EFiled: Aug 19 2021 11:57AM EDT
Filing ID 66862797
Case Number 179,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS,	)	
Appellant Below,	)	No. 179, 2021
Appellants,	)	
v.	)	Court Below: Delaware Superior Court C.A. No. K20A-09-003 WLW
CHESAPEAKE UTILITIES CORPORATION, ET. AL.,	)	
Appellees Below,	)	
Appellees.	)	

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Dated: August 19, 2021

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I. Preliminary Statement

This case presents a most unusual question: may an entity challenge an agency's decision in a case to which that entity was not a party? Because, at the end of this appeal, that is what Appellant Delaware Association of Alternative Energy Providers ("DAAEP") really wants. Appellee Chesapeake Utilities Corporation ("Chesapeake"), a regulated natural gas utility, sought Delaware Public Service Commission ("Commission") approval of proposed ratemaking treatment for its future acquisitions of community gas systems ("CGSs") from an affiliated company and conversion of those systems to natural gas. The Commission opened Docket No. 19-0529 ("Docket 19-0529") to consider Chesapeake's application. DAAEP, a trade association of unregulated propane and fuel oil providers,[1] thought its members might be adversely affected by whatever happened in Docket 19-0529. Despite its concern, it took no steps to try to become a party to Docket 19-0529, for reasons known only to it.[2] Instead, it monitored the docket from afar. Then, just one week before the scheduled Commission hearing on a proposed settlement reached by the

[1] *See* 26 *Del. C*. § 102(2) ("public utility" includes companies providing "natural gas, electric … water, wastewater [and certain] telecommunications" services – but not propane or fuel oil).

[2] Appellees submit that it was because the Superior Court had previously held that the Commission lacked authority to allow unregulated competitors of public utilities to intervene in utility rate proceedings. *Chesapeake Utilities Corp v. Delaware Public Service Commission*, 2017 WL 2480804 (Del. Super. Ct. June 7, 2017) ("*Chesapeake 1"*).

parties in Docket 19-0529, DAAEP initiated a "complaint" challenging the proposed settlement, apparently hoping that the Commission would postpone considering the settlement. Its ploy did not succeed: the Commission held the scheduled evidentiary hearing and approved the settlement. Subsequently, the Commission considered and dismissed DAAEP's complaint because it was moot, DAAEP lacked standing, and DAAEP's complaint was untimely.[3]

Appellees respectfully submit that the answer to the question posed above is a resounding "no." DAAEP's complaint was a transparent attempt to circumvent its failure to move to intervene in Docket 19-0529. Neither the Commission nor the Superior Court were deceived by DAAEP's actions, and neither should this Court be. The record before the Commission contains substantial evidence supporting its dismissal of DAAEP's complaint, and it made no errors of law in doing so. DAAEP's appeal should be summarily dismissed, and the Commission's Order should be affirmed.[4]

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[3] Appendix (hereinafter, "A") -001239 to A-001242 (Docket No. 20-0357, Order No. 9635).

[4] *Delaware Solid Waste Authority v. DNREC,* 250 A.3d 94, 105 (Del. 2021) ("When 'review[ing] a Superior Court ruling that, in turn, … reviewed the ruling of an administrative agency,' [the Supreme] Court examines the agency's decision directly … thus, '[its review of the agency's] decision matches that of the Superior Court - whether the decision is supported by substantial evidence and is free from legal error.'")

II. Nature of Proceedings

In August 2019, Chesapeake filed an application seeking approval to establish ratemaking treatment to govern its future acquisitions of propane CGSs from its unregulated affiliated propane provider and its conversion of those CGSs to natural gas service. In May 2020, Appellees (Chesapeake, Delaware Public Service Commission Staff ("Staff") and the Division of the Public Advocate ("DPA")) and a properly-admitted intervenor executed a settlement resolving all issues raised in Docket 19-0529, and the Commission scheduled a hearing on the settlement for June 17, 2020.

DAAEP filed its complaint on June 10, 2020. On June 17, 2020, the Commission held the hearing on the settlement and issued Order No. 9594 approving it. That Order was not appealed and became final 30 days later.

Appellees moved to dismiss DAAEP's complaint. The Commission heard oral argument and issued Order No. 9635 dismissing DAAEP's complaint as moot because the Commission had already approved the settlement DAAEP sought to challenge. The Commission also ruled that even if DAAEP's complaint was not moot, it would have rejected the complaint because: (1) as a unregulated competitor of Chesapeake seeking to protect its competitive interests, DAAEP lacked standing to file the complaint; (2) the settlement in Docket 19-0529 did not violate prior

settlement agreements or orders; and (3) DAAEP's complaint was untimely.[5] *See* A-001241.

DAAEP appealed Order No. 9635 to the Superior Court. Appellees filed a Joint Motion to Dismiss the appeal. The Superior Court affirmed the Commission, finding that: (1) because DAAEP was not a party to Docket 19-0529, it was not "aggrieved" by the settlement's approval; (2) DAAEP lacked standing to file its complaint; and (3) DAAEP's argument that *Chesapeake 1* did not constitute *stare decisis* was meritless.

DAAEP filed this appeal on June 3, 2021, and filed its Opening Brief ("OB") on July 20, 2021. This is Appellees' Joint Answering Brief.

[5] The Commission cited the Superior Court's prior decision in *Chesapeake 1*, in which the Court held that the Commission lacked statutory authority to allow unregulated competitors of public utilities to intervene in utility rate proceedings.

III. Summary of Argument

1. Appellees deny Paragraph I of DAAEP's summary. The Superior Court correctly affirmed Order No. 9635. First, it found that DAAEP was not a party to Docket 19-0529 and consequently lacked standing to challenge the Docket 19-0529 settlement. A-001006 to A-001009. Second, the Superior Court correctly found that the Commission lacks jurisdiction over propane and fuel oil services; therefore, it lacks authority to protect the competitive interests of unregulated utility competitors like DAAEP and its members. A-001008, A-001241. Third, because the Commission was statutorily created to balance the interests of public utilities and the "consuming public" (*i.e.*, utility customers), the Superior Court found that DAAEP lacked standing to file its complaint with the Commission seeking to protect its competitive interests. A-001006 to A-001011; A-001241. Fourth, the Superior Court found that neither DAAEP nor its members were "aggrieved" by Order No. 9594 because they were not subject to it and could not demonstrate any judicially cognizable harm from it. A-001007 to A-001009. Finally, the Commission correctly decided that Order No. 9594 did not violate the provisions of prior settlements. A-001241.

2. Appellees deny Paragraph II of DAAEP's summary.[6] The Superior Court applied the correct standard of review to Appellees' Joint Motion to Dismiss below. A-001000 to A-001011. The Superior Court concluded that Superior Court Rule 72(i) provides that "dismissal [of an appeal] may be ordered … for any reason deemed by the Court to be appropriate," and that rule "incorporates Rule 12(b)(6) by authorizing dismissal 'when a party fails to set forth any semblance of a legal argument upon which relief can be granted.'" A-001006.

