



March 16, 2016

Ms. Donna Nickerson, Secretary
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Re: Chesapeake Utilities Corporation – PSC Docket No. 15-1734

Dear Ms. Nickerson:

Enclosed please find Chesapeake Utilities Corporation's Petition for Interlocutory Appeal of Order No. 8860, issued March 11, 2016, allowing the Delaware Association of Alternative Energy Providers, Inc. to intervene in PSC Docket No. 15-1734.

Should you have any questions with regard to this submission, please contact William O'Brien at 302.736.7635.

Sincerely,

A handwritten signature in black ink that reads "Brian M. Quinn (wfo)". The signature is written in a cursive style.

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(410) 244-7400

Enclosure

Cc: Service List

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

**IN THE MATTER OF THE APPLICATION)
OF CHESAPEAKE UTILITIES)
CORPORATION FOR A GENERAL)
INCREASE IN ITS NATURAL GAS RATES) PSC DOCKET NO. 15-1734
AND FOR APPROVAL OF CERTAIN)
OTHER CHANGES TO ITS NATURAL)
GAS TARIFF)
(FILED DECEMBER 21, 2015))**

**CHESAPEAKE UTILITIES CORPORATION'S
PETITION FOR INTERLOCUTORY APPEAL**

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Counsel for Chesapeake Utilities Corporation

DATED: March 16, 2016

Pursuant to 26 *Del. Admin. C.* §1001-2.16, Chesapeake Utilities Corporation (“Chesapeake”) hereby submits this Petition for Interlocutory Appeal of Order No. 8860, issued March 11, 2016, allowing the Delaware Association of Alternative Energy Providers, Inc. (the “Association”) to intervene in the above-captioned proceeding. For the reasons explained herein, the Association’s intervention is contrary to the public interest and should be denied.

STATEMENT OF THE CASE

1. On December 21, 2015, Chesapeake filed its application in the above-captioned proceeding seeking an increase in its natural gas base rates and requesting approval for certain changes to its tariff. On February 25, 2016, the Association filed a petition for leave to intervene (the “Association’s Petition”). On March 4, 2016, Chesapeake filed an opposition to the Association’s Petition and on March 9, 2016, the Association filed its reply. On March 11, 2016, the Hearing Examiner issued Order 8860, granting the Association’s Petition (the “Order”).

SUMMARY OF CHESAPEAKE’S POSITION

2. The Association seeks to hijack a Commission proceeding to protect the private interest of its unregulated propane service provider members who are competitors of Chesapeake. The Association rightly concedes that it seeks to intervene in this case to protect the market share of its propane company members.¹ Of course, members of the propane service industry are *not* subject to the Commission’s jurisdiction and the Commission certainly does *not* have jurisdiction over allegations of anti-competitive conduct raised by non-regulated competitors of a public utility. In other words, safeguarding the competitive interests of certain private propane companies is not an interest this Commission is charged with protecting.²

¹ “The docket will have a direct impact upon DAAEP’s members, and their employees, who may be significantly harmed by the expansion service offerings Chesapeake proposes....” See Association’s Petition, p. 3, ¶ 11.

² The Commission’s Rules provide that the Commission *shall not* grant leave to intervene if *either*: (1) the parties to the proceeding adequately represent the interest of the person seeking to intervene; *or* (2) the person’s intervention in the proceeding would *not* be in the public interest. See 26 *Del. Admin. C.* §1001-2.9.1.3 (“Rule 2.9.1.3”).

3. Extraordinary circumstances necessitate a prompt decision by the Commission to prevent both substantial injustice and detriment to the public interest. Respectfully, if the Commission does not act quickly and deny intervention by the Association, an improper party will be allowed to participate in a Commission proceeding. As demonstrated by their intervention in Chesapeake's last rate case, the Association's participation accomplished nothing other than needlessly complicating the discovery process and wasting the Commission's resources.³ Moreover, the Commission should take this opportunity to recognize what a number of other state utility commissions have already determined – namely, that allowing intervention into rate cases and other commission proceedings by unregulated competitors of public utilities is improper and *not* in the public interest.

