IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN A. NICHOLS and FUELCELL ENERGY, INC., a Delaware corporation, Plaintiffs, v. JACK MARKELL, in his official capacity as the Governor of Delaware; WILLIAM O'BRIEN, in his official capacity as Executive Director of the Delaware Public Service Commission; JAYMES B. LESTER, in his official capacity as Commissioner of the Delaware Public Service Commission; JOANN CONAWAY, in her official capacity as Commissioner of the Delaware Public Service Commission; DALLAS WINSLOW, in his official capacity as Commissioner of the Delaware Public Service Commission; and JEFFREY CLARK, in his official capacity as Commissioner of the Delaware Public Service Commission, Defendants.	)	C.A. No. 12-777-CJB

DEFENDANTS' OPENING BRIEF IN SUPPORT OF MOTION TO DISMISS

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I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs John A. Nichols ("Nichols") and FuelCell Energy, Inc. ("FuelCell" together with Nichols, the "Plaintiffs") filed a complaint for declaratory and injunctive relief (the "Complaint") on June 20, 2012. (D.I. 1) The Complaint contains two counts. Count I seeks a declaratory judgment that the 2011 amendments to the Delaware Renewable Energy Portfolio Standards Act (with respect to the statute generally "REPSA," as to the 2011 amendments specifically, the "Amendments") violate the Dormant Commerce Clause of the United States Constitution. Count II seeks a declaratory judgment that the Amendments violate the Equal Protection Clause of the United States Constitution. Defendants Governor Jack Markell, William O'Brien, Jaymes B. Lester, Joann Conaway, Dallas Winslow, and Jeffrey Clark (collectively "Defendants") now move to dismiss the Complaint and respectfully submit this opening brief in support of their motion to dismiss.

II. SUMMARY OF ARGUMENT

1. Count I of the Complaint must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) because FuelCell lacks standing to challenge the Amendments under the Dormant Commerce Clause where FuelCell has not alleged that it will attempt or has attempted to do business in Delaware. Moreover, FuelCell's challenge will not be ripe unless and until FuelCell actually attempts to do business in Delaware and suffers some detriment from the Amendments.

2. Count II of the Complaint must be dismissed for failure to state a claim pursuant to Rule 12(b)(6) because the General Assembly clearly had a rational basis for enacting the Amendments and they impinge on no fundamental interest or right.

III. STATEMENT OF FACTS

A. REPSA Is Enacted to Improve Environmental Quality, Better Meet Delaware's Electricity Demands and Promote Economic Development.

In 2005, the Delaware General Assembly enacted REPSA, an intrastate regulatory scheme designed to foster "improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities." 26 *Del. C.* §351(b). REPSA, as subsequently amended, requires that an increasing percentage of retail sales of electricity "delivered to Delaware end-use customers by a retail electricity supplier or municipal electric company during any given compliance year … include a minimum percentage of electrical energy sales with eligible energy resources and solar photovoltaics[.]" *Id.* at §354(a); Compl. ¶20.[1] Eligible energy resources include solar photovoltaics, wind energy, ocean energy, geothermal energy, fuel cells powered by renewable fuels, gas from anaerobic digestion of organic material, hydroelectric facilities, biomass combustion, and methane gas captured from a landfill. 26 *Del. C.* at §352(6).

The requirement to use these renewable energy sources is not limited to electric companies regulated by the Delaware Public Service Commission (the "DPSC") like Delmarva Power & Light ("Delmarva"). It applies to any "person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to nonregulated power producers[.]" *Id.* at §§354, 352(22). As such, REPSA's requirements also apply to electric companies operated by municipalities (e.g., the City of Newark or City of Dover) and to any rural electric cooperative unless they elect to exempt

[1] The minimum percentage required from eligible energy resources began at 5% in 2010 and will increase to 25% by 2025. 26 *Del. C.* §354. There is a separate minimum percentage requirement for electricity produced by solar photovoltaics. *Id.* This, too, has an escalating schedule, ranging from 0.018% in 2010 to 3.5% in 2025. *Id.*

themselves by developing and implementing a comparable renewable energy portfolio standard program. *Id.* at §363(a).