3. Appellees deny Paragraph III of DAAEP's summary. In support of its holding that DAAEP lacked standing before the Commission, the Superior Court cited its prior decision in *Chesapeake 1*. That decision was not appealed. Accordingly, the Superior Court correctly held that *Chesapeake 1* is a final order and whether it was correctly decided is not before this Court. A-001010.

4. Appellees deny Paragraph IV of DAAEP's summary. The Superior Court was not required to decide each of the twenty-three individual arguments DAAEP asserted in its Notice of Appeal. A-000710 to A-000724; A-001006 to A-001007. The Superior Court and the Commission correctly held that most of the

[6] In Paragraphs II, III and IV of its Summary of Argument, DAAEP criticizes the Superior Court's decision below. DAAEP's arguments are misplaced and misunderstand the applicable standard of review in this matter. It is settled that when the Supreme Court reviews a Superior Court ruling, that, in turn, reviewed the ruling of an administrative agency, this Court examines the agency's decision directly. *See Delaware Solid Waste Authority, supra* at 105.

issues raised in DAAEP's appeal were moot and that DAAEP lacked standing before the Commission and the Court. A-001006 to A-001011. The Superior Court appropriately dismissed DAAEP's complaint below because it failed to state a claim. A-001000 to A-001011.

5. Appellees deny Paragraph V of DAAEP's summary. DAAEP's complaint sought only to challenge the Commission's decision in Docket 19-0529 – a case to which DAAEP was not a party. A-000372 to A-000373. The Superior Court concluded that DAAEP's complaint was an attempt to intervene in Docket 19-0529 without following the Commission's procedures for doing so, and that if DAAEP had wanted to challenge that decision, it should have sought to intervene in Docket 19-0529. A-001010. Accordingly, the Superior Court correctly held that DAAEP lacked standing to challenge Order No. 9594. A-001000 to A-001011.

6. Appellees deny Paragraph VI of DAAEP's summary. Commission Order No. 9594 in Docket 19-0529 is not on appeal before this Court. Regardless, the Superior Court correctly found that the Commission acted within its jurisdiction in issuing Order No. 9594. A-001008. The Court appropriately noted that the Commission's regulatory jurisdiction begins at the moment a CGS is converted from propane to natural gas and extends no further into the realm of propane. A-001008.

7. Appellees deny DAAEP's statement in Paragraph VII of its summary. Again, Order No. 9594 is not on appeal before this Court and DAAEP was not a

party to Docket 19-0529. Nevertheless, DAAEP has not claimed that Order No. 9594 was affected by any legal error or that it was not supported by substantial evidence.

IV. Statement of Facts[7]

A. Docket 19-0529 - Chesapeake's Application for Approval for Regulatory Accounting Treatment and Valuation Methodology Concerning Certain CGSs

On August 20, 2019, pursuant to 26 *Del. C.* §§ 102 and 201, Chesapeake filed an application with the Commission seeking to establish a regulatory accounting treatment and a valuation methodology for its future acquisition of certain CGSs owned by its unregulated affiliate and the conversion of the CGSs to natural gas service. A-000376. Chesapeake proposed a plan to acquire the CGSs one at a time (at the time of conversion) and pay a proposed replacement cost for each CGS. A-000377. On September 26, 2019, the Commission assigned this matter as Docket 19-0529 and referred it to a hearing examiner. A-000377. Each of the Appellees was a party to Docket 19-0529, but DAAEP was not; it neither sought nor was granted intervention. A-000376.

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[7] DAAEP's 17-page "Statement of Facts" section includes lengthy descriptions of several prior Commission cases and materials (including cases from 2007 to 2019) that are *not* on appeal before this Court and not part of the Superior Court record in this appeal. *See* DAAEP Opening Brief ("OB") at 4-8 and 11–16. Also, DAAEP's "Statement of Facts" section is replete with conjecture, characterizations and arguments that are not facts, and are therefore inappropriate for inclusion in a Statement of Facts section. *See, e.g.*, OB at 18 ("Chesapeake's plan for a fossil fuel future for thousands of Delawareans is self-serving, and short-sighted both economically and environmentally."). Equally as objectionable, DAAEP's Appendix includes copies of numerous documents that were not part of the record of the Superior Court in this appeal, including over 550 pages of documents from prior Commission cases dating back to 2007 that are *not* on appeal here. *See* A-000015 to A-000030; A-000035 to A-000346; A-001016 to A-001238.

On May 6, 2020, the parties to Docket 19-0529 executed a unanimous settlement resolving all issues in that case. A-000376 to A-000387. On June 17, 2020, after an evidentiary hearing, the Commission issued Order No. 9594 approving the settlement. A-001243 to A-001277.

B. Docket No. 20-0357 – DAAEP's Complaint Challenging the Settlement in Docket 19-0529

On October 29, 2019, DPA's counsel emailed the procedural schedule in Docket 19-0529 to DAAEP's counsel. A-000427, A-000454. On May 8, 2020, DAAEP's counsel emailed DPA's counsel inquiring about the status of the docket. A-000429; A-000456 to A-000457. DPA's counsel responded that the parties had provided the Hearing Examiner with a proposed settlement in Docket 19-0529 the day before, and that an evidentiary hearing was scheduled before the Commission for June 17, 2020. A-000429; A-000456 to A-000457. DPA's counsel also provided DAAEP's counsel with a copy of the executed settlement. A-000429; A-000456 to A-000457.

On June 10, 2020 – more than a month after it had been provided with a copy of the proposed settlement and only seven days before the scheduled evidentiary hearing – DAAEP filed a complaint with the Commission challenging the Docket

19-0529 settlement. A-000347 to A-000419. Other than boilerplate relief,[8] DAAEP's complaint requested relief related *exclusively* to the Docket 19-0529 proceedings, asking the Commission to: (1) stay Docket 19-0529; (2) direct the parties to provide DAAEP with all testimony, data request responses and discovery in the docket; (3) determine whether Docket 19-0529 should be dismissed for lack of subject matter jurisdiction; and (4) reject the settlement. A-000372 to A-000373. On June 10, 2020, the Commission Staff assigned DAAEP's complaint as Docket No. 20-0357. A-000420 to A-000421.

C. Docket No. 20-0357 – Order No. 9635 - The Commission's Order Dismissing DAAEP's Complaint

On June 30, 2020, Staff and DPA filed a Joint Motion to Dismiss DAAEP's complaint. A-000422 to A-000459. They argued that: (1) DAAEP's complaint was moot because the Commission had already approved the settlement that DAAEP asked it not to approve; (2) even if the complaint was not moot, DAAEP lacked standing to file the complaint with the Commission seeking to protect its competitive interests (citing *Chesapeake 1*); and (3) the settlement in Docket 19-0529 did not violate prior settlements because: (a) all of the prior settlements expressly permitted the parties to take contrary positions in future cases (and included language that

[8] The Complaint also asked the Commission to: (1) serve the Complaint on the respondents; (2) require the respondents to respond to the Complaint within 20 days after service; and (3) afford DAAEP such other and further relief as is just and appropriate. A-000372 to A-000373.

expressly noted that the settlements were not to be considered precedent for future cases); (b) the Commission is not bound by previous decisions as long as it provides reasons for departing from those decisions; and (c) DAAEP could not demonstrate that it suffered any damages.[9] A-000422 to A-000459.

