customers in Delaware. A347. Chesapeake is a public utility regulated by the PSC, which operates an unregulated affiliate company, Sharp Energy, Inc. A348-9. Sharp owns and operates more than forty propane CGSs in Delaware. A349, A1001-2. A major purpose of Chesapeake's application is to allow it to create "anchor customers" to greatly expand its natural gas distribution system to serve businesses and residents that it does not presently serve. A350. Another purpose is



to supplant existing propane distributors, including the members of the DAAEP, who provide propane to Delawareans. A350.

The DAAEP's members market, sell, and distribute propane in Delaware. A353. The DAAEP, its members, employees, and customers have a direct and substantial financial, legal, and contractual interest in the Settlement Agreement in Docket No. 19-0529. A353-4. There is a substantial likelihood that the DAAEP's members will have their businesses and finances affected by the settlement, because it regulates the conversion of propane CGSs to natural gas. A354. There is a likelihood that the DAAEP, its members, employees, and customers will be directly affected by Chesapeake's plan to significantly expand its natural gas service, as it will eliminate or stifle energy competition in Delaware. A354. The DAAEP has a direct and substantial interest in the distribution and sale of alternative energy supplies and services for residential and commercial customers in Delaware. A354.

The DAAEP was a party to several prior PSC proceedings filed by Chesapeake, including Docket No. 07-186, which was resolved by PSC Order No. 7434. A349, 354-5. Order 7434 and the settlement approved there required that, when a propane CGS is converted to natural gas, the customer must pay the cost of converting propane appliances and the costs cannot be included in Chesapeake's rate base. A355. Order 7434 is a final order and the settlement approved there is a

contract that binds Chesapeake, the PSC Staff, the Public Advocate, and the DAAEP. PSC Order No. 9594 and the approved Settlement Agreement contravene Order No. 7434 and the Settlement Agreement approved there, because they allow Chesapeake to finance and recover some of the costs of converting appliances from propane to natural gas, and to recover the CGS acquisition and conversion costs in rate base. A349, 357, 442. Given the number of Sharp CGSs, it will take decades for Chesapeake to carry through on its conversion plans. A361.

The PSC does not regulate Sharp's propane business, but it does regulate the conditions under which Chesapeake is allowed to operate an affiliate that engages in the unregulated business of propane. A350-2, 369-71. In November 2001, the PSC issued Order No. 5828, in Docket No. 00-523, a proceeding to which the DAAEP was a party. A352, 369-71. There, the PSC approved the Code of Conduct under which Chesapeake is authorized to operate its Sharp subsidiary and thereby compete with the DAAEP's members in the propane business. A352, 369-71. A major purpose of the Code of Conduct, which includes an asymmetric pricing rule, was to prevent Chesapeake from using its unregulated propane business to gain an unfair advantage over its competitors in the energy business, including the DAAEP's members. A370-1. Under the asymmetric pricing rule, and given the age of the Sharp CGSs, Chesapeake would be required to purchase them at net book value. A369-71. The settlement approved in Order No. 9594

requires the PSC to enter an order approving the waiver of the asymmetric pricing rule for purposes of its acquisition of the Sharp CGSs. A369-71. Chesapeake's goal is to use the Settlement Agreement approved in Order No. 9594 to erode the business prospects of its competitors, including the members of the DAAEP. A360-1.

The DAAEP alleged a legally protected interest. Contrary to the Superior Court's conclusion, a competitor of a public utility does have the legal right to file a complaint with the PSC, when the activities of a public utility and its unregulated subsidiary threaten the competitor with economic harm. In addition, the DAAEP was a party to prior PSC proceedings, final orders, and contractual settlement agreements that created legally protected interests. Further, the PSC has exercised its authority to regulate the manner in which Chesapeake can engage in the unregulated business of propane and imposed conditions on Chesapeake, for example, through a Code of Conduct and the asymmetric pricing rule, to assure a level playing field. Such provisions prevent Chesapeake and Sharp from using Chesapeake's status as a protected public utility monopoly from entering the propane industry and engaging in unfair competition, thereby damaging propane distributors economically. The DAAEP can rightly ask how the PSC can regulate Chesapeake's operation of its Sharp subsidiary that competes with private businesses in the propane industry, and yet those private businesses have no means

to challenge Chesapeake's activities, even when it engages in unfair competitive practices that violate contractual commitments.

