BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS, Complainant, v. CHESAPEAKE UTILITIES CORPORATION, a Delaware corporation and regulated Delaware public utility, DIVISION OF THE PUBLIC ADVOCATE, and the DELAWARE PUBLIC SERVICE COMMISSION STAFF, Respondents.	)	PSC DOCKET NO. 20-0357

THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE'S REPLY TO THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS' MEMORANDUM IN OPPOSITION TO THE JOINT MOTION OF THE OF THE DELAWARE PUBLIC ADVOCATE AND THE DELAWARE PUBLIC SERVICE COMMISSION STAFF'S MOTION TO DISMISS THE COMPLAINT

This is the Reply of the Delaware Division of the Public Advocate ("DPA") to the Delaware Association of Alternative Energy Providers' ("DAAEP") Memorandum in Opposition to the Joint Motion filed by the Public Service Commission Staff ("Staff") and the DPA to dismiss the Delaware Association of Alternative Energy Providers' ("DAAEP") Complaint ("Complaint").

I. INTRODUCTION

1. In their Joint Motion to Dismiss DAAEP's Complaint ("Joint Motion"), the DPA and Staff argued that: (1) DAAEP's Complaint was moot as a result of actions that the Commission and Staff had already taken in Docket No. 19-0529; and (2) DAAEP lacked standing to assert its claims. The Joint Motion also raised certain arguments based on DAAEP's reliance on a Commission order in Docket No. 07-186 issued twelve years ago, although any rights under that contract were rendered moot by a Delaware Supreme Court opinion issued in 2017 in which the court found that DAAEP lacks standing to participate in Commission proceedings involving

regulated utilities with which DAAEP's members compete. Chesapeake Utilities Corporation ("Chesapeake") also filed a Motion to Dismiss and Answer, raising many of the same bases for dismissal as the Joint Motion but also some different bases.

2. In its response to the Joint Motion and Chesapeake's Motion (some of which it incorporates by reference into its response to the Joint Motion), DAAEP claims that its Complaint is not moot; that it does have standing because the Settlement Agreement in Docket No. 07-186 gives it standing; that this Commission lacked jurisdiction over Docket No. 19-0529 because it purports to set rates for unregulated propane users; and that Chesapeake, Staff, and the DPA are bound by principles of waiver and estoppel from arguing that DAAEP cannot press its Complaint because of the existence of the Docket No. 07-186 Settlement Agreement.

3. As the DPA will show, none of DAAEP's arguments is correct, and its Complaint should be dismissed.

II. ARGUMENT

A. STANDING ISSUES

1. DAAEP's Complaint Is Moot.

4. DAAEP incorporates by reference its argument in opposition to Chesapeake's Motion to Dismiss for its contention that its Complaint is not moot.[1] The DPA understands that Chesapeake will address this issue in greater detail in its reply, so we will not burden the Commission with additional argument here; rather, we will rely on paragraphs 27-31 of our Joint Motion and on the arguments and authorities in Chesapeake's Reply.

[1] References to DAAEP's response to the DPA's and Staff's Joint Motion will be called "DAAEP Memo at __." References to DAAEP's response to Chesapeake's Motion will be called "DAAEP Chesapeake Memo at __."

2. Even If DAAEP's Complaint Was Not Moot, It Lacks Standing to Prosecute Its Claims.

5. In our Joint Motion, the DPA and Staff argued that the Delaware Superior Court's decision in *Chesapeake Utilities Corp. v. Delaware Public Service Commission*,[2] in which the Court concluded that DAAEP, as an unregulated competitor of Chesapeake's natural gas business, had no standing to intervene in a Chesapeake rate case was binding on this Commission; therefore, even if DAAEP had tried to intervene, its intervention would have been improper. DAAEP tries to avoid *Chesapeake's* preclusive effect by claiming that it does not constitute *stare decisis*.[3] DAAEP is incorrect: the *Chesapeake* opinion is binding on the Commission, whether it is called a standing issue or a *stare decisis* issue.