GROUND SUPPORTING INTERLOCUTORY APPEAL

A. The Commission Has No Authority to Protect the Association's Competitive Interest

4. The Association's competitive interest, which is its only interest in this case, is not protectable by the Commission. Title 26 grants the Commission authority over a public utility's rates and services but nowhere does it provide the authority to balance (or even consider) the competitive interests of a regulated gas company versus its unregulated competitors. When the General Assembly intends to grant such authority, it does so specifically, as it did in §708(c).⁴ Of course in §708, the authority granted was over the competitive interests of *regulated* telecommunications service providers, not regulated and unregulated providers, and the jurisdiction over competitive interests was expressly limited to predatory pricing.⁵

³ In PSC Docket No. 07-186, the Association served twenty-seven data requests (with multiple subparts) which sought highly sensitive competitive information related to how Chesapeake determines areas into which it will expand and then failed to file *any* written testimony in the case.

⁴ See 26 Del. C. § 708(c), which charges the Commission with resolving complaints of predatory pricing brought by a telecommunications provider against another.

⁵ In the Order, the Hearing Examiner makes a statement that highlights the extraordinary expansion of the Commission's jurisdiction that results from granting the Association's intervention. He states that the legislature did not intend "for the Commission to aid a regulated natural gas distributor like Chesapeake in attempting to begin to

B. The Association Does Not Raise Any Issues That Are Not Adequately Represented By Others.

5. The Association argues that it should be allowed to intervene in the present rate case so that it may investigate Chesapeake's proposed "new service offerings" to determine: "the basis for the proposed offerings, whether such offerings are in the best interest of the public, and Chesapeake's potential cross-subsidization of its services." See Association's Petition, p. 2, ¶ 6. These issues do not constitute the Association's interest, of course, as its interest lies in protecting market share. These are more accurately characterized as the *issues* by which it seeks to further its interest in stopping or slowing natural gas expansion.

6. Even considering these issues as constituting the Association's interests, however, the existing parties to this proceeding (*i.e.*, Commission Staff and the Division of Public Advocate ("DPA")) already *better* represent any protectable interest regarding Chesapeake's proposed new service offerings and their effect on rates. The Commission Staff and DPA are specifically charged by Delaware law⁶ with fully investigating Chesapeake's rate case application, including the identical issues described by the Association. Moreover, the Commission Staff and DPA have more experience in investigating such issues within the context of a rate case and are thus better equipped to investigate and provide *meaningful* participation in this rate case proceeding. See fn. 3. In addition, neither the Commission Staff nor DPA have

virtually extinguish the economic interest of alternative fuel dealers...." Order at pp. 11-12, ¶ 27. First the Examiner's statement is pure supposition and not supported by any citation to the record. Nevertheless, if the Commission must now restrict natural gas expansion in order to protect the alternative heating fuel market, despite its higher commodity cost and higher emission rates, then the Commission truly is taking on a new mission. Furthermore, what has not been said is that propane dealers can already provide its customers with everything that Chesapeake is asking to provide in this rate proceeding, and much more, because they are not regulated by the Commission. Perhaps that is one reason why the legislature has not tasked the Commission with policing the competitive balance between regulated gas companies and unregulated propane and oil dealers.

⁶ See 26 Del. C. §§ 108, 201, 302, 303, 305, 311; 29 Del. C. § 8716.

any vested interest in protecting the competitiveness of one industry over another – unlike the Association.

C. The Association Has Failed to Demonstrate That its Intervention Would Further the Public Interest.

7. The Association argues that certain proposed tariff changes offered by Chesapeake if approved by the Commission will cause certain unregulated propane service providers to lose revenue and market share. *See* Association’s Petition, p. 3, ¶ 11. The Association’s interest in deflecting competition on behalf of its private company members, however, is not a relevant or material issue that can be considered by the Commission during its review of a public utility’s base rate application and is insufficient to justify its intervention. Numerous other state utility commissions, including those in New Jersey, Pennsylvania and Maryland, have held that it is not in the public interest to allow competitors of public utilities to intervene in rate cases and other proceedings purely to protect their competitive market share.⁷ The Commission should likewise reject the Association’s Petition.⁸