The PSC's assertion of jurisdiction in the prior proceedings recognizes that propane distributors that compete with Chesapeake and Sharp have standing to complain, when Chesapeake seeks to take advantage of them. The allegations in the Complaint are sufficiently concrete and particularized, especially given that the proceeding was before the PSC on motions to dismiss. While certain events about which the DAAEP complained had not yet actually occurred, for example, the conversion of their CGSs by Chesapeake, that is not necessary to attain standing. The DAAEP did not have to wait until the propane CGSs owned by its members were being acquired after Chesapeake had expanded its natural gas pipeline system. Indeed, had the DAAEP waited, Chesapeake would certainly argue that the DAAEP engaged in laches and had waived any legal right to contest its activities by its delay. Further, objectionable provisions of the Settlement Agreement were going into immediate effect, *e.g.*, waiver of the asymmetric pricing rule and the inclusion of conversion costs in rate base.

The DAAEP is not a "mere intermeddler." *Dover Historical Society* at 1111. The DAAEP and the economic interests it represents along with its members are within the zone of interests to be protected. The PSC regulates Chesapeake in the manner in which it conducts business through and with its Sharp

subsidiary. The PSC has imposed requirements on Chesapeake to prevent it from using Sharp to obtain an unfair competitive advantage over propane companies, who compete with Chesapeake and Sharp in the energy field. The DAAEP was a party to those PSC proceedings.

Title 26, Section 201(a) provides:

The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

The first sentence of Section 201 sets forth the general jurisdiction of the PSC, and it does not limit the PSC's jurisdiction to "the interests of consumers."

While safeguarding the interests of consumers is arguably the greatest obligation of the PSC, there is no provision preventing the PSC from hearing the complaints of competitors of a public utility. The DAAEP's Complaint asserts that the Settlement Agreement does not even adequately take consumers into account. *See, e.g.,* A351-3, 358-62, 369. The term "interests of the consumer of public utility service" appears in the second sentence of Section 201(a), but that is in connection

with the regulation of “any pole, duct, conduit, right-of-way or other facility of any public utility.”

The DAAEP’s Complaint also pled an environmental claim. The Complaint alleges that Chesapeake admittedly intends to use the Sharp CGSs to establish “anchor customers” to expand its natural gas pipeline distribution system. A350. Natural gas is a legacy fossil fuel, and its expansion is not consistent with current Delaware public policy. A350, 352. 362-9. When Chesapeake expands its pipeline system, it will commit Delaware to decades of fossil fuel usage, and thus have substantial, long term negative environmental consequences. A350-1. It will discourage the development of renewable green energy initiatives, including sustainable community initiatives, and cause consumers to lose opportunities to change to zero-carbon alternatives. A352.

While the DAAEP’s environmental allegations are admittedly general, after filing its Complaint, the DAAEP submitted the Declaration of Brian Reynolds. A698-701. The Reynolds Declaration makes more specific allegations about the DAAEP’s economic and environmental claims, and supports the argument that, had PSC denied the motions to dismiss, the DAAEP was prepared to demonstrate at a hearing that it could meet the *Oceanport* standard that the alleged environmental injuries will actually affect the DAAEP, its members, their

employees, and customers. *Oceanport* was decided only after public evidentiary hearings.

The DAAEP's Complaint met the standards of *Dover Historical Society* and *Oceanport*, and adequately pled economic and environmental claims.