6. The long-established doctrine of *stare decisis* provides that:

> Once a point of law has been settled by decision of this Court, "it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside ... and [it] should be followed except for urgent reasons and upon clear manifestation of error." The need for stability and continuity in the law and respect for court precedent are the principles upon which the doctrine of *stare decisis* is founded. 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.[4]

7. Indeed, DAAEP agrees that these elements are necessary for an opinion to have binding effect.[5] Therefore, for the *Chesapeake* opinion to be binding, therefore, there must have been: (1) a judicial opinion; (2) on a point of law; (3) expressed in a final decision. All three elements are present here.

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[2] 2017 WL 2480804 (Del. Super. June 7, 2017).
[3] DAAEP Chesapeake Memo at 49-50. Interestingly, after arguing that the *Chesapeake* case is non-binding and should not be applied to this proceeding, DAAEP states that "the DAAEP does not contend that the Commission should ignore the Order." *Id.* at 50. If the Commission doesn't ignore the *Chesapeake* decision, there is only one conclusion that it can reach – and that is that DAAEP lacks standing to assert its claims before the Commission.
[4] *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (internal quotations and citations omitted).
[5] DAAEP Chesapeake Memo at 49.

8. First, *Chesapeake* was not merely an "order."[6] It was a full-blown opinion in which the Court carefully addressed and resolved every argument made to it.

9. Second, *Chesapeake* decided a legal issue: whether the Commission properly granted DAAEP's intervention. The Court said no. It held that DAAEP, as an unregulated competitor of Chesapeake, lacked standing to intervene in a regulated utility's rate proceeding even if DAAEP were doing so to protect its members' admittedly economic interests "because the Commission may not consider the competitive interests of unregulated competitors."[7] The Court found that the Commission's authority "is necessarily limited, by the statute, to the relationship of the utility to its subscribers."[8] And, the Court said, "[w]hile the statute does not itself 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."[9]

10. DAAEP's new-found role as an environmental advocate notwithstanding, DAAEP is an association whose goal is to promote "alternative" energy. That "alternative" energy is propane – not wind, not solar, not biomass, not hydropower – but *propane*, which the United States Environmental Information Agency says produces more CO_2 emissions than natural gas.[10] Moreover, while the Commission does consider dockets in which emission levels are discussed, it does not make state policy on what energy sources should be supported. Rather, that policy is

[6] DAAEP Chesapeake Memo at 48 (calling the decision a "non-binding, non-reported, advisory Order only").
[7] *Chesapeake*, 2017 WL 2480804, at *3.
[8] *Id.*
[9] *Id.* (emphasis added).
[10] Actual environmental associations such as the Sierra Club, and alternative energy associations such as the Delaware Solar Electricity Coalition and the Mid-Atlantic Renewable Energy Coalition, do promote development of "alternative energy." The DPA suspects that those organizations would contest DAAEP's claim that propane is environmentally friendly.

made by the General Assembly and the Governor. If DAAEP's members want their voices to be heard, they should talk to the General Assembly and the Governor.

11. Third, the *Chesapeake* Court's opinion became a final decision when *DAAEP did not file a timely appeal*. This is true despite DAAEP's attempt to mount a collateral attack on the opinion here.[11]

12. The facts here are identical to those in *Chesapeake*. Just like in *Chesapeake*, DAAEP seeks to participate as a party in a litigated matter involving a regulated utility that falls within the Commission's authority. Just like in *Chesapeake*, DAAEP claims that it has a significant interest in the litigation. And just like in *Chesapeake*, DAAEP's interest as a competitor of Chesapeake cannot confer standing on it. *Chesapeake* "operates to fix a specific legal result" in this case, and the Commission, as an inferior tribunal to the Superior Court, is bound by it.[12]

13. DAAEP argues that the *Chesapeake* case's unreported status means that it is not precedential.[13] The *Phillips* opinion does state that "[g]enerally, the decision or opinion" must be reported to have *stare decisis* effect,[14] but since that opinion was issued, the Delaware Supreme, Chancery, and Superior courts have all promulgated rules specifically recognizing that unreported cases have precedential value,[15] and the Delaware Supreme Court has itself acknowledged the