In DAAEP's responses to the Appellees' Motions to Dismiss, DAAEP proffered all of the same arguments it asserts before this Court, including: (1) the Commission lacked subject matter jurisdiction to approve the Docket 19-0529 settlement; (2) the Commission had jurisdiction to hear DAAEP's complaint; (3) DAAEP's complaint was not moot; (4) DAAEP had standing to file its complaint; (5) *Chesapeake 1* was inapplicable; (6) Order No. 9594 neither fairly nor adequately addressed Delaware's public policy towards fossil fuels; (7) DAAEP was not required to intervene in Docket 19-0529; and (8) Order No. 9594 violated prior settlements. A-000506 to A-000582.

Chesapeake, Staff and DPA filed separate reply memoranda with the Commission.[10] On July 29, 2020, the Commission heard oral argument on the motions to dismiss DAAEP's complaint.

On August 19, 2020, the Commission issued Order No. 9635 dismissing

[9] Chesapeake filed a separate Motion to Dismiss DAAEP's Complaint asserting the same arguments presented in the Staff's and DPA's Motion to Dismiss. A-000460 to A-000499.

[10] DAAEP's Appendix filed with this Court omitted Chesapeake's Reply filed in Docket No. 20-0357 on July 22, 2020. A-000033.

DAAEP's complaint as moot because the Commission "has already granted the procedural relief requested in the WHEREFORE clause of DAAEP's Complaint." A-001241. That is, the Commission had already approved the settlement that DAAEP sought to challenge.

The Commission also ruled that even if DAAEP's complaint was not moot, it would have dismissed the complaint based on the Superior Court's decision in *Chesapeake 1* that "DAAEP lacks standing to obtain the relief it seeks based on its status as a competitor of Chesapeake." A-001241.

Finally, the Commission held that "even if DAAEP's Complaint were not moot and DAAEP had standing to assert the claims in its Complaint, the Commission rejects them." A-001241. The Commission ruled that Order No. 9594 in Docket 19-0529 did not violate prior settlements because all of those prior settlements explicitly allowed the parties thereto "to take contrary positions in future cases" and specifically provided that the agreements would "not serve as precedent in future cases." A-001241. Moreover, the Commission rejected DAAEP's contention that these prior settlements created contract rights that were breached because DAAEP failed to demonstrate it suffered any damages. A-001241. Finally, the Commission found that DAAEP's complaint was untimely because: (1) DPA's counsel had sent the procedural schedule to counsel for DAAEP, so DAAEP could have provided public comment prior to the Commission's March 6, 2020 deadline;

and (2) DAAEP knew about the Docket 19-0529 settlement more than a month before it filed its complaint because DPA's counsel sent it to DAAEP's counsel a month before. A-001241.

D. The Superior Court's Order Dismissing DAAEP's Appeal

DAAEP appealed Order No. 9635 to the Superior Court, which granted the Appellees' Joint Motion to Dismiss and affirmed the Commission's decision. A-001000 to A-001011. Specifically, the Court held that DAAEP lacked standing to file its complaint with the Commission because it was neither a party to Docket 19-0529, nor did it petition to be an intervenor in that case. A-001006 to A-001010. The Court ruled that DAAEP's complaint was in fact "an attempt[] to intervene [in Docket 19-0529] without actually going through the procedural process to become an intervenor …". A-001010.

Moreover, the Superior Court held that neither DAAEP nor its members were "aggrieved" by Order No. 9594 because they were *not* subject to the Commission's regulatory jurisdiction and were not affected by the conversion of the CGSs owned by Chesapeake's unregulated affiliate (who is not a DAAEP member). A-001007 to A-001009. The Court noted that DAAEP and its members are *not* the "consuming public" as that term is used in the Commission's enabling statute (*i.e.*, Delaware Code Title 26), and unregulated competitors are outside the class of persons whose

interests the Commission is charged with protecting.[11] A-001007 to A-001010.

The Superior Court also held that the Commission maintained the jurisdiction to consider Chesapeake's application in Docket 19-0529, noting that the Commission's "regulatory jurisdiction begins at the moment those systems are converted from propane to natural gas and can go no further into the realm of propane." A-001008.

Next, the Superior Court held that DAAEP also lacked standing because it failed to satisfy the test for standing under Delaware law.[12] A-001008 to A-001009. Specifically, the Court explained that DAAEP could not credibly claim an imminent injury to it (or to its members) from the Commission's approval of the Docket 19-0529 settlement. A-001008 to A-001009. The Court noted that DAAEP's asserted injury (*i.e.*, that it could take years for Chesapeake to convert all of its affiliates' systems from propane to natural gas) was simply a "forward-looking concern" that failed to demonstrate any concrete and particularized injury. A-001008 to A-001009.

In addition, the Superior Court rejected DAAEP's attack on *Chesapeake 1* as

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[11] In support of its holding, the Court cited its prior decision in *Chesapeake 1*. A-001008.

[12] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1996) (quoting *Gannett Co., Inc. v. State*, 565 A.2d 895 (Del. 1989)): "[t]he test for standing is whether: 1) there is a claim of injury-in-fact; and 2) the interest sought to be protected or regulated by the statute or constitutional guarantee in question."). A-001009.

"a non-binding, unreported order [that] does not constitute *stare decisis*." A-001009. The Court noted that *Chesapeake 1* was final, and no party had appealed it. A-001009 to A-001010. Therefore, the Court ruled that DAAEP's arguments were untimely and not appropriately before that court.[13] A-001009 to A-001010.

Finally, the Superior Court rejected DAAEP's argument that the Commission's purported faulty filing system prevented DAAEP from becoming a party to Docket 19-0529. A-001010. The Court found that this basis had not been fully developed in Order No. 9635 and refused to "substitute its judgment for that of PSC personnel in handling DAAEP's complaint." A-001010.

Accordingly, the Superior Court agreed with the Appellees and dismissed DAAEP's appeal on grounds that it failed to state a claim for which relief could be granted, citing Superior Court Rule 72(i), which incorporates Rule 12(b)(6). A-001006, A-001011.

[13] The Court noted that DAAEP *was* a party to the appeal decided in *Chesapeake 1*, and had it wanted to argue that the order issued in that case was wrongly decided, DAAEP should have appealed. A-001010. But DAAEP did not appeal.