REPSA provides that "[a] retail electricity supplier or municipal electric company may use accumulated renewable energy credits ["REC"] or solar renewable energy credits ["SREC"] to meet the renewable energy portfolio standard established pursuant to this subchapter[]," *id.* at §360(a), and "commission-regulated electric companies shall be responsible for procuring RECs, SRECs and any other attributes needed to comply with [the renewable energy portfolio standards] with respect to all energy delivered to such companies' end use customers." *Id. at* §354(e). Each purchased REC or SREC is treated, respectively, as the equivalent of one megawatt-hour of retail electricity sales in the state from eligible energy resources or from solar photovoltaic energy resources. *Id*. at §§352(18), (25), 354; Compl. ¶21.

B. The Amendments are Enacted to Further the Goals of REPSA.

On July 7, 2011, after passing 35-4 in the Delaware House of Representatives and 18-2 in the Delaware State Senate, the Governor signed the Amendments to REPSA into law. The Amendments were enacted to meet the same goals as REPSA generally, such as improved environmental quality, better meeting Delaware's electricity demands and promotion of economic development. 26 *Del*. *C.* §364(d)(2).

More specifically, the Amendments provide a regulatory framework by which a DPSC-regulated electric company, such as Delmarva, could deliver to its customers energy generated by a "qualified fuel cell provider project," in return for allowing energy output from such projects to reduce the obligation of the DPSC-regulated utility to acquire RECs or SRECs to satisfy a portion of the REPSA obligations of such company.[2] *Id.* at §353(d)(1); Compl. ¶30.

[2] The Amendments to REPSA did not change that Delmarva and other Delaware entities can use power produced by fuel cells manufactured in other states or sited in other states to meet REPSA

A "qualified fuel cell provider project" must be operated by a "qualified fuel cell provider." 26 *Del. C.* §352(17). A "qualified fuel cell provider" is defined as an entity that (1) manufacturers fuel cells in Delaware that are capable of being powered by renewable fuels, and (2) is designated by the Director of the Delaware Economic Development Office and the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC") as an economic development opportunity. *Id*. at §352(16).

A "qualified fuel cell project" must also operate "under a tariff approved by the Commission pursuant to §364(d) of this title." *Id.* at §352(17). Approval of the tariff requires that, *inter alia*:

1. the fuel cell project be of a certain size, *id.* at §364(d)(1)a;
2. the fuel cell project provide for at least a 20-year term of service, *id.* at b;
3. the cost to customers of the DPSC-regulated electric company not exceed a specified price "cap," *id*. at c; and
4. a certain average efficiency level must be maintained, *id.* at h.

According to the Amendments, before allowing such a project to become a part of Delmarva's supply portfolio, the DPSC must determine whether the incremental cost to Delmarva's customers of the qualified fuel cell provider project is in the public interest by applying at least the following factors: whether the fuel cell provider or the tariff (a) "utilizes innovative baseload technologies"; (b) "offers environmental benefits relative to conventional baseload generation technologies"; (c) "promotes economic development in the State"; and (d) "promotes price stability[.]" 26 *Del. C.* §364(d)(2)a-d; *see also* New Energy Opportunities, Inc. et al, Report on Delmarva Power's Application for Approval of a New Electric Tariff Applicable to Proposed Bloom

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obligations, if those fuel cells are powered by renewable fuels. In fact, REPSA gives a 300% REC credit for energy derived from a fuel cell powered by renewable fuel regardless of where the fuel cell is manufactured or located. 26 *Del. C.* §356(a)(2).

Energy Fuel Cell Project, *In re Application of Delmarva Power and Light Co. for Approval of Qualified Fuel Cell Provider Project Tariffs*, PSC Docket No. 11-362, at 18, 36-41 (Oct. 3, 2011) (the "Consultant Report") (Exhibit A to the Burton Declaration).[3]

Like REPSA, the Amendments promote new economic development in Delaware, but only if such economic development also improves Delaware's air quality, increases Delmarva's electric supply diversity, and provides protection against price volatility and supply disruption through the use of innovative technology. On October 18, 2011, after a robust regulatory process that included three public hearings, hundreds of pages of sworn testimony, a full-day hearing with multiple witnesses, and a thorough review by an independent expert witness, the DPSC ruled 5-0 that the 30MW project proposed by Bloom had satisfied each of the elements provided for in the Amendments. Compl. ¶¶41-42; DPSC Opinion.