The Superior Court acknowledged that the PSC has no subject matter jurisdiction over propane, and appears to have incorrectly concluded that Order 9594 only affects Sharp's propane CGSs, and then only after they have been converted to natural gas. Exhibit A at 9; A1008. The DAAEP's Complaint alleges (and Chesapeake's Application, and the Hearing Examiner's Report adopted by the PSC in Order 9594, confirm) that Chesapeake's plan is to use the propane CGSs to create a system of anchor customers to greatly expand its natural gas system to serve business and customers that it does not presently serve, and supplant existing propane distributors, including the DAAEP's members. A350. The Complaint alleges, *e.g.*, that the waiver of the asymmetric pricing rule, authorized in Order 9594, will allow Chesapeake to use its unregulated Sharp subsidiary to gain an unfair competitive advantage over the DAAEP's members. A370-1. The effects of Order 9594, the Hearing Examiner's Report, and the Settlement Agreement are not limited to the future acquisition of Sharp's CGSs. In addition, the Complaint alleges that the Settlement Agreement approved in Order 9594 improperly asserts PSC subject matter jurisdiction over Sharp's propane business and customers.

A351-2, pars. 13, 14, A358-62. And that is precisely why the PSC, on August 19, 2020, dismissed Chesapeake's previous propane CGS conversion application for lack of subject matter jurisdiction in Order 9635. A1239-42.

**The DAAEP had the right to file a Complaint under 26 Del. C. § 206.**

By filing a Complaint under 26 *Del. C.* §206 and 26 *Del. Admin. C.* §2.3, the DAAEP became a party to a PSC proceeding and a case decision was rendered against it. The DAAEP submits that it was properly a party to Docket 19-0529. However, were not the case, DAAEP submits that it had standing to challenge the PSC's proposed action to enter Order 9594 in a separate proceeding. The assertion in our opening brief, that the Superior Court did not cite §206, was mistaken. However, the Court did not grapple with the meaning or application of Section 206 to the PSC's jurisdiction. The DAAEP submits that it had the right to file its Complaint under §206, and that it had a direct interest in the issues raised in Docket 19-0529.

Appellees argue that filing a complaint under §206 is not a substitute for intervention. In response, the DAAEP contends that the Superior Court wrongly decided "*Chesapeake I*" and that the DAAEP and other persons with an interest in a PSC proceeding should be permitted to intervene, as has been the practice historically (as the Superior Court admitted in *Chesapeake I*). *And see, e.g.,*



*Constellation New Energy v. Public Service Commission*, 85 A.3d 872, 876 (Del. Super. 2003). Because the PSC (A1241) and the Superior Court relied upon *Chesapeake 1*, this Court may take up *Chesapeake 1*, and DAAEP submits that it should be overruled. The PSC's past practice of permitting the DAAEP and others to intervene in Chesapeake's proceedings has not prejudiced or burdened Chesapeake or any other party. The PSC can limit the involvement of intervenors, including their ability to take discovery.

Appeals from the PSC are not governed exclusively by the APA, 29 *Del. C. Ch.* 101. The Superior Court cited 26 *Del. C.* §§ 510. That aside, Section 10142(a) of the APA provides: "Any party against whom a case decision has been decided may appeal such decision to the Court." By bringing its Complaint, the DAAEP became a party to a PSC proceeding and had the right to appeal.

**DAAEP's Complaint specifically pled that PSC Order No. 9594 and the Settlement Agreement violated prior Commission Orders and Settlement Agreements to which the DAAEP was a party.**

Appellees contend that the prior PSC proceedings were not in the record before the Superior Court. To the contrary, they were specifically pled in the Complaint, and the Superior Court was required to accept the allegations as true. The issues raised were not moot, because the DAAEP had standing to raise them, the DAAEP adequately pled economic and environmental claims, and the ongoing threat of injury continued unabated.

The argument that the DAAEP was foreclosed from filing its Complaint because the prior settlement agreements contain provisions which allow the parties to take contrary positions in future cases is wrong and misses the point. As the DAAEP said in its opening brief (pp. 29-30), it does not contend that the PSC and the parties to the previous proceedings are forever locked into all provisions of those orders and settlement agreements. Rather, the DAAEP contends that the PSC could not change substantial material provisions of its previous orders and approved settlement agreements, which directly affect and prejudice the DAAEP, without allowing the DAAEP to participate in the proceedings and contest the changes.