[11] DAAEP Chesapeake Memo at 50 (arguing that the opinion is advisory only and that the Superior Court's decision is non-binding because subject matter jurisdiction cannot be conferred by consent or agreement). The Commission should disregard these arguments because they should have been made in an appeal to the Supreme Court.
[12] *Account*, 780 A.2d at 248.
[13] DAAEP Chesapeake Memo at 49.
[14] *State v. Phillips*, 400 A.2d 299, 308 (Del. 1979).
[15] Del. Supr. Ct. R. 14(b)(vi)B.(2) (providing that if an unreported opinion is not available on Westlaw or Lexis, party citing it must attach a copy to their brief); *id.* Rule 14(g) (prescribing form of citation of unreported cases); Del. Ch. Ct. R. 171(i) (providing that a party may submit a compendium of "key authorities" they want the Court to "focus on;" examples of such "key authorities" include "principal Delaware decisions (whether reported or unreported")); Del. Super. Ct. Civ. R. 107(d)(4)b. (prescribing form of citation of unreported cases); *id.* Rule 107(g) (requiring copy of unreported opinion cited in brief to be attached to brief); *id*. Rule 107(i) (requiring copies of unreported cases to be included on a CD-ROM if the party provides a CD-ROM to the Court).

holdings of unreported opinions issued in lower courts.[16] Delaware courts routinely consider unreported decisions. Indeed, it is significant that DAAEP had to go back to 1979 – a time before Westlaw, Lexis, and Fastcase – to find a case that supported its contention.

14. Even if the Chesapeake case's status as unreported had some validity in 2020, an unreported case is *stare decisis* if the court fully considers or discusses the points of law and issues a final decision.[17] That is exactly what happened in *Chesapeake*. In *Chesapeake*, the Delaware Superior Court fully considered and discussed DAAEP's standing to intervene in a Chesapeake rate case. It issued a decision. DAAEP did not appeal that decision. That decision is binding on DAAEP and on this Commission as a lower tribunal than the Superior Court.

15. Our courts have long held that one cannot achieve indirectly what the law forbids it from achieving directly. Indeed, this Commission has felt the sting of that very stricture.[18] Here, the existing law would have prevented DAAEP from obtaining intervenor status in Docket No. 19-0529 (which is most likely why it didn't even try). It cannot obtain indirectly – through its Complaint –that which it cannot obtain directly – intervenor party status in Docket No. 19-0529.

3. DAAEP Does Not Meet the Test for Organizational Standing.

16. DAAEP claims that it meets the test for organizational standing. The DPA understands that Staff will address organizational standing in its reply, so we will not burden the Commission with additional argument here; rather, we will rely on the arguments and authorities in Staff's Reply.

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[16] *See, e.g., Fiat Motors of North America, Inc. v. Mayor and Council of the City of Wilmington*, 498 A.2d 1062, 1068 (Del. 1985) ("In important but unreported cases, the Superior Court of Delaware has twice decided that the dicta in the *Hedrick* decision involved an erroneous application of Delaware law.")

[17] *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987).

[18] *Public Service Comm'n of the State of Delaware v. Wilmington Suburban Water Corp.*, 467 A.2d 446, 449-51 (Del. 1983) (where statute defined rate base to include, among other things, accumulated depreciation on non-investor-contributed property, Commission could not assign zero value to accumulated depreciation on that non-investor-contributed property to effect a reduced return to the utility on the basis of fairness to ratepayers.)

B. COMMISSION JURISDICTION ISSUE

1. The Commission Had Subject Matter Jurisdiction in Docket No. 19-0529.

17. DAAEP repeatedly insists that in Docket No. 19-0529, the Commission improperly exercised jurisdiction over propane customers,[19] claiming that Staff's and the DPA's failure to discuss it in the Joint Motion is "a telling concession that jurisdiction does not exist."[20] We actually *did* address this issue in the Joint Motion – in Paragraph 30 n. 31. DAAEP must have missed it. But, the DPA addresses it again here.

18. To be clear, the DPA does not concede that the Commission lacks jurisdiction, and DAAEP's argument that it does fails the red-face test. First, it is internally inconsistent. If the Commission lacks jurisdiction over Docket No. 19-0529, then it also lacks jurisdiction to grant DAAEP's requested relief: participation in a docket over which the Commission has no jurisdiction, and denial of an application seeking relief that this Commission has no jurisdiction to approve. If the Commission lacks jurisdiction over Chesapeake's application, then why is DAAEP fighting so hard for the Commission to let it play in the Docket No. 19-0529 sandbox? The answer is obvious.