Consistent with certification under REPSA that the Bloom project presented a viable economic development opportunity, Delaware's Council on Development Finance also approved a Delaware Economic Development Authority ("DEDA") grant to incentivize Bloom to build its manufacturing operations in Delaware. The grant is for up to $16.5 million from the Delaware Strategic Fund, contingent upon Bloom employing up to 1500 individuals and spending $50 million dollars constructing a new factory in Newark, Delaware. DPSC Opinion at 25-26. The economic development incentives were contingent upon the tariff being approved by the DPSC, which occurred as described above.

[3] The Consultant Report and the Findings, Opinion and Order No. 8079, *In re Application of Delmarva Power and Light Company for Approval of Qualified Fuel Cell Provider Project Tariffs*, PSC Docket No. 11-362 (Dec. 1, 2011) (the "DPSC Opinion") (Exhibit B to the Burton Declaration) are cited and quoted from extensively in the Complaint. *See* Compl. ¶¶35-42. It is well-settled that in "ruling on a motion to dismiss, the…Court may consider certain narrowly defined types of material without converting the motion to dismiss to a summary judgment motion, including items that are integral to or *explicitly relied upon in the complaint*." *Coulter v. Doerr*, No. 12-1864, 2012 U.S. App. LEXIS 10839 (3d Cir. May 30, 2012) (emphasis added).

C. Plaintiffs File Suit in this Action Claiming That the Amendments to REPSA Are Unconstitutional.

On June 20, 2012, Nichols and FuelCell filed the Complaint. In the Complaint, Nichols purports to be a Delaware resident who purchases electricity from Delmarva. Compl. ¶10. FuelCell purports to be a fuel cell manufacturer with its principal place of business in Connecticut. *Id.* at ¶2.

Plaintiffs claim that the Amendments violate the United States Constitution in two ways. First, they claim that the Amendments violate the Dormant Commerce Clause by requiring that a "qualified fuel cell provider" manufacture fuel cells in Delaware. *Id*. at ¶46. Second, Plaintiffs claim that the Amendments violate the Equal Protection Clause of the Fourteenth Amendment by allegedly treating Delmarva customers differently from other Delaware residents who are not Delmarva customers. *Id*. at ¶48.

IV. ARGUMENT

A. This Case Should Be Dismissed Because Plaintiffs Lack Standing.

1. Legal Standard

The United States Constitution limits federal court jurisdiction to cases and controversies. U.S. Const. art. III, §2. "Art[icle] III…requires a litigant to have 'standing' to invoke the power of a federal court[.]" *Allen v. Wright*, 468 U.S. 737, 750 (1984). To meet the Article III standing requirement, a plaintiff must allege that: (1) it suffered an "injury in fact," (2) "a causal connection [exists] between the injury and conduct complained of," and (3) it is "likely…that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

In the present case, FuelCell alleges only that it "aims" to compete for business in Delaware. Compl. ¶2. Such an allegation is not sufficient to confer standing. FuelCell has not alleged that it has previously conducted business in Delaware or has any concrete plans to do so. It also fails to

allege that it could meet the requirements to be a "qualified fuel cell provider" that it does not challenge as unconstitutional. It has not alleged any facts to demonstrate that this Court's resolution of the Dormant Commerce Clause claim will have any practical effect on FuelCell's ability to do business with Delmarva – the only entity FuelCell identifies as a potential customer. In short, this is a hypothetical dispute devoid of factual context or realized or imminent injury.

2. The Complaint Fails to Allege that FuelCell Suffered an "Injury in Fact."

To allege that it has suffered an "injury in fact," a plaintiff must plead facts sufficient to demonstrate that it suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) *actual or imminent*, not conjectural or hypothetical[.]" *Id.* at 560 (internal quotations and citations omitted) (emphasis added). Where the plaintiff seeks prospective relief, "the plaintiff must 'establish a real and immediate threat'" of government action in order to demonstrate standing. *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

In cases such as this, where the alleged injury is to the business prospects of the plaintiff, the plaintiff must allege that it has taken steps to develop the opportunity. *See, e.g.*, *Nationwide Ins. Indep. Contrs. Ass'n v. Nationwide Mut. Ins. Co.*, No. 11-3085, 2012 U.S. Dist. LEXIS 60691, at *9-11 (E.D. Pa. Apr. 30, 2012) (failure to allege a concrete injury where agent had never attempted to obtain financing); *Jamaica Ash & Rubbish Removal Co. v. Ferguson*, 85 F. Supp. 2d 174, 186 (E.D.N.Y. 2000) (finding no standing where plaintiffs challenged a New York City law but "admitted that they do no business in New York City, that they never have done business in New York City, and that they have not made an application to do business in New York City.").