V. Argument

A. The Commission and the Superior Court correctly ruled that DAAEP lacked standing to file its complaint before the Commission.

1. Question Presented

Whether the Superior Court erred when it concluded that the DAAEP lacked standing to file its Complaint with the PSC. A-000717, A-000892-98.

2. Scope of Review

Whether the Superior Court correctly interpreted the law governing standing is a question of law which this Court reviews *de novo*.[14]

3. Merits of the Argument

a. The Commission is a creature of statute and its jurisdiction and the right to appeal its orders are limited by law.

It is well-settled that the Commission (like any administrative agency) is a creature of statute and only possesses the powers and jurisdiction granted it by the legislature.[15] Likewise, the right to an administrative appeal is created by statute. In *Oceanport*, this Court ruled that a stevedore company lacked standing to appeal a

[14] *See Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

[15] *See Eastern Shore Natural Gas Co. v. Delaware Public Service Commission*, 635 A.2d 1273, 1283 (Del. Super. Ct. 1993), *aff'd*, 637 A.2d 10 (Del. 1994), *overruled on other grounds, Public Service Water Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999) ("Because the Commission is a creature of the Delaware legislature, its powers are limited to those conferred by the legislature.").

permit decision of the Department of Natural Resources and Environmental Control and held that a person must be authorized by an applicable statute to appeal an agency's case decision.[16]

b. The Superior Court correctly held that DAAEP lacked standing to file its complaint with the Commission.

Here, the Superior Court correctly applied *Oceanport* and ruled that DAAEP lacked standing to file its complaint with the Commission. First, the Court recognized that DAAEP's complaint sought *only* to challenge the settlement reached in Docket 19-0529. A-001001. The Court correctly noted that Chesapeake's application in Docket 19-0529 and Order No. 9594 were expressly limited only to Chesapeake's future acquisitions of CGSs from its affiliate.[17] A-001002. Next, the Court concluded that:

> Specifically, this appeal is going to rest on whether DAAEP was a party to the hearing for Docket 19-0529. If DAAEP is found to be a party to that PSC action, then it would have been entitled to challenge the Settlement Agreement that was the subject of that action.

(A-001006).

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[16] *See Oceanport*, *supra* at 899 ("While the general principles of standing are helpful in determining [the stevedore company's] status, *the real determinant is the statutory language itself, for no party has a right to appeal unless the statute governing the matter has conferred a right to do so*.") (emphasis supplied).

[17] Specifically, the Court held that, "the Settlement Agreement adjudicated in Docket No. 19-0529, PSC Order 9594, pertained *only* to those Systems owned by the subsidiary and slated for conversion by Chesapeake." A-001002 (emphasis supplied).

Consistent with *Oceanport*, the Court analyzed the applicable sections of the APA,[18] and specifically the statutory definitions of "party," "person" and "aggrieved." A-001007 to A-001009. The Court concluded that while DAAEP was a "person," it was not a "party" to Docket 19-0529 because it had not sought to intervene, nor was it granted intervention, in that case.[19] A-001008.

Furthermore, the Court held that DAAEP was not "aggrieved" by Order No. 9594 for two reasons. First, neither DAAEP nor its members were subject to Order No. 9594 – which, by its terms, applied *only* to *Chesapeake's* future acquisition of CGSs from its affiliate.[20] A-001008. Second, DAAEP was not "aggrieved" because neither it nor its members were regulated by the Commission,[21] and therefore had no right to appeal Order No. 9594. A-001008

The Court recognized that under Delaware law, only "parties" to Commission

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[18] Judicial appeals from Commission decisions are governed by the Administrative Procedures Act ("APA"). *See* 29 *Del. C.* § 10161(a)(3); *see also Delmarva Power & Light v. Public Service Commission*, 508 A.2d 849, 860 (Del. 1986) ("The Administrative Procedures Act is clearly intended to control the standard and scope of judicial review of decisions of the Commission.").

[19] The Court held that "[a]dditionally, DAAEP was not a party to PSC Docket No. 19-0529 and therefore could not have standing to bring this appeal of Order 9594." A-001008.

[20] The Court opined that "DAAEP's claim of being 'aggrieved' would fail because DAAEP is not subject to the regulations that the PSC may issue regarding the conversion of the Systems from propane to natural gas."). A-001008.

[21] The Court held that "DAAEP cannot be an aggrieved party because DAAEP is not subject to PSC's regulatory jurisdiction because DAAEP and its members were not members of the 'consuming public' under the statute giving the PSC its purpose." A-001008.

proceedings may present cases and proffer arguments, and only parties who timely seek and are granted intervention may participate in those proceedings.[22] A-001006. Again, DAAEP's complaint requested relief related *solely* to the proceedings in Docket 19-0529. A-000372 to A-000373. But, having neither sought nor obtained leave to intervene in that docket, DAAEP was not a party to it. A-001007. Similarly, under the APA, only a "party" against whom a case decision has been decided may appeal that decision,[23] and DAAEP was not a party to Docket 19-0529; therefore, the Court held that DAAEP lacked standing to appeal the order in that case. A-001007 to A001010.

This Court should affirm the Superior Court's decision. DAAEP was not a party to Docket 19-0529, and thus cannot appeal the Commission's decision in that docket.[24]

c. The Commission's complaint statute (26 *Del. C.* § 206) is not a substitute for intervention in Commission dockets.

DAAEP asserts that it has standing to challenge Order No. 9594 by filing a complaint with the Commission because 26 *Del. C.* § 206 does not restrict who may file a complaint against a public utility. OB at 22–24. While it is true that 26 *Del.*

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[22] 26 *Del. C*. § 503(a) governs the conduct of hearings before the Commission and expressly provides that only "parties" have the right to be heard and introduce evidence.

[23] *See* 29 *Del. C.* §§ 10142(a), 10102(6).

[24] The Court correctly recognized that "DAAEP attempted to intervene without actually going through the procedural process to become an intervenor." A-001010.

C. § 206 imposes no explicit restrictions on who may file a complaint,[25] it is also true that the Commission can consider only complaints that are within its jurisdiction to decide. Again, the Commission's powers are limited to those conferred by the legislature, and "'[t]he enactment of section 201(c), coupled with sections 203A(a)(1) and (b)(3), indicates to the Court that the legislature specifically created the Commission for the purpose of balancing the interests of the consuming public with those of regulated companies …"[26]

The Superior Court correctly rejected DAAEP's argument that Section 206 authorized it to file a complaint to challenge an order in a case to which it was not a party. A-001007 to A-001008. First, the Court recognized the "contradiction in logic" presented by DAAEP's argument that it could file a complaint asking the Commission to investigate "any matter" involving a public utility, even though propane service is not classified as a "public utility" subject to Commission jurisdiction. A-001008.