Contrary to appellees' assertion, DAAEP contends that Order 9594 failed to meet the requirements of 29 *Del. C.* § 10128 for a case decision, contains legal errors, and is not supported by substantial evidence. A710-20, 718, par. k.

In sum, appellees seem to argue that, no matter how the DAAEP raised this matter, the PSC lacks jurisdiction and the DAAEP has no adequate remedy at law.

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

The Superior Court could only grant the motions to dismiss if the DAAEP failed to articulate even the barest modicum of evidence or legal argument in favor of its position. The appellees argue that PSC Order No. 9594, the adopted Hearing Examiner's Report, and the approved Settlement Agreement only regulated the conversion of Sharp's propane CGSs, and thus could not affect the CGSs owned by the DAAEP's members. Their argument ignores the well-pled allegations of the Complaint about the concrete economic and environmental injuries, which meet the Delaware requisites for standing. It also ignores the well-pled allegations about how the future treatment of those CGS acquisitions by Chesapeake will allow it to use its unregulated Sharp subsidiary to gain an unfair economic advantage over the DAAEP's members. Limitations imposed by the PSC that were designed to prevent unfair competition, such as the asymmetric pricing rule, the requirement that Sharp customers pay for their own appliance conversions, and the prohibition against including conversion costs in rate base are being tossed aside, only after the PSC gave Chesapeake the commercial advantage of engaging in the propane business through Sharp. In addition, the financial treatment of the Sharp conversions sets the precedent for the future treatment of CGSs owned by the DAAEP's members.

Appellees concede that the Superior Court did not address the many substantial legal and factual questions raised by the appeal (A710-20), and limited its ruling to standing and the alleged status of the DAAEP as a non-party. On all of the issues presented, including “standing” and the DAAEP “party” status, the DAAEP presented evidence and legal arguments that merited full briefing.

PSC Order 9594 adopts the Hearing Examiner’s Report and its findings, including the waiver of the asymmetric pricing rule. A1244. The Report quotes the testimony of Chesapeake witness Shane Breakie, which repeatedly makes clear that Chesapeake’s expansion plans are not limited to the Sharp CGSs:

1) A1257: “The book value of a Sharp CGS *or another provider’s Gas System* reflect depreciation rates....”

2) A1257: “*If Chesapeake acquires a propane CGS from a third party owner, the Company would likely need to pay fair market value for the asset, including a valuation of the current energy stream generated by the system. If Chesapeake acquires a CGS, ‘customers benefit directly as Chesapeake will be able to spread the costs....’*”

3) A1257: “According to the Company, conversions of CGS systems will aid residents in the communities being converted, *residents in the communities*

*surrounding the communities begin converted, current and potential businesses, builders/developers, as well as existing Chesapeake customers.”*

4) A1258: “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.*” (Emphasis added and footnotes omitted throughout.)

Chesapeake’s plan to greatly extend its natural gas distribution system in Kent and Sussex Counties is not limited to using the system to serve only the Sharp CGSs.

**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.**

The fact that the DAAEP did not appeal *Chesapeake 1*, does not prevent it from challenging the decision here, as it was relied upon by the PSC and the Superior Court.

**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.**

The Superior Court should have: a) entered a full briefing schedule; and b) addressed the DAAEP's motion to require the PSC to comply with the citation on appeal. These failures prevented the Court from gaining a complete understanding of the issues presented, and resulted in an opinion that contained legal and factual errors.