19. Second, the Commission is not exercising jurisdiction over propane customers, no matter how many times DAAEP says it is. This Commission has "exclusive original supervision and regulation of all public utilities and also over their rates, property right, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the

[19] *See, e.g.,* Chesapeake DAAEP Memo at 6-10.
[20] DAAEP Memo at 5.

provisions of" the Public Utilities Act.[21] Chesapeake, as a natural gas utility, is a regulated public utility.[22] Propane dealers, on the other hand, are not public utilities.[23]

20. In its application, Chesapeake sought: (1) a waiver of asymmetric pricing principles in order to permit it to purchase CGS systems (the piping) which it would then use to provide natural gas service to natural gas customers; (2) to include a certain purchase price other than that which the asymmetric pricing principles would allow in its rate base; and (3) to include the costs of converting new customers from propane to natural gas. The Commission has the exclusive original supervision and regulatory authority, pursuant to Section 201(a), to address all of those requests. The Commission did not approve, and will not be approving, rates for propane service, because *Chesapeake* is not proposing to provide propane service to any customers.[24] *Sharp* – the CGSs' current propane provider – will continue to provide propane service, unregulated by the Commission, to its customers up until the moment Chesapeake turns on the gas to the customers who chose to convert to natural gas. And *Sharp* will continue to provide propane service, unregulated by the Commission, to customers who choose not to convert to natural gas. As noted in Chesapeake's Motion to Dismiss and Answer, the formula that the Commission was asked to approve is one that will be used to set rates for Chesapeake's future natural gas customers, not current or future propane customers.[25]

21. The Commission had supervisory and regulatory authority over every aspect of the relief sought in Chesapeake's application. DAAEP's contrary argument is not only baseless, but belied by the very relief it seeks, and must be rejected.

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[21] 26 *Del. C.* § 201(a).
[22] *Id.* § 102(2).
[23] *Id.*
[24] *See supra* n.24.
[25] Chesapeake Motion at ¶20.

C. CONTRACT ISSUES

1. Introduction.

22. In the Joint Motion, the DPA and Staff argued that even if DAAEP's Complaint was not moot, and even if DAAEP had standing, it still did not state a claim upon which relief could be granted because: (1) other provisions in the Docket No. 07-186 Settlement Agreement permitted Chesapeake, Staff, and the DPA to do exactly what they did in Docket No. 19-0529; (2) the Commission was free to change its position from the one it approved in Docket No. 07-186; (3) DAAEP could not establish that a breach of the Docket No. 07-186 Settlement Agreement caused it any damage;[26] and (4) despite being informed of all significant dates and occurrences, DAAEP waited too long to assert its claims.[27]

22. In response, DAAEP claims that: (1) principles of waiver and estoppel prevent Chesapeake, Staff and the DPA from arguing against the validity of the Docket No. 07-186 Settlement Agreement; (2) that Agreement permits DAAEP to assert its Complaint before the Commission; and (3) it did not wait too long to assert its Complaint.

23. DAAEP is wrong on all counts. Principles of estoppel do not generally apply in the contract context, which the Docket No. 07-186 Settlement Agreement is. The DPA could not have waived a right it didn't know existed in 2008. And the very emails that DAAEP's counsel successfully fought to include in the file in this docket demonstrate DAAEP's dilatoriness.

2. Waiver and Estoppel Principles Are Inapplicable to a Breach of Contract Issue.

24. DAAEP suggested in its Complaint that the Docket No. 07-186 Settlement Agreement forever precluded Chesapeake from proposing the conversion of Sharp CGSs to natural

[26] Joint Motion at ¶¶41-53.
[27] *Id*. ¶¶54-60.

gas, and that Chesapeake was definitely precluded from making ratepayers responsible for any costs of converting customer appliances of HVAC equipment.[28] In our Joint Motion, we explained why these contentions lacked merit. We also pointed out that the Commission is not perpetually bound by its prior orders.[29]

25. Realizing that the contentions in its Complaint about its rights under the Docket No. 07-186 Settlement Agreement are meritless, DAAEP flails about for some other basis for holding Chesapeake, Staff, and the DPA to an agreement that specifically did not bind them in future cases, and lands on principles of waiver, equitable estoppel and regulatory estoppel.[30] But those principles do not provide DAAEP with any assistance either.