When FuelCell alleges that its injury relates to business or other activity in the future, it must allege a concrete plan for engaging in the conduct. *Lujan*, 504 U.S. at 563-64. Undefined

"'someday' intentions – without any description of concrete plans, or indeed even any specification of *when* the someday will be – do not support a finding of the 'actual or imminent' injury' required to establish standing." *Id.* at 564 (emphasis in original). *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (allegation that plaintiff "'want[s] to' go" to a particular area in Allegheny National Forest is "insufficient to satisfy the requirement of imminent injury") (modification in original); *McConnell v. Sapia*, No. 4:11-CV-0969, 2012 U.S. Dist. LEXIS 6362, at *2 (M.D. Pa. Jan. 19, 2012) (dismissing plaintiff's claim where plaintiff's "complaint states merely that he 'plans to return' to [the defendant's] property in the future, but fails to indicate or even speculate when he will return[.]").

Applying these principles to a Dormant Commerce Clause challenge to a state law governing a public utility, the court in *American Energy Solutions, Inc. v. Alabama Power Co.* dismissed a complaint for lack of standing under circumstances similar to this case. 16 F. Supp. 2d 1346, 1355 (M.D. Ala. 1998). There, the plaintiffs, an electric services provider and associations representing the interests of electricity consumers, sought declaratory and injunctive relief preventing the implementation of an Alabama statute that permitted the Alabama Power Company to collect reimbursement fees for "stranded costs" from customers who elected to switch to an alternative provider of electric services. *Id*. at 1348-49. The defendants moved to dismiss based partly on the plaintiffs' lack of standing. *Id.* at 1349. The defendants argued that the plaintiffs had never applied for authorization to switch electric providers and, accordingly, no denial of contract or imposition of fees had occurred. *Id.* at 1351.

The district court dismissed the action, finding that the plaintiffs "fail[ed] to allege facts sufficient to establish the requisite injury." *Id.* at 1353, 1355-56. Critical to this conclusion was that "no applications for such contracts have yet been made, the APSC has not yet made any

determination of imposition of stranded costs[,]" and the plaintiffs made "no allegation concerning any lost savings or any private contracts that they have had to forego." *Id.* at 1353-54.

Like the plaintiffs in *American Energy Solutions*, FuelCell fails to make allegations supporting a finding of "injury in fact." FuelCell's only apparent claim of injury is that the Amendments deny FuelCell "equal competitive footing regarding the sale of fuel cell products and services to Delmarva and other potential customers in Delaware." Compl. ¶43. But FuelCell never alleges that it has sold or attempted to sell fuel cell products or services to Delmarva or other potential customers in Delaware. FuelCell alleges only that it "*aims* to compete for . . . business from Delmarva[.]" Compl. ¶2 (emphasis added). Thus, FuelCell has failed to state an actual injury because it has not taken any action that would be affected by, or subject to, the Amendments, i.e., actually attempting to secure a contract with Delmarva. *See American Energy Solutions*, 16 F. Supp. 2d at 1353-54. Put simply, FuelCell cannot be heard to complain of being denied "equal competitive footing" when it has yet to place its foot on the competitive playing field.

Not only does FuelCell fail to allege an actual injury, it also fails to allege an imminent injury. FuelCell's declaration that it "aims to compete" for Delmarva's business hardly qualifies as a concrete plan sufficient to survive constitutional scrutiny. *See Lujan*, 504 U.S. at 564. FuelCell provides no information to explain *how* it plans to compete or *when* it plans to compete. In other words, FuelCell has alleged a manner of "'someday' intentions" that "do not support a finding of the 'actual or imminent' injury that [the Supreme Court's] cases require." *Id.*

FuelCell's claim of injury is further undercut by its allegation that its fuel cells qualify as "eligible energy resources" under REPSA, Compl. ¶23, meaning that energy produced by those fuel cells would qualify any retail electricity supplier or municipal electric company in Delaware for a 300% REC credit, regardless of where the fuel cells are manufactured. 26 *Del. C.* §§352(6)(e),

356(a)(2). Yet, despite alleging that its fuel cells qualify as "eligible energy resources," FuelCell has not registered to be an "eligible energy resource" in Delaware or alleged that it has attempted to sell or provide electric energy to any electric supplier or generator in Delaware. This further illustrates that FuelCell is a not a meaningful or potential participant in the Delaware market and, consequently, that it has not suffered any injury as a result of the Amendments.