**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.**

The conclusion that the DAAEP was required to seek leave to intervene in Docket 19-0529 is illogical and would result in a waste of judicial and administrative resources. As the appellees would have it, the DAAEP's only recourse was to timely move to intervene in Docket 19-0529. Of course, the DAAEP had no right to intervene under *Chesapeake I*, and therefore its motion would have been denied. The DAAEP would then have been forced to sit on the sidelines until the PSC resolved the docket in a final order. Then, the DAAEP would have to appeal, but it is not a party, having been denied leave to intervene. According to the Superior Court and appellees, only a party to a PSC docket has a right to appeal, and having been denied party status, the DAAEP would have no right to appeal. If the non-party DAAEP managed to appeal, the appeal would solely pertain to the denial of its intervention motion. As a non-party denied the right to intervene, the DAAEP could not raise on appeal any of the substantive issues in its Complaint. Assuming that the Superior Court followed *Chesapeake I*, it would dismiss the appeal, because the DAAEP is an unregulated competitor of Chesapeake. Assuming that the Superior Court followed *Chesapeake II*, it would dismiss the appeal because the DAAEP was not a party to the PSC proceeding. Either way, the Superior Court would dismiss the appeal. Then, the DAAEP



would be left with an appeal to this Court limited to the issue of its right to intervene. Assuming a reversal and a remand to the PSC, the DAAEP would then have to somehow revive Docket 19-0529, where a final order had already been entered, and raise the issues presented in its Complaint.

Appellees cite the PSC's intervention rule, 26 *Del. Admin. C.* § 1001.2.9.1: "Any person, other than an original party to a proceeding or a party entitled to participate as a matter of right, must file a petition to intervene." Appellees then cite *Chesapeake 1*, and argue that the DAAEP had no right to intervene. Yet, they also argue, incongruously, that the DAAEP was required to move to intervene, despite having no right to intervene.

The DAAEP pursued a different course by filing a Complaint pursuant to 26 *Del. C.* § 206, and 26 *Del. Admin. C.* § 1001.2.3, which addresses formal complaints. A347. Rule 2.3.1 provides: "Formal complaints must be filed within two (2) years of the alleged violation, unless good cause is shown to extend this period." The PSC had jurisdiction over the DAAEP's Complaint under § 206, and the Complaint could not be untimely under Rule 2.3.1.

While it is true that the DAAEP received the parties proposed Settlement Agreement by email about one month before it filed its Complaint, it did not have public access to or receive the Hearing Examiner's Report, even when it attempted

to file its Complaint on June 9, 2020. If the Hearing Examiner had followed the precedent set in the previous Chesapeake CGS conversion case, Order No. 9297, Docket No. 18-0933, he would have dismissed the proceeding for lack of jurisdiction. Order No. 9297 is not mentioned.

Preparing and filing an extensive complaint within thirty days is not dilatory, and cannot constitute undue delay, when in the midst of a once-in-a-century pandemic, and given that the PSC's own rule allows two years to file a Complaint,. As reflected in the Complaint, the issues were complex and required extensive explication and analysis. Chesapeake's plan is to convert the more than forty Sharp CGSs to natural gas will, as the Superior Court admitted, take decades. Thus, there was no harm or undue prejudice to Chesapeake.

Appellees argue that the DAAEP could have provided public comment in Docket 19-0529 before the March 6, 2020 deadline. The deadline was two months before the May 6, 2020 Settlement Agreement was signed, and well before the Hearing Examiner issued his May 18, 2020 report. We submit that it is an unacceptable practice for the PSC to routinely set premature deadlines for public comment, which expire before hearing examiner reports and settlement agreements even become public. Unless this Court acts, the practice will continue, much to the public's detriment.

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

The DAAEP's Complaint alleged that the PSC lacked subject matter jurisdiction over Chesapeake's application and the Settlement Agreement in Docket 19-0529. A358-62. On June 29, 2018, Chesapeake filed an application asking the PSC to exercise jurisdiction over its then-plan to convert the Sharp propane CGSs to natural gas. A35-91, 358-62. On December 20, 2018, the PSC entered Order 9297, in Docket No. 18-0933, dismissing Chesapeake's application for lack of jurisdiction over propane. A35-91, 358-62, 1235-8. The DAAEP's Complaint alleged that the Settlement Agreement in Docket 19-0529 required the PSC to improperly exercise jurisdiction over Sharp's propane business and customers, and provided specific examples. A358-62.