Next, the Court explained that its prior holding in *Chesapeake 1* supported the same conclusion here: "that [the] PSC lacked the statutory authority to allow unregulated utility competitors – in this case, DAAEP – to intervene in PSC

[25] The statute authorizes the Commission to investigate "any matter concerning any public utility."
[26] *Eastern Shore Natural Gas*, *supra* at 1280.

proceedings involving regulated utilities."[27] A-001008. If the Commission has no jurisdiction over DAAEP or its unregulated members, and has no power to consider their competitive interests, then it has no jurisdiction to consider DAAEP's complaint.[28]

d. DAAEP cannot assert organizational standing or taxpayer standing sufficient to challenge Order No. 9594.

DAAEP argues that it has organizational standing to file the complaint with the Commission because the "Complaint alleged that the DAAEP itself, its members, employees, and customers will be directly affected by the Settlement

[27] In *Chesapeake 1*, the Court cited *Eastern Shore*'s holding that "the legislature specifically created the Commission for the purpose of balancing the interests of the consuming public with those of regulated companies." *Chesapeake 1, supra* at *3. That Court then held that "[w]hile the statute itself does not define who the members of the 'consuming public' are, it is abundantly clear that DAAEP and its members would not be included given the fact that their sole interest here is as dealers of a competing product." *Id*. In addition, the *Chesapeake 1* Court favorably cited examples of utility commissions in other states that dismissed complaints filed by unregulated entities (including propane associations) against regulated utilities on the ground that these unregulated entities lacked standing – notwithstanding the fact that the laws of these other states did not limit who may file a complaint. *Id.* at *5 (citing *Commonwealth of Virginia, ex rel. Mid-Atlantic Petroleum Distributors Association, et al.*, 1983 WL 911011 (Va. S.C.C. 1983) and *Dayton Comm. Corp. v. Pub. Util. Comm.*, 414 N.E.2d 1051 (Ohio 1980)).

[28] *See Sierra Club v. Delaware Department of Natural Resources and Environmental Control*, 2015 WL 1548851, at *5-6 (Del. Super. Ct. Mar. 31, 2015) (affirming agencies' dismissal of complaints because they lacked subject matter jurisdiction to consider the appellants' appeals).

Agreement."[29] OB at 25. Putting aside the fact that the Superior Court has already held that utility competitors (*including* DAAEP) may *not* use the Commission's regulatory process to advance claims of competitive injury (*see Chesapeake 1*), the Court here analyzed DAAEP's claimed injury, correctly applied the *Oceanport* analysis, and held that neither DAAEP nor its members could demonstrate an "injury in fact" from Order No. 9594.[30] A-001008 to A-001009.

The Superior Court recognized that to establish injury in fact, a plaintiff must show that s/he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[31] A-001009. A "particularized" injury "must affect the plaintiff in a personal and individual way."[32] An injury in fact must also be "concrete."[33] A "concrete" injury must be "de facto" – that is, it must actually exist.[34] *Id*. "Concrete" means "real," and not "abstract."[35] And concreteness is quite different from

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[29] As explained above, the Superior Court held that DAAEP's claim that its members would be "directly affected" by Order No. 9594 was contrary to the plain language in the settlement itself and Order No. 9594 - which applied only to *Chesapeake* (and to no other persons). A-001002.
[30] The third prong of the organizational standing test requires that the organization's members also have standing. *See Oceanport*, *supra* at 902.
[31] *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110-11 (Del. 2003).
[32] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1548 (2016).
[33] *Id*.
[34] *Id.*
[35] *Id*.

particularization.[36]

DAAEP describes its purported injury as follows:

> 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.

(OB at 27–28). The alleged injury that befalls DAAEP's members because of their status as taxpayers and business owners is not a particularized and concrete injury in fact. Under DAAEP's logic, every Delaware taxpayer and every Delaware business owner would have standing to appeal every Commission order. DAAEP has alleged nothing to show how the settlement, actually or imminently, adversely affects any of its individual members' business and financial interests in a real and concrete way.

The Superior Court held that DAAEP's claim of organizational standing failed to satisfy the *Oceanport* test:

> Further, DAAEP's assertion of injury is based on the forward-looking concern that many of its members have regarding the conversion of the Systems "persist[ing] for decades." Standing requires two elements. First, there must be an injury-in-fact. Second, the plaintiff's interest must be one that can be either protected or regulated by statute or by a constitutional guarantee. In terms of "grievance[s] widely held," in this case an alleged grievance of members of an organization, such grievances are "judicially cognizable if individual plaintiffs can demonstrate a concrete and particularized injury." This Court cannot see that there is a judicially cognizable harm done to the members of

[36] *Id*.

> DAAEP based on the record provided. *All that can be ascertained from the response offered by DAAEP is that members of the association that own Systems are having to wait an undetermined period of time before these systems are converted from propane to natural gas*. There is no indication provided by DAAEP or from any portion of the record that DAAEP or its members have suffered a judicially cognizable harm sufficient to vacate the PSC's Order 9635 and remand it for further adjudication by the Commission.

A-001008 to A-001009 (emphasis supplied). The Court correctly held that DAAEP failed to demonstrate that it (or its members) would be harmed (actually or imminently) by a Commission order that, by its express terms, does not apply to it (or its members).

Finally, citing *Smith v. Delaware Coach Co.*, 70 A.2d 257 (Del. Ch. 1949), DAAEP argues that its competitive injury provides standing for it to file the complaint with the Commission. OB at 27. In *Smith*, the Commission increased a company's bus fare rates without holding a hearing and without providing notice to the public or the bus company as required by law. *Id.*, 70 A.2d at 258. The court held that members of the consuming public (*i.e.*, the plaintiff and other uses of regulated bus services) could seek a preliminary injunction to test the validity of the Commission's action. *Id*.

Smith is inapposite for several reasons. First, the Court noted that Smith, as a user of regulated bus services, was a member of the "consuming public," and would be directly impacted by the bus fare increase. Here, neither DAAEP nor its members are the "consuming public" pursuant to the Commission's enabling statute (*see*

Chesapeake 1). A-001008. Moreover, the Court found that neither DAAEP nor its members would suffer any judicially cognizable injury from Order No. 9594. A-001009. Second, the nature of Smith's complaint (the setting of just and reasonable regulated bus fares) and the relief requested therein were within the "zone of interest" protected by the Commission's enabling statute. On the other hand, DAAEP's complaint seeks to protect its competitive interests, which are of no concern to the Commission. The Commission simply has no statutory authority to police the competitive balance between regulated natural gas companies and unregulated propane dealers. *See Chesapeake 1, supra*.

e. Order No. 9594 did not violate prior settlements, and no prior settlement confers standing on DAAEP to challenge a Commission order in a case to which it was not a party.

DAAEP touts its participation in several past Chesapeake dockets in which DAAEP intervened and participated as a party. OB at 28-31. None of these prior settlements were in the record before the Superior Court, and, therefore, DAAEP cannot rely on them here. In fact, the Superior Court noted that DAAEP's arguments not addressed to standing (including those concerning prior settlements) were moot because DAAEP was not a party to Docket 19-0529. A-001007.