26. The Delaware Supreme Court has held that equitable estoppel does not apply to cases "in which the alleged promise is supported by consideration."[31] The only situation in which the Delaware courts have deviated from that is where the circumstances show that representations made by the party to be estopped induced the party claiming estoppel to take some action to its detriment, and the only way to avoid injustice is to enforce the promise.[32] The promises in the Docket No. 07-186 Settlement Agreement were supported by consideration, and so equitable estoppel principles do not apply. But even assuming that they do, DAAEP has not established any injustice, let alone injustice that is avoided by preventing Chesapeake from recovering any conversion costs from ratepayers. There is nothing in the Complaint alleging that the DPA induced

[28] In fact, the latter is the *only* issue that the DAAEP can raise from the Docket No. 07-186 Settlement Agreement, because it explicitly "left for another day" "*how the cost of any future acquisition by [Chesapeake] of a community propane distribution system will be treated for ratemaking purposes*." Docket No. 07-186, Settlement Agreement, ¶23 (emphasis added).
[29] Joint Motion ¶¶ 44-49. *See also Town of Cheswold v. Central Delaware Business Park*, 188 A.3d 810 (Del. 2018) (Town that was party to stipulated orders with developer that established particular zoning of developer's land not forever barred from changing that zoning by legislation).
[30] DAAEP Memo at 12-13.
[31] *Genencor Intern., Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000).
[32] *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1033-34 (Del. 2003).

the DAAEP to take action, or refrain from taking action, to its detriment. "Characterizing this as an equitable estoppel suit sidesteps the critical fact that the parties disagree about the scope of a contract right."[33] That is all that is present here.

27. Nor can DAAEP establish a regulatory estoppel claim. If DAAEP had read the entire case that it cites as support for this argument, it would know that the Delaware Supreme Court described "regulatory estoppel" as a theory that some courts have applied in the context of *insurance contracts*, under which "notwithstanding the literal terms of an insurance contract, insurers are estopped from interpreting the contract language in a manner inconsistent with prior representations made to insurance regulators."[34] Obviously, the Docket No. 07-186 Settlement Agreement was not an insurance contract. But even more damning to DAAEP is the fact that *the Supreme Court declined to adopt the regulatory estoppel theory:* "Further, we agree with the Superior Court that the public policy rationale for adopting the theory of regulatory estoppel, as advanced by the State in its *amicus* brief, is *unpersuasive*."[35] Thus, despite DAAEP's insinuation to the contrary,[36] no Delaware court has accepted the "regulatory estoppel" theory.

28. The DAAEP's waiver claim fares no better. While parties may waive rights, the standards to establish a waiver are "'quite exacting:'"[37]

> Waiver is the voluntary and intentional relinquishment of a *known* right. It involves knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those rights. We have also explained that the facts relied upon to establish waiver must be unequivocal. Applying those principles, we have required a party claiming waiver to show three elements: (1) that there is a requirement or condition to be waived; (2) that the waiving party must know of the

[33] *Genencor*, 788 A.2d at 13.
[34] *E.I du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1062 (Del. 1997).
[35] *Id.* (emphasis added).
[36] The fact that *E.I. du Pont* did not adopt the "regulatory estoppel" theory may be why DAAEP only suggested that the Commission "see" it "for a discussion of regulatory estoppel." DAAEP Memo at 13. Knowing that the Commissioners are busy, and thus unlikely to read every case the parties cited in their papers, it carefully crafted its argument to suggest that the "regulatory estoppel" theory has been accepted by Delaware courts.
[37] *Bantum v. New Castle County Vo-Tech Educ. Ass'n*, 21 A.3d 44, 50 (Del. 2011) (internal citations omitted).

requirement or condition; and (3) that the waiving party must intend to waive that requirement or condition.[38]

29. The Superior Court did not issue its opinion in *Chesapeake* until 2017. Thus, it was impossible for the DPA to know that it had a legal basis for objecting to the DAAEP's 2007 intervention in a Chesapeake docket. Nor can it be argued that the DPA waived its right to object here: not only did DAAEP not even attempt to intervene in Docket No. 19-0529, but if it had, the DPA would have objected on the basis of the *Chesapeake* opinion. Finally, if, as DAAEP itself argues, parties cannot confer subject matter jurisdiction by agreement, then the parties could not confer jurisdiction on this Commission to consider the interest of a party whose interest it had no authority to consider.[39]

30. Neither principles of estoppel nor waiver provide a basis for this Commission to hear DAAEP's Complaint. It should be dismissed.