The PSC Staff and the Public Advocate successfully argued for the dismissal of Chesapeake's application in Docket 18-0933, which resulted in the entry of Order 9297. A1235-8. In Docket No. 18-0933, Chesapeake asked the PSC to approve the manner in which it would convert the Sharp CGSs to natural gas, just as it did in Docket 19-0529. It offered the supporting testimony of the same witnesses, Shane Breakie and Christopher Redd. It proffered the same facts and exhibits to extol the alleged benefits of natural gas expansion. In both dockets, Chesapeake made clear its intentions to use its "anchor customers" to expand its

natural gas distribution system to attract new residential and business customers, including those using propane, who are served by members of the DAAEP. The PSC determined that it lacked subject matter jurisdiction to regulate the manner in which Chesapeake would convert the Sharp CGSs to natural gas. A1235-8. Docket 19-0529 raised the same jurisdictional issue. How is it that the conversion of Sharp CGSs was beyond the PSC's jurisdiction in 2019, but within its jurisdiction in 2020? How could there be such a monumental shift in the PSC's understanding of its jurisdiction in so limited a time?

The DAAEP can find no reference in the appellees' brief that speaks to the PSC Order 9297 dismissing Chesapeake's 2018 application for approval to convert the Sharp CGS to natural gas. The appellees argue that Docket No. 19-0529 only involved the conversion of the Sharp CGSs. However, Chesapeake's Application in Docket 18-0933 was limited in the same respects as its Application in Docket 18-0933. A35-91. Indeed, the "Wherefore" clause in Chesapeake's Application in Docket 18-0933 sought the following relief: "B. That the Commission ... (ii) approve the proposed regulatory accounting treatment and valuation for Chesapeake's acquisition of the CGS systems owned by Sharp Energy, Inc....." A49.

In the three years before Chesapeake filed its August 20, 2019 application, Chesapeake converted three Sharp CGSs to natural gas. A371. Either the

conversion of the Sharp CGSs is within the PSC's jurisdiction, or it is not. It cannot be both.

The Complaint alleged a substantial legal issue, namely, the PSC's jurisdiction to regulate propane, which was not fairly addressed by the PSC, the Hearing Examiner, or the parties in Docket 19-0529, despite the fact that the PSC, itself, had dismissed a comparable Chesapeake application just eight months before the PSC opened Docket 19-0529. The DAAEP's Complaint raised this critically important legal issue.

**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, COMMISSION ORDER NO. 9594, OR BY THE SUPERIOR COURT.**

The DAAEP’s Complaint included specific allegations about Delaware public policy, the adverse effects of fossil fuel use, the long term negative consequences of the expansion of, and reliance upon, natural gas pipelines, that would force Delawareans to rely upon fossil fuel for decades, and the related environmental injuries. A350-1, 352-3. 362-71, 373. *See also*, Declaration of Brian Reynolds, the DAAEP’s Treasurer. A698-706. The appellees fail to acknowledge the extensive allegations about Delaware public policy in the Complaint. Instead they focus upon one fact, *i.e.*, Senate Bill No. 250, promoting community-based renewable energy systems, did not ultimately pass the General Assembly in 2020.

The DAAEP asks this Court to take judicial notice that, in 2021, the General Assembly further demonstrated Delaware’s public policy commitment to renewable energy by passing two major pieces of legislation. The first is Senate Bill No. 33, which amended 26 *Del.C.* § 354, by increasing the required minimum percentage of electrical energy sales to Delaware end-use customers from renewable energy sources, and adding a ten-year year expansion of the law’s application from 2025 to 2035. AR1-15. The second is Senate Bill No. 2,

arguably a successor to Senate Bill No. 250, which is intended to accelerate the adoption of community-based solar photovoltaic systems in Delaware and increase the maximum system size to 4 megawatts. AR16-23.

Contrary to appellees' argument, the DAAEP's Notice of Appeal preserved this issue. A719, par. t.

## 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, and overrule *Chesapeake 1*;

B. Alternatively, the opinion of the Superior Court should be reversed, *Chesapeake 1* overruled, and the matter remanded for further proceedings.

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