Nevertheless, in Order No. 9635, the Commission correctly rejected DAAEP's arguments concerning prior settlements. Specifically, the Commission ruled that Order No. 9594 did not violate prior settlements because: (1) they all

contained language specifically allowing the parties to assert contrary positions in future cases; (2) they all expressly provided that they would not serve as precedent in future cases; and (3) DAAEP had not alleged that it would suffer any damages from any purported breach.[37] A-001241.

On appeal here, DAAEP simply repeats the arguments it proffered to the Commission that these prior settlements: (a) created contractual rights providing DAAEP with standing to file its complaint; (b) were somehow breached by Order No. 9594; or (c) somehow waived Appellees' rights to object to the complaint. The Commission's jurisdiction to hear a complaint is governed by its enabling statute and cannot be bestowed by any purported contract between private parties. *See Eastern Shore Natural Gas Co.*, *supra* at 1283. Thus, for the reasons explained by the Commission in Order No. 9635, DAAEP's arguments provide no basis to overturn Order No. 9594.

[37] Interestingly, DAAEP neglects to mention that all of these prior settlements occurred *before* the Superior Court issued its order in *Chesapeake 1* holding that the Commission lacked the statutory authority to allow unregulated utility competitors (*i.e.*, specifically DAAEP) to intervene in Commission proceedings involving regulated utilities. *See Chesapeake 1*, *supra*. Accordingly, the continued validity of these prior settlements involving DAAEP is questionable - at best.

B. The Superior Court applied the correct legal standard in granting Appellees' motions to dismiss.

1. 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. A-000892-98.

2. Scope of Review

This Court reviews judgments on a motion to dismiss *de novo*.[38]

3. Merits of the Argument

DAAEP contends that the Superior Court applied the wrong legal standard to decide Appellants' Joint Motion to Dismiss. OB at 32. This contention is baseless. The Superior Court correctly noted that Appellees filed their Joint Motion to Dismiss pursuant to Superior Court Rule 72(i), which "incorporates Rule 12(b)(6) by authorizing dismissal 'when a party fails to set forth any semblance of a legal argument upon with relief can be granted.'" A-001006.

[38] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 438 (Del. 2005).

The Supreme Court has long held that the issue of standing is a "threshold question."[39] Likewise, the issue of an agency's subject matter jurisdiction is a threshold question.[40]

The Superior Court reviewed DAAEP's complaint and its Notice of Appeal and concluded that DAAEP lacked standing. A-001001 to A-001006. Accordingly, the Court correctly found that "because DAAEP lacks standing, those grounds not addressing the issue of standing are rendered moot because DAAEP was not a party to Docket No. 19-0529 and did not petition to be an intervenor to Docket No. 19-0529." A-001007. DAAEP does not (and cannot) deny that: (1) it was not a party to Docket 19-0529; and (2) Order No. 9594, which approved the settlement DAAEP sought to challenge, is final – thereby rendering its complaint moot. Further, the Court correctly ruled that the Commission lacked subject matter jurisdiction to rule on DAAEP's complaint seeking to protect its competitive interests. A-001008 (*citing Chesapeake 1*).

The Court properly addressed the threshold questions of DAAEP's standing and the Commission's subject matter jurisdiction first. Because DAAEP failed to

[39] *See Dover Historical Society, supra* at 1110 ("Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers.").
[40] *See Sierra Club*, *supra* at *6.

demonstrate either, the Court was not required to request useless briefing on the other matters DAAEP tossed into its complaint, or even on standing.

DAAEP asserts that when deciding a motion to dismiss, the Superior Court is required to accept all the allegations in its complaint as true. OB at 25 and 32. This statement is misleading; it omits a critically important qualifier of this legal standard. When considering a motion to dismiss, a court is required to accept as true only "well-pled" allegations – not conclusory statements. As this Court explained:

> In reviewing the grant of a motion to dismiss, we view the complaint in the light most favorable to the nonmoving party, "*accepting as true their well-pled allegations* and drawing all reasonable inferences that logically flow from those allegations. *We do not, however, blindly accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff's favor*."[41]

Additionally, a court may consider, for certain limited purposes, the content of documents that are integral to or are incorporated by reference into the complaint.[42]

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[41] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (emphasis supplied) (citations omitted). *See also In Re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 168 (Del. 2006) ("Moreover, a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint; and '*is not required to accept every strained interpretation of the allegations proposed by the plaintiff*.'") (emphasis supplied).

[42] *See In Re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995); *see also In Re Wheelabrator Tech's, Inc. S'holders Litig.*, 1992 WL 212595 at *3 (Del. Ch. Sept. 1, 1992) ("the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegations that flow from it."); *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001).

DAAEP's argument that it (and its members) will be adversely affected by the settlement in Docket 19-0529 is directly contradicted by the language in the settlement itself and Order No. 9594.[43] A-001002. Specifically, the Superior Court noted that the Docket 19-0529 settlement and Order No. 9594 "*pertained only to those Systems owned by the subsidiary and slated for conversion by Chesapeake*." A-001002 (emphasis supplied). The settlement was an exhibit to DAAEP's complaint, and "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[44] The Court reviewed the settlement and properly concluded that it negated DAAEP's claimed injury because by its very terms it could not apply to DAAEP or DAAEP's members. Rather, it governs Chesapeake's behavior with respect to CGSs it may purchase in the future from its affiliate and convert to natural gas service.

DAAEP proffers two additional arguments that it asserts "must be accepted as true" and somehow provide it with standing to file its complaint. First, DAAEP alleges that Chesapeake plans to use Order No. 9594 to acquire and convert CGSs owned by DAAEP members. OB at 26. Second, DAAEP argues that the "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."

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[43] Without any basis, DAAEP asserts that "DAAEP itself, its members, employees, and customers will be directly affected by the Settlement Agreement." OB at 25.
[44] *Malpiede*, *supra* at 1083.

OB at 27. Both claims are meritless. Not only are they pure supposition, but they are expressly negated by terms of the settlement and Order No. 9594, which apply only to Chesapeake and the company's future acquisition of CGSs from its affiliate.

The Superior Court applied the correct legal standard to the Joint Motion to Dismiss and reached the correct result. It should be affirmed.

C. The Superior Court appropriately relied on *Chesapeake 1*.

1. Question Presented

Whether the Superior Court committed an error of law when it followed its previous order in *Chesapeake 1, supra,* ruling that DAAEP, as a competitor of Chesapeake, could not be a party to Commission proceedings. A-000896-97.

2. Scope of Review

Whether the Superior Court correctly ruled that DAAEP could not collaterally attack *Chesapeake 1* in this proceeding is a question of law that this Court reviews *de novo*.[45]

3. Merits of the Argument

"A collateral attack is an attempt to 'avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial.'"[46] Collateral attacks are impermissible. In this case, however, DAAEP asks this Court to decide "[w]hether the Superior Court correctly decided" *Chesapeake 1* four years ago, citing a 1999 Colorado Supreme Court opinion and a 1990 order of the Maryland Public Service Commission. OB at 34-35. DAAEP's argument is without merit and the Superior Court correctly rejected it.