3. FuelCell Has Not Alleged an Injury Caused by the Amendments or Redressable by the Requested Relief.

Because FuelCell has failed to allege an injury in fact, this Court need not reach the issues of causation and redressability. *American Energy Solutions*, 16 F. Supp. 2d at 1355. In the event that the Court reaches those issues, however, FuelCell has not alleged an injury caused by the alleged constitutional violation, or one that is capable of being redressed by the requested relief.

To demonstrate standing, a plaintiff must allege "a causal connection between the injury and conduct complained of" and that it is "'likely' . . . that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (internal quotations omitted). Demonstrating causation and redressability is "'substantially more difficult'" where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*[.]" *Id.* at 562 (internal quotations omitted) (emphasis in original). Where causation and redressability "'depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,'" it is the plaintiff's burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (internal quotation omitted).

FuelCell alleges in conclusory fashion that its injury is "causally connected" to the Amendments. Compl. ¶7. However, FuelCell is not regulated by the Amendments; rather, the Amendments regulate Delmarva. *See* 26 *Del. C.* §353(d). Because FuelCell is not directly regulated

by the Amendments, FuelCell must "adduce facts to show that [Delmarva's] choices have been made in such a manner as to produce causation[.]" *See Lujan*, 504 U.S. at 562.

FuelCell does not allege any facts to support the idea – not even alleged in the Complaint – that Delmarva would either have purchased energy from FuelCell in the past or would purchase energy from FuelCell in the future, if the manufacturing requirement of the Amendments had not been enacted or is stricken from the law. Moreover, FuelCell does not allege that, had the Amendments been adopted without the challenged requirements, FuelCell would be able to meet the other – unchallenged – requirements of the Amendments. For example, FuelCell does not allege that it could meet the size, term of service, cost requirements or efficiency standards set forth in the Amendments. FuelCell also does not allege that it could build a 30MW FuelCell project that utilizes innovative baseload technologies, produces environmental benefits versus conventional baseload generation, promotes price stability, or in any manner enhances economic development in Delaware, sufficiently to outweigh the incremental costs to Delmarva's customers. 26 *Del. C.* §364(d)(2).

FuelCell also fails to allege how its alleged injury is redressable by the relief it seeks. For example, FuelCell has not alleged that eliminating the Delaware manufacturing requirement from the definition of "qualified fuel cell provider" would result in Delmarva, or any other party subject to the Amendments, doing business with FuelCell. And, FuelCell does not allege that it could meet the uncontested requirements for a "qualified fuel cell provider project." Absent such allegations, FuelCell does not allege a redressable injury.

B. FuelCell's Claim is Not Ripe for Adjudication.

As explained above, FuelCell has not alleged a concrete or live dispute. Rather, its claim is hypothetical and contingent on events that may not occur, such as an actual effort to engage in business in Delaware that may be frustrated by the Amendments. For these reasons, FuelCell's claim is not ripe.

Federal court jurisdiction extends only to those cases that are ripe for judicial review. *See Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992). This limitation prevents federal courts from issuing advisory opinions. *Tait v. City of Philadelphia*, 410 Fed. Appx. 506, 508 (3d Cir. 2011). "In determining whether an action is ripe for judicial review, the Supreme Court generally looks to 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Armstrong*, 961 F.2d at 411 (internal quotations omitted). The Third Circuit uses a refined test for ripeness in declaratory judgment actions, which focuses on (1) "'the adversity of interest' between the parties," (2) "the 'conclusivity' that a declaratory judgment would have on the legal relationship between the parties," and (3) "the 'practical help, or utility,' of a declaratory judgment." *Id.* (internal quotations omitted).

The adversity inquiry asks "[w]hether the claim involves uncertain and contingent events, or presents a real and substantial threat of harm." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 342 n.9 (3d Cir. 2001). "Adversity of interest is minimal where plaintiff's action depends upon a contingency which may not occur." *New York Shipping Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 460 Fed. Appx. 187, 189 (3d Cir. 2012). The conclusivity inquiry "examine[s] the conclusivity that a declaratory judgment would have on the legal relationship between the parties." *Armstrong*, 961 F.2d at 421. Here, courts ask "[w]hether further factual development would be useful." *NE Hub Partners*, 239 F.3d at 342 n.9. The utility inquiry asks whether the declaratory judgment would be of any "'practical help, or utility'" to the parties. *Armstrong*, 961 F.2d at 423 (internal quotations omitted). "[T]he proper focus of the utility inquiry is the effect of a declaratory judgment on the parties' plans of action – not *third* parties' plans of action." *Id.* (emphasis in original). In this context, the court also examines the "[h]ardship to the parties of withholding decision." *NE Hub Partners*, 239 F.3d at 342 n.9.