3. Paragraph 32 of the Docket No. 07-186 Settlement Agreement Does Not Confer Jurisdiction on the Commission to Hear DAAEP's Complaint Where None Exists.

31. DAAEP argues that the Docket No. 07-186 Settlement Agreement specifically provides that the Commission has the ability to consider its Complaint because Paragraph 32 says so.[40] Paragraph 32 says that any disputes about enforcement or interpretation of the agreement were to first be brought to the Commission, and then any party unhappy with the Commission's decision may challenge that decision in Superior Court.[41] There are two problems with DAAEP's argument.

[38] *Id.* at 50-51.
[39] DAAEP Chesapeake Memo at 50, citing *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995). It should be noted that *El Paso* has been overruled. *See National Indus. Group (Hldg.) v. Carlyle Inv. Mgmt., L.L.C.*, 67 A.3d 373 (Del. 2013).
[40] DAAEP Memo at 7.
[41] *Id.* at 7.

32. First, that provision was included in a settlement that *preceded* the Superior Court's decision in *Chesapeake* that *specifically* holds that DAAEP, as an unregulated competitor of Chesapeake, has no standing to intervene in a docket involving Chesapeake's regulated activities. The law has changed since then. Given that the Commission now has marching orders from the Superior Court (a superior tribunal) that preclude it from admitting DAAEP as a party in a Chesapeake docket, enforcing that provision as DAAEP suggests would run afoul of that law.

33. Second, DAAEP itself argues that parties cannot confer jurisdiction by agreement on a tribunal that does not have such jurisdiction.[42] If, as the Superior Court has held, the Commission lacks jurisdiction to consider the arguments of an entity that it does not regulate, then the Commission also lacks jurisdiction to hear DAAEP's Complaint in this docket.

4. DAAEP's Last-Ditch Effort to Derail Docket No. 19-0529 Was Too Late and Should Be Rejected.

34. The DPA and Staff argued in the Joint Motion that the Commission should reject DAAEP's last-minute effort to derail the Docket No. 19-0529 Settlement Agreement. In response, DAAEP tries to justify its failure to move to intervene or provide timely public comments. But there is no justification.

35. DAAEP cannot deny that it knew about the case within a week after the intervention period passed. It knew, because the DPA's counsel sent its counsel a copy of the approved procedural schedule. A copy of that email has been made part of the file in this case, at DAAEP's counsel's request. Since the case had barely started, DAAEP could have requested leave to intervene out of time. It did not.

[42] DAAEP Chesapeake Memo at 50, citing *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995), *overruled by National Indus. Group (Hldg.) v. Carlyle Inv. Mgmt., L.L.C.*, 67 A.3d 373 (Del. 2013).

36. The approved procedural schedule in Docket No. 19-0529 that DAAEP's counsel received listed the dates of the public comment sessions and the deadline for written public comments. Had DAAEP read it, it would have been aware of those deadlines. No one on behalf of DAAEP attended any of the public comment sessions in Docket No. 19-0529, nor did DAAEP submit timely written comments. It did not.

37. Finally, DAAEP cannot deny that it knew about the proposed settlement in Docket No. 19-0529 and the date on which the Commission would hold a public hearing on the proposed settlement more than a month before the scheduled hearing date. It knew, because the DPA's counsel sent its counsel a copy of the executed settlement agreement and notified him of the hearing date. A copy of that email has been made part of the file in this case, at DAAEP's counsel's request. Yet DAAEP did *nothing* until a week before the hearing.

38. In light of these facts – which cannot be disputed – the DPA respectfully submits that DAAEP waited too long to make any entrance into Docket No. 19-0529. Its request that the Commission throw all that work away comes too late, and should be rejected.