⁷ *See, Superior Propane Co. v. South Jersey Gas*, 60 PUR 3d 217, 221 (N.J.B.P.U. 1965) (The Board found that it had not been granted by the legislature the authority to regulate vendors of bottled gas and therefore lacked the power to protect them from the hazards of competition.”); *Re Jersey Central Power & Light*, 1996 WL146752 (N.J.B.P.U.) (denying intervention by party who’s “asserted interest in this matter is as a potential competitor of JCP&L ...”); *Pennsylvania Petroleum Assoc. v. Pennsylvania Power & Light Co.*, 337 A.2d 1270 (1977), *aff’d* 412 A.2d 522 (1980), where an association of petroleum dealers intervened in a rate case before the Pennsylvania PUC and subsequently filed a petition for judicial review of the PUC’s order challenging certain aspects of the utility’s rate design. The Pennsylvania court recognized that the petroleum association’s only interest in the rate case was to protect its members’ market share. *Id.* at 1273. The court dismissed the association’s complaint on grounds that the association failed to have a sufficient interest in the PUC’s order and held that “[o]ur view of the case law concerning the standing of parties alleging competitive injury to appeal leads us to conclude that such parties have standing only where the alleged competition is prohibited by a regulatory scheme in which both parties participate. *** [W]e conclude that PPA does not have a substantial interest in the PUC order sufficient to bring this appeal.” *Id.* *See also, In the Matter of the Application of Mirant Mid-Atlantic, LLC for Approval to Modify the Morgantown Generating Station*, Case No. 9031 (May 6, 2005 Order of Maryland Hearing Examiner concluding that unregulated railroad company’s interest in “deflecting competition” was insufficient to justify intervention); *In the Matter of the Request of National Cab Assoc. for Approval of a New Baltimore City Taxicab Association*, Case No. 9003 (June 9, 2004 Order of Hearing Examiner denied association’s petition to intervene as based only on a desire to limit the number of its competitors.).

⁸ In addition, protecting the competitive interest of certain propane companies is in fact *contrary* to the public interest of Delaware citizens as demonstrated by SJR 7, attached to the Order. SJR 7 resulted from the efforts of a task force consisting of elected legislators, cabinet secretaries and representatives of the business and labor communities that, among other things, found that “the lack of easily available natural gas in Kent and Sussex affects

D. The Association’s Participation in Certain Prior Proceedings is Irrelevant.

8. The fact that this Commission has allowed the Association to intervene in prior proceedings involving Chesapeake is irrelevant to the consideration of its Petition here. Whether or not a person was granted intervention in a prior proceeding is *not* a criterion included in Rule 2.9.1.3. Nevertheless, if the Commission does consider its prior orders permitting the Association’s intervention, it is settled that the Commission is not bound by its prior decisions as long as the Commission provides a rational basis for its departure from the prior decision.⁹

9. Moreover, contrary to the Hearing Examiner’s Order, the Commission would not be violating two prior settlement agreements that the Association signed. See the Order ¶ 23. Neither the settlement in Docket No. 12-292 nor the one in Docket 07-186 provide the Association with any continuing rights regarding its participation in future cases. In addition, a Commission policy to allow interventions as a matter of right to signatories of prior settlement agreements would have a chilling effect on the development of settlement agreements, as companies would be discouraged from signing an agreement because it would guarantee the signatory party’s intervention in the next case regardless of whether that party’s participation would be contrary to the public interest. As the Commission is aware, state law encourages settlement agreements in Commission proceedings¹⁰ and, therefore, a policy that would discourage settlement should not be adopted here.

10. For all of the reasons set forth above, the Association’s Petition for Leave to Intervene should be denied.

the cost of energy and our ability to attract manufacturing business.” *Id.* As a result, SJR 7 directed two state agencies “to work with private sector providers to develop a plan for implementation” of a natural gas pipeline to Kent and Sussex Counties. *Id.* Notably, SJR 7 notes, without angst, “the Task Force recognized that natural gas has been replacing fuel oil and coal for producing energy....”

⁹*Eastern Shore Natural Gas Co. v. Delaware PSC*, 635 A.2d 1273, 1283 (Del. Super. 1993), *aff’d*, 637 A.2d 10 (Del. 1994), *overruled on other grounds by Public Service Water Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999).

¹⁰ *See* 26 Del. C. § 512

CERTIFICATE OF SERVICE

I, William O'Brien, do hereby certify that on March 16, 2016, a copy of Chesapeake Utilities Corporation's Petition for Interlocutory Appeal of Order No. 8860, issued March 11, 2016, in PSC Docket No. 15-1734 was issued to the following persons in the manner indicated:

VIA DELAFILE

Donna Nickerson, Secretary
Delaware Public Service Commission
Suite 100, Cannon Building
861 Silver Lake Blvd.
Dover, Delaware 19904

VIA E-MAIL

Service List (as of 03/16/16)



William O'Brien
Associate General Counsel