The decision in *Armstrong* demonstrates that a case is not ripe until a transaction actually has been proposed that is allegedly frustrated by a contested statute. In the present case, FuelCell has not so much as contended that it has made any proposal that has been allegedly affected by the manufacturing requirement in the Amendments that it challenges. The same was true in *Armstrong*, where plaintiff shareholders of a Pennsylvania corporation sought declaratory and injunctive relief in challenging the Pennsylvania anti-takeover act of 1990. 961 F.2d at 407-08. Applying the foregoing three-part test, the Third Circuit Court of Appeals determined that the plaintiffs' claims were not ripe because no takeover offer had been made for the corporation in question. *Id.* at 424. First, the claims failed the adversity requirement because the alleged injuries – both to the stockholders of the corporation and any tender offeror – were contingent upon a hypothetical tender offer for the corporation's stock. *Id.* at 413-420. As to conclusivity, the court determined that, although the plaintiffs' facial challenge to the statute did not necessitate further factual development, this did not "make up for the lack of a live controversy[.]" *Id.* at 423. The court also determined that "[i]n the absence of a pending takeover attempt, a declaratory judgment would have no significant effect on either plaintiffs' or defendants' course of conduct." *Id.* at 423. Moreover, delay in adjudication would not place the plaintiffs in danger of prosecution under the statute or cause them economic hardship. *Id.* at 423-24. Accordingly, the Court held that the plaintiffs' claims were not ripe and affirmed dismissal. *Id.* at 424.

Just as the plaintiffs in *Armstrong* failed to meet the adversity requirement because no tender offer had commenced, FuelCell fails to meet the adversity requirement because it has not attempted to conduct business with Delmarva. *See Armstrong*, 961 F.2d at 420; *see also SWT Acquisition Corp. v. TW Servs., Inc.*, 700 F. Supp. 1323, 1329 (D. Del. 1988) (potential tender offeror's challenge to 8 *Del. C.* §203 not ripe in advance of commencing an all shares tender offer).

Moreover, even if FuelCell implemented a plan to compete in the Delaware market, its assertion that it is injured by the Amendments incorrectly assumes that FuelCell would be eligible to participate in a "qualified fuel cell provider project" absent the Delaware manufacturing requirement. But, FuelCell has not alleged that it can even satisfy the host of criteria for a "qualified fuel cell provider project." And, even if FuelCell could meet such criteria, it has failed to allege that it could secure a partnership with Delmarva, which possesses independent decision-making authority regarding its contractual arrangements. Because FuelCell's ultimate success depends upon so many layers of "uncertain and contingent events," FuelCell has not alleged that its interests are presently or imminently adverse to Defendants.

FuelCell's requested relief also would have no effect on the plans of either FuelCell or Defendants. FuelCell has not alleged that it will compete or even is capable of competing in Delaware if the Court grants the relief it seeks. FuelCell also has not alleged that the continued existence of the challenged Amendments will cause it economic hardship – something it cannot allege since its ability to secure business with Delmarva will be determined by multiple factors unrelated to the challenged provisions of the Amendments.

Conversely, should this action continue, Delaware and this Court will certainly be burdened by the extensive litigation necessary to resolve Plaintiffs' hypothetical questions. In sum, FuelCell cannot satisfy the ripeness requirement.

C. Nichols Lacks Standing to Bring Dormant Commerce Clause Claims.

The Complaint does not raise a Dormant Commerce Clause claim on behalf of Nichols. *See* Compl. ¶46 (focusing on the alleged effects of the Amendments on out of state fuel cell providers). For that reason, this brief does not address the fact that Nichols would lack standing to raise such a claim. To the extent that Nichols seeks to "piggy-back" on the claim asserted by FuelCell, Nichols's claim also fails for the reasons set forth above.

D. The Complaint Fails to State a Claim for Denial of Equal Protection and Must Be Dismissed.

1. Legal Standard on a Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As the Supreme Court explained in *Iqbal*, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Additionally, even where a complaint presents appropriate factual allegations, a court must determine whether the allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Id.* at 679.