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[45] *See Delaware Solid Waste Authority, supra* at 105.
[46] *In the Matter of Vale for Asche*, 2013 WL 3804584 at *5 (Del. Ch. July 19, 2013) (internal citation omitted).

Obviously, DAAEP does not agree with the Superior Court's ruling in *Chesapeake 1*. However, DAAEP was a party in that 2017 case and could have appealed the court's decision, but – for reasons only it knows – chose not to. The Court summarily rejected DAAEP's arguments:

> It is interesting to note that at the time the order in [*Chesapeake 1*] was issued against DAAEP, DAAEP did not appeal it. In fact, no party appealed that order. If DAAEP wishes to now make the argument that that Order should not have stood because this Court lacked jurisdiction, then this Court will have to categorically dismiss such an argument.

(A-001010).

If DAAEP disagreed with the decision in *Chesapeake 1*, it could (and should) have appealed to this Court. It did not. Instead, *Chesapeake 1* has been final for four years. DAAEP's collateral attack on *Chesapeake 1* is improper and must be rejected.

D. The Superior Court appropriately dismissed DAAEP's appeal and was not required to enter a full briefing schedule.

1. Question Presented

Whether the Superior Court abused its discretion by not entering a full briefing schedule and by failing to address DAAEP's motion to require the Commission to comply with the Citation of Appeal which demanded the Commission prepare the record in Docket 19-0529 as well as Docket 20-0357. A-000892-98; A-000740 to A000807.

2. Scope of Review

"When an act of judicial discretion is under review this Court cannot substitute its opinion of what is right for that of the trial judge, if the trial judge's opinion was based upon conscience and reason, as opposed to arbitrariness or capriciousness."[47]

3. Merits of the Argument

DAAEP argues that the Superior Court abused its discretion in dismissing DAAEP's appeal without full briefing and without addressing DAAEP's motion to compel compliance with the Citation on Appeal. OB at 33 and 36. This Court should reject DAAEP's arguments.

First, Appellees filed their Joint Motion to Dismiss pursuant to Superior Court Rule 72(i). That rule contains no provision requiring the Superior Court to allow

[47] *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1238 (Del. 2012).

"full briefing" as argued by DAAEP. Moreover, DAAEP ignores Superior Court Rule 78 that limits motions to six pages.[48] The Superior Court has discretion to control its own docket.[49] If that Court wanted a fuller explication of any of the issues raised in the Joint Motion to Dismiss, it was within its right to request additional briefing. No rule or precedent required "full briefing," and the Court did not abuse its discretion in not requesting it.

Finally, as explained above, the issue of standing is a "threshold question."[50] Having correctly decided that DAAEP lacked standing to file a complaint with the Commission, the Superior Court was not required to address each and every argument asserted in DAAEP's Notice of Appeal. A-000710 to A-000724; A-001006 to A-001007. The Superior Court reviewed Appellees' Joint Motion to Dismiss, DAAEP's opposition thereto, and heard oral argument on the matter. A-000951 to A-001011.

Finally, the Superior Court did not err in not deciding DAAEP's motion regarding the Commission's compliance with the Citation on Appeal before dismissing the appeal under Rule 72(i). DAAEP instructed the Commission to prepare the record in Docket 19-0529 as well as Docket 20-0357, but, again, DAAEP was not a party to Docket 19-0529. DAAEP cites no authority for its proposition

[48] *See* Super Ct. Civ. R. 78.
[49] *Theriault*, *supra* at 1238.
[50] *See Dover Historical Society*, 838 A.2d at 1110.

that an appellant can issue a Citation of Appeal for a case in which the appellant was not a party, and it would be strange indeed if an appellant could do so. Accordingly, DAAEP's argument should be rejected.

E. The Superior Court correctly held that DAAEP should have sought to intervene in Docket 19-0529 if it wished to challenge the Commission's order in that case.

1. Question Presented

Whether DAAEP was required to file a motion to intervene in Docket 19-0529 to appeal the Commission's order in that case. A-000719, A-000892-98.

2. Scope of Review

In reviewing an agency's case decision, a court must determine whether substantial evidence supports the agency's ruling and it is free from legal error.[51]

3. Merits of the Argument

The Superior Court correctly held that if DAAEP wanted to challenge Order No. 9594, it should have sought to intervene in Docket 19-0529. Instead, DAAEP filed its complaint to circumvent the Commission's procedural process for intervention. A-001010.

DAAEP argues that it was not required to seek to intervene in Docket 19-0529 to challenge Order No. 9594, and that its inaction somehow authorized it to file its complaint with the Commission. OB at 37-41. DAAEP posits that, if it had no right to intervene in cases before the Commission (as *Chesapeake 1* holds), then it "should not be penalized for failing to do what Chesapeake says it had no legal right to do" and this Court should not accept such a "Catch-22" argument. OB at 37. DAAEP

[51] 29 *Del. C.* § 10142(d); *Delmarva, supra* at 860.

then spends five pages criticizing *Chesapeake 1*, alleging that it was "non-binding," "advisory only," "distinguishable," and "incorrectly decided as a matter of law and fact."[52] OB at 37-41.

DAAEP's arguments provide no basis to reverse the Superior Court's decision. First, the Commission maintains plenary authority to manage how it conducts its business – including enforcement of its Rule of Practice and Procedure and setting procedural schedules that control the timing and methods for participation in Commission dockets.[53] Its rules regarding intervention provide that: "[A]any person, *other than an original party to a proceeding or a party entitled to participate by right*, must file a petition to intervene."[54] DAAEP was not an original party, nor was it a party entitled to participate by right.[55] Thus, its contention that it can challenge the order in Docket 19-0529 without being a party flies in the face of the Commission's procedural rules. Without structural rules, the process of creating a formal record in a case would become impossible to manage. DAAEP's action

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[52] As explained above (Section C), the Superior Court's order in *Chesapeake 1* is not on appeal here and this Court should reject DAAEP's attempt to appeal that decision now. The Superior Court correctly rejected these arguments as untimely. A-001010.
[53] 26 *Del. C.* § 503 governs the conduct of hearings before the Commission. It provides that only "*parties* shall be entitled to be heard in person or by attorney, and to introduce evidence." (emphasis supplied). In addition, the Commission's Rules allow only a party to a case to file exceptions to the Hearing Examiner's findings and recommendations. *See* 26 *Del. Admin. Code* § 1001.2.19.
[54] 26 *Del. Admin Code* § 1001.2.9 (emphasis supplied).
[55] The DPA is entitled to participate by right. *See* 29 *Del. C.* §§ 8716(e)(1), (h).

here is an attempt to perform an "end-run" around the Commission's rules and the statutory requirement that only parties are entitled to be heard. Adding to the egregious nature of DAAEP's conduct, the Commission found that DAAEP had actual knowledge of the procedural schedule and the proposed settlement agreement for months before it decided to file its "complaint" just seven days before the scheduled hearing at which the Commission approved the settlement. A-001241. If, as DAAEP asserts, this presents a "Catch-22" situation, it is a self-inflicted one.