D. MISCELLANEOUS DAAEP ARGUMENTS

1. DAAEP's Complaint About the Timing of Public Comments Should Be Rejected Because It Chose Not to Comment.

39. An entity or individual has two ways to participate in a Commission docket: intervene as a party to the proceeding, or submit public comments. Here, DAAEP did neither. As pointed out in both Chesapeake's Motion and the Joint Motion, the *Chesapeake* decision presumably persuaded the DAAEP not to intervene in this matter.[43]

[43] As noted in the Joint Motion, nothing prevented the DAAEP from trying to intervene in this matter. But it chose not to, and presumably that was a conscious decision. Joint Motion at n.48.

40. DAAEP complains that the deadlines for public comments were too early in the process for it to challenge the Settlement Agreement in Docket No. 19-0529, and therefore it could not have contested the provisions of the agreement.[44] However, as the Joint Motion pointed out, the Settlement Agreement largely reflects the relief sought in the Application, which was available to DAAEP, along with the procedural schedule that was sent by DPA's counsel to DAAEP's counsel on October 29, 2019.[45] DAAEP's failure to submit comments is its own.

2. Fairness to the Parties and Ratepayers Supports Dismissing DAAEP's Complaint.

41. In addition to the many legal reasons why the Commission should dismiss DAAEP's Complaint, fairness to the parties and ratepayers also supports dismissal. Chesapeake, Staff, the DPA, and Hart's Landing all followed the approved procedural schedule, negotiated, and reached a point where they had a proposed settlement to submit for the Commission's consideration. If the Commission grants DAAEP's requested relief, everything will start over. This is unfair to the parties who have already participated in Docket No. 19-0529, and especially to ratepayers who will eventually pay for this needless do-over in their rates.

III. CONCLUSION

DAAEP has no standing to assert the claims in its Complaint, because the Commission does not have jurisdiction over non-regulated propane providers. Moreover, Docket No. 19-0529 is essentially over: the Settlement Agreement has been approved, and Chesapeake has made a compliance filing setting out its proposed rates for the Hart's Landing subdivision once it has been converted to natural gas. The relief it seeks is moot. And even if DAAEP could overcome these legal obstacles, its eleventh-hour complaint comes too late. DAAEP has only itself to blame for

[44] DAAEP Memo at 7.
[45] Joint Motion at 23.

its current position. It chose to wait until the case was one week away from hearing to drop its complaint bomb; it must live with the consequences of that choice.

For the reasons set forth in the Joint Motion and this Reply, the DPA respectfully requests the Commission to dismiss DAAEP's Complaint.

Respectfully submitted,

/s/ *Regina A. Iorii*
Regina A. Iorii (De. Bar No. 2600)
Deputy Attorney General
Delaware Department of Justice
820 N. French Street, 4th Floor
Wilmington, DE 19801
(302) 577-8159 (Office)
(302) 893-0279 (Cell)
regina.iorii@delaware.gov

Counsel for the Delaware Division of the Public Advocate

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2020, I caused a copy of the attached **THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE'S REPLY TO THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS' MEMORANDUM IN OPPOSITION TO THE JOINT MOTION OF THE OF THE DELAWARE PUBLIC ADVOCATE AND THE DELAWARE PUBLIC SERVICE COMMISSION STAFF'S MOTION TO DISMISS THE COMPLAINT** to be served on the parties on the service list identified below via electronic mail.

James McC. Geddes, Esq.	jamesgeddes@mac.com
Dr. Rajnish Barua	raj.barua@delaware.gov
Connie McDowell	connie.mcdowell@delaware.gov
Joshua Bowman	joshua.bowman@delaware.gov
Samantha Hemphill	samantha.hemphill@delaware.gov
Thomas D. Walsh, Esq.	thomasd.walsh@delaware.gov
Lindsay B. Orr, Esq.	lorr@chpk.com
Brian M. Quinn, Esq.	bquinn@venable.com
Matthew Everngam	meverngam@chpk.com
Francis J. Murphy, Jr., Esq.	fmurphy@msllaw.com
Andrew Slater	andrew.slater@delaware.gov
Andrea Maucher	andrea.maucher@delaware.gov
Glenn A. Watkins	watkinsg@tai-econ.com

/s/ *Regina A. Iorii*
Regina A. Iorii (#2600)
Deputy Attorney General
Delaware Department of Justice
820 N. French Street, 4th Floor
Wilmington, DE 19801
(302) 577-8159
regina.iorii@delaware.gov

Counsel for the Delaware Division of the Public Advocate

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