2. Summary of Claim and Argument

Count II of the Complaint attempts to state an equal protection claim on the grounds that "[the Amendments], *facially and as applied*, violate[] the Equal Protection Clause[,]" because they "separate[] Delaware residents into classes based on their electricity supplier: only Delaware residents who are also Delmarva customers are required to pay the fuel cell tariff that has been approved by the Defendant DPSC Commissioners." Compl. ¶48 (emphasis added). Nichols alleges that he is a member of "a unique, discrete class of Delaware consumers" who pay "higher electricity bills". *Id*. at ¶1. The discrimination is alleged to be against "Delmarva customers" and "between Delaware residents who are Delmarva customers and all other Delaware residents."[4] *Id.* at ¶48(b).

[4] The Complaint does not purport to assert the Equal Protection Clause claim on behalf of FuelCell, which is not a Delaware resident within the class that the complaint asserts has been discriminated against. For that reason, to the extent the Complaint seeks to assert an equal protection claim on behalf of "plaintiffs," FuelCell lacks standing to bring such a claim.

To the extent Nichols argues that the Amendments facially discriminate between Delmarva customers and customers of other electricity suppliers, the argument must fail because there is no facial discrimination. The Amendments do not apply only to Delmarva, as Plaintiffs appear to allege. And the tariff in question rationally applies to Delmarva and its customers because Delmarva is a regulated for-profit utility, as opposed to an unregulated municipal or non-profit utility. Unless Nichols is contending that the distinction between regulated and unregulated utilities is irrational – and he does not make any allegations to support such an assertion – the Complaint fails to state a claim for facial discrimination. To the extent Nichols is arguing that there is no rational basis for the tariff as applied and approved by the DPSC, that argument must fail because the tariff, as enacted and applied, is rationally related to the objectives of REPSA as articulated by the General Assembly when REPSA was adopted in 2005.

3. As Economic Legislation Involving Neither a Suspect Class Nor a Fundamental Right, Distinctions Under the Amendments Are Subject to Rational Basis Review and Are Presumed to Be Rational.

"The Supreme Court . . . has repeatedly held that a statute being challenged by those asserting [] an equal protection claim, in a case 'impinging upon no fundamental interest,' is to be reviewed under the rational basis standard that is normally used in matters of economic regulation." *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 255 (3d Cir. 1989). Distinctions in electric rates do not interfere with a fundamental right or discriminate against a suspect class and are therefore subject to only rational basis review. *See Barket, Levy & Fine v. St. Louis Thermal Energy Corp*., 21 F.3d 237, 240-43 (8th Cir. 1994) (charging higher rates for heat to customers with a boiler than to customers without such a boiler satisfied rational basis review); *Allen v. Electric Power Board of Metropolitan Government*, 422 F. Supp. 4, 6 (M.D. Tenn. 1976) (electric meter reading regulations satisfied rational basis review).

"The equal protection clause is satisfied, under this standard, as long as the legislature 'rationally could have believed' that the statutory classification would promote a legitimate objective." *Swin Res. Sys.*, 883 F.2d at 255 (internal quotations omitted). Economic regulation – such as the tariff at issue here – is subject to the most deferential rational basis review:

> [E]conomic legislation 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality' such that 'the varying treatment of different groups . . . is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'

Id. at 256 (quoting *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, at 462-63 (1988) (citations omitted)).

In this case, Nichols does not allege that there is any fundamental interest or suspect classification at issue. Rather, he makes the conclusory allegation of irrationality. Compl. ¶48. To overcome the presumption of rationality, Nichols must allege facts demonstrating that no rational basis for the classification exists. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) ("the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." (internal quotations omitted)). Not only do Nichols's allegations fail to overcome the presumption of rationality, a proper understanding of the structure and operation of REPSA and the Amendments only confirms their rationality.

4. The Complaint Fails to Allege Facts that Could Plausibly Overcome the Amendments' Presumed Rationality.

a. On their Face, the Amendments Do Not Facially Irrationally Discriminate Against Delmarva or its Customers.