As for DAAEP's arguments that *Chesapeake 1* is non-binding and advisory only, this Court has stated:

> In determining whether *stare decisis* applies, this Court should examine whether there is: "a judicial opinion by the [C]ourt, on a point of law, expressed in a final decision." The doctrine of *stare decisis* operates to fix a specific legal result to facts in a pending case based on a judicial precedent directed to identical or similar facts in a previous case in the same court or one higher in the judicial hierarchy.[56]

Chesapeake 1 was a judicial opinion, on a point of law (whether the Commission properly granted DAAEP intervention in a regulated utility's rate proceeding), expressed in a final decision.[57] It meets the *stare decisis* requirements.

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[56] *Account v. Hilton Hotels Corp.,* 780 A.2d 245, 248 (Del. 2001) (internal quotations and citations omitted).

[57] The fact that *Chesapeake 1* was an unreported decision is immaterial. *See Nationwide General Ins. Co. v. Thomas*, 1995 WL 158599 *4 (Del. Super. Ct. Feb. 27, 1995) ("Because unreported Delaware Court opinions are frequently cited by Delaware courts, this Court holds that it is not essential that a legal opinion of this Court be reported for it otherwise to have potential *stare decisis* effect.").

DAAEP argues that *Chesapeake 1* was only an advisory opinion because the parties to the underlying Commission matter on appeal there (including DAAEP) agreed to settle all issues in that Commission case except for one – whether the Commission should have granted DAAEP's intervention – an issue the settlement agreement expressly preserved for review on appeal. *See* OB at 39. DAAEP then asserts that "Delaware law does not allow settling parties to preserve an issue for appeal within a settlement agreement."[58] *See* OB at 39. Contrary to DAAEP's argument, the parties to a settlement agreement may expressly preserve an issue for appeal within the agreement.[59]

The time for DAAEP to argue that *Chesapeake 1* was wrongly decided was when the opinion was issued in 2017. As discussed previously, DAAEP did not appeal that decision, and it cannot collaterally attack the decision four years later.

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[58] DAAEP cites *Maddox v. Justice of the Peace Court No. 19, et al.*, 1991 WL 215650 (Del. Super. Ct. 1991). *See* OB at 39. However, the *Maddox* court did *not* rule that a party to a settlement agreement could not preserve an issue for appeal. Rather, in that case the court simply recognized that general rule that, subject to certain exceptions, "an appeal does not lie from a consent judgement." *Id*. at *4. Unlike *Maddox*, the parties in *Chesapeake 1* expressly preserved the right to appeal the intervention issue in the agreement that settled the underlying Commission case.

[59] *See Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 223 (3d Cir. 2000) ("Where as here, it is clear from the record that the parties stipulated to a consent judgment with the express understanding that the party against whom judgment was entered would appeal a contested issue decided by the district court, there is no reason to hold the right to appeal waived."); s*ee also* 4 C.J.S. *Appeal and Error* § 60 ("A settlement agreement between the parties will generally moot an appeal, *unless a party has preserved the right to appeal in the agreement*, or the agreement has not encompassed all of the issues.") (emphasis supplied).

F. The Commission had subject matter jurisdiction to issue Order No. 9594 approving the settlement in Docket 19-0529.

1. Question Presented

Whether the Commission lacked subject matter jurisdiction to enter Order No. 9594 and approve the underlying settlement. A-000719, A-000892-98.

2. Scope of Review

In reviewing an agency's case decision, a court must determine whether substantial evidence supports the agency's ruling and it is free from legal error.[60]

3. Merits of the Argument

DAAEP argues that the Commission lacked jurisdiction to issue Order No. 9594 because the Docket 19-0529 settlement purports to regulate the propane business. For example, DAAEP asserts that Order No. 9594 "regulates" propane because "Chesapeake must file its three-year CGS conversion plans with the PSC," and a customer of Chesapeake's propane affiliate (whose rates are not regulated and who is not served by Chesapeake) could somehow file a complaint against Chesapeake. OB at 42-45.

DAAEP either misunderstands the Docket 19-0529 settlement and Order No. 9594 or is misrepresenting them.[61] The Superior Court correctly found that the

[60] 29 Del. C. § 10142(d); *Delmarva, supra* at 860.
[61] Again, we note that Order No. 9594 approving the settlement in Docket 19-0529 is not on appeal before this Court.

settlement itself belied DAAEP's argument: "… the Settlement Agreement adjudicated in Docket No. 19-0529, PSC Order 9594, pertained only to those Systems owned by the subsidiary and slated for conversion by Chesapeake."). A-001002. Notably, the Court expressly rejected DAAEP's argument that Order No. 9594 sought to regulate propane:

> DAAEP's argument that regulating the conversion of propane delivery systems to natural gas delivery systems allows for the circumvention of the statute regarding PSC's lack of jurisdiction over propane is without merit because PSC's regulatory jurisdiction begins at the moment of conversion from propane to natural gas and can go no further into the realm of propane.

(A-001008).

The Court correctly interpreted the settlement and Order No. 9594 in Docket 19-0529 and rejected DAAEP's attempt to manufacture a jurisdictional issue. This Court should do the same.

G. Order No. 9594 is not on appeal here; nevertheless, DAAEP's argument that the order is contrary to Delaware public policy should be rejected.

1. Question Presented

Whether the Commission addressed the issue of Delaware's public policy toward the expansion of fossil fuel natural gas infrastructure in Order No. 9594. A-000719, A-000892-98, A-000920.

2. Scope of Review

In reviewing an agency's case decision, a court must determine whether substantial evidence supports the agency's ruling and it is free from legal error.[62]

3. Merits of the Argument

DAAEP asserts that Order No. 9594 contradicts state public policy of "favoring solar and wind energy over natural gas as the long-term future for Delaware." OB at 47. As support, DAAEP cites a bill (Senate Bill 250) introduced during the Delaware General Assembly's 2020 session. That bill did not pass, so it confers no understanding about the state's policy regarding natural gas infrastructure.

Again, Order No. 9594 is not on appeal before this Court. Moreover, DAAEP presents no argument that Order No. 9594 suffers from any "legal error" or is not "supported by substantial evidence." Accordingly, DAAEP's criticism of Order No.

[62] 29 Del. C. § 10142(d); *Delmarva, supra* at 860.

9594 fails to justify overturning that order.

VI. Conclusion

Appellees respectfully request that the Court affirm the decisions of the Superior Court and the Commission below.

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Dated: August 19, 2021