The allegation that REPSA facially discriminates against Delmarva customers is simply incorrect. The renewable energy requirements created by REPSA are applicable to any "retail electricity supplier or municipal electric company" delivering "retail electricity product" to Delaware

end use customers. Those requirements are *not* limited to Delmarva or even commission-regulated utilities. 26 *Del. C.* §354(a); *see also* Compl. ¶20 (conceding that REPSA applies to "other ... electricity suppliers"). There is no facial discrimination between Delmarva customers and other end-users of electricity with respect to the REPSA requirements. To the extent that Nichols's electric rates have been affected by the requirements of REPSA, there has been no discrimination against Delmarva or its customers.

The allegation that the tariff provisions of Section 364(b) of the Amendments discriminate against Delmarva customers also is incorrect. The tariff provision in question allows any DPSC-regulated utility to apply to the DPSC for authority to pass through to its customers the cost to operate a qualified fuel cell provider project. That provision on its face is not limited to Delmarva, and the fact that Delmarva is the only such utility is not a function of any statutory or facial discrimination. Rather, the tariff provisions at issue discriminate between a utility whose cost structure and rates are regulated by the DPSC and one whose cost structure and rates are not so regulated. Section 364's limited application to DPSC-regulated electric companies arises from the fact that the DPSC only has jurisdiction over the rates of DPSC-regulated electric companies (of which Delmarva is the only one (Compl. ¶22)). *See* 26 *Del. C.* §§202(a), (g), 223 (largely exempting municipal electric utilities and electric cooperatives, the only other electric utilities in Delaware, from DPSC jurisdiction). Consequently, Plaintiffs must allege some basis to conclude that discrimination between regulated for-profit energy utilities and unregulated non-profit or municipal providers of electricity is irrational. Plaintiffs do make not make any such allegation. Yet, that distinction is the reason that the tariff provisions apply to Delmarva and the reason that Nichols's electric rates are impacted by the tariffs approved by the DPSC. To allege an actionable claim that the Amendments violate the equal protection clause on their face, Nichols must allege

some facts that create a plausible basis for concluding that the regulatory structure is irrational. He does not.[5]

b. The Tariff Provisions As Applied in this Case Are Rationally Related to the Legitimate Objectives of REPSA As Expressly Identified by the Delaware General Assembly.

Plaintiffs' as-applied equal protection challenge is equally specious. The tariff complained of was submitted by Delmarva and approved by the DPSC pursuant to Section 364. As explained above, a fuel cell project is not a "qualified fuel cell provider project" unless a tariff is submitted and approved in accordance with that section. A tariff under that section must meet certain requirements that directly reflect the express purposes for which REPSA was enacted in 2005.

REPSA expressly states that "[t]he General Assembly finds and declares that the benefits of electricity from renewable energy resources accrue to the public at large" and that these "benefits include improved regional and local air quality, improved public health, increased electric supply diversity, increased protection against price volatility and supply disruption, improved transmission and distribution performance, and new economic development opportunities." 26 *Del. C.* §351(b). When considering a tariff submitted by Delmarva under Section 364, the DPSC is required to consider precisely those factors, among others, including: whether the fuel cell project or the tariff (a) utilizes innovative baseload technologies; (b) offers environmental benefits relative to conventional baseload generation technologies; (c) promotes economic development in the State; and (d) promotes price stability. *Id*. at §364(d)(2)a-d. As reflected in the Consultant's Report and DPSC's Opinion in the Complaint, the DPSC and its consultants evaluated each of those factors and

[5] The Plaintiff does not allege any facts suggesting that the distinction between regulated and unregulated retail electric suppliers violates the Equal Protection Clause or is irrational. For that reason, Defendants do not burden the Court in this brief with a recitation of the public policy rational behind the distinctions under Delaware law between a regulated public utility, owned by stockholders seeking to profit from the customers, and an unregulated retail electric supplier, such as an electric cooperative or a municipal electric company, owned or controlled by customers or customers who are voters, respectively.

concluded they were met with respect to the tariff in question. Compl. ¶¶41-42; Consultant Report at 36-41; DPSC Opinion at 45-55. These analyses demonstrate that the tariff rationally relates to accomplishing those legitimate governmental objectives expressly set forth in REPSA. To the extent the submission and approval of the tariff affects the price Nichols will pay for electricity, there is more than a rational basis for those prices, there is a demonstrated and reasonable basis for them in accordance with the expressed legislative purposes.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant the Motion to Dismiss.

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Dated: August 29, 2012

CERTIFICATE OF SERVICE

I, David C. McBride, Esquire, hereby certify that on August 29, 2012, I caused to be electronically filed a copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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