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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAKE A DORMANT COMMERCE CLAUSE CHALLENGE TO REPSA.

A. FuelCell Still Has Not Established Standing

It is undisputed that FuelCell lacks standing to make a Dormant Commerce Clause challenge unless it can show an "injury in fact" caused by REPSA and redressable through the relief sought. DOB 6-7; PAB 7;[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[2] Defendants' Opening Brief explained that FuelCell's speculative allegation that it "aims" to compete for business in Delaware does not give rise to an injury in fact sufficient to confer standing. DOB 6-11. FuelCell evidently agrees, as it felt compelled to interject new factual assertions via the Affidavit of Frank Wolak ("Wolak Aff."). Nevertheless, FuelCell still does not allege that it suffers an actual or imminent injury from the Amendments—the Wolak affidavit merely confirms that FuelCell has no concrete plan to compete in Delaware, and that any purported plan is speculative at best. FuelCell therefore still has not sufficiently alleged that the Amendments to REPSA caused an injury in fact on which to base standing. Further, Defendants contest the unsubstantiated assertions in the Wolak Affidavit and request leave to take focused discovery on its assertions before this Court relies upon them.[3]

Even accepting the assertions made in the Wolak Affidavit, here is the existing record:

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[1] Undefined capitalized terms used herein have the meanings ascribed to them in Defendants' Opening Brief dated August 29, 2012 ("DOB __") (D.I. 20). Plaintiffs' Answering Brief dated September 17, 2012 is cited herein as "PAB __." (D.I. 22).

[2] *See also Tandy v. City of Wichita*, 380 F.3d 1277, 1283-84 (10th Cir. 2004)(prospective relief requires the plaintiff to suffer "a continuing injury or be under a real and immediate threat of being injured in the future. . . . A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction.").

[3] *See Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997) (on Rule 12(b)(1) motion, court not confined to allegations in plaintiff's complaint, but can consider affidavits, depositions, and testimony, citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977) (on Rule 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations")).

--- FuelCell has never done business or attempted to do business in Delaware, including with respect to its fuel cells that it alleges qualify as renewable energy under REPSA *and that are not subject to any in-state manufacturing requirement.* FuelCell never offers any explanation why its previous complete lack of interest in Delaware has now changed or what foreclosed FuelCell from doing business in Delaware in the past that now is different.

--- FuelCell's professed interest in doing business in Delaware in the future is so conditional that it is illusory. For example, FuelCell states that "when Delmarva or any other electricity supplier located in the State of Delaware issues a request for a proposal (RFP) for a multi-MW FuelCell energy project in the State of Delaware, FuelCell will bid on it...so long as the RFP is on commercially reasonable terms...." Wolak Aff. ¶17; PAB 13. The problem with this proffer is that there is no history of Delmarva issuing such an RFP.[4] Thus, FuelCell is stating that it will come to Delaware if and only if something that has never happened in the past were to happen now.

--- FuelCell says that it will only respond to the fictitious RFP if it is proposed on commercially reasonable terms, but FuelCell never states what commercially reasonable terms are, much less suggests that Delmarva would also find those undefined terms "reasonable."

As explained in Defendants' Opening Brief, it was to avoid this type of hypothetical or illusory injury that the court in *American Energy Solutions, Inc. v. Alabama Power Co.* required the plaintiff in that case to make a concrete proposal in order to establish standing to challenge the constitutionality of a utility regulation. DOB 8-9, 10; 16 F. Supp. 2d 1346 (M.D. Ala. 1998). FuelCell's effort to create standing suffers the same infirmity as the plaintiff in *American Energy Solutions*. FuelCell simply ignores that decision in its Answering Brief.

In addition, FuelCell relies upon legal authority that is inapposite to this case, and a comparison evidences the inadequacies in FuelCell's standing. FuelCell relies upon a line of "equal protection" cases in which a plaintiff alleged that racial or gender discrimination prevented them

[4] By law, Delmarva is not required to competitively bid a vast majority of the energy it supplies to Delmarva's standard offer service customers. Delmarva is given broad discretion to procure its energy supply through, for example, long or short-term contracts, by owning and operating its own generating facilities, or take any other Commission-approved action to diversify its retail load. 26 *Del. C.* §1007(b). The only limitation is that such procurement must be approved by the Commission as being in the "public interest." *Id.*

from competing for government contracts awarded pursuant to public bidding processes. Those cases hold that the plaintiff has standing if it is "able and ready to bid on contracts[.]" PAB 8-9. But, even under those cases, the plaintiff must demonstrate that it has a history of bidding or otherwise demonstrate "that sometime in the relatively near future it will bid on another Government contract" affected by the challenged regulations. *Adarand Constrs. v. Pena*, 515 U.S. 200, 211-12 (1995) (considering plaintiff's bidding history and frequency of bidding opportunities).

By contrast, in this case, there is no public bidding process, and FuelCell has not demonstrated any history of competing for business in Delaware or demonstrated that in the relatively near future it will participate in a bidding process. FuelCell must demonstrate a meaningful prospect of doing business with Delmarva if the in-state manufacturing requirement is eliminated.

Because FuelCell has failed to allege an injury, this Court need not reach causation and redressability, but in all events, FuelCell has not alleged an injury <u>caused</u> by the alleged constitutional violation, or one that is capable of being <u>redressed</u> by invalidating the in-state manufacturing requirement. DOB 10-11. *American Energy Solutions*, 16 F. Supp. 2d at 1355.

In its Answering Brief, FuelCell alleges vaguely that "[t]he 2011 Amendments and [] DPSC Commissioner's approval of the tariff . . . . are responsible for the injuries that these discriminatory provisions inflict upon FuelCell's relative ability to compete for business in Delaware." PAB 10-11. However, not all provisions of the Amendments are challenged in the Complaint as violating the Dormant Commerce Clause. The alleged constitutional violation is the inclusion of the in-state manufacturing requirement in the definition of a qualified fuel cell provider. To have an identifiable and redressable injury, FuelCell must establish an injury flowing from that provision, not other alleged injuries flowing from the business opportunity that Bloom pursued—an opportunity that was made available to a company that previously did not do business in Delaware and an opportunity that was not restricted to pre-existing Delaware businesses. FuelCell identifies five hypothetical "disadvantages" to out-of-state competitors arising from the Amendments. PAB 4-5. Four of these hypothetical disadvantages arise from geographically-neutral provisions: the tariff submitted by Delmarva and approved by the DPSC, the reduction in the number of RECs and SRECs Delmarva

must purchase, the 20-year length of a QFCP project, and the infrastructure advantage Bloom enjoys as a result of building a manufacturing facility in Delaware. [5] *Id.* FuelCell fails to appreciate that *any* fuel cell manufacturer not administering a QFCP project suffers these "disadvantages" *regardless of location.* Finally, FuelCell's argument that its lack of in-state facilities is a *dis*advantage is perverse. This argument has causation reversed. In order to establish that an in-state manufacturing requirement has caused injury to FuelCell, it must allege that it would be better off without such facilities, not worse off because it lacks such facilities. Moreover, FuelCell's lack of in- state facilities was not caused by the law it challenges, it was caused by FuelCell long-ignoring the Delaware market; any fuel cell manufacturer can gain an infrastructure advantage by establishing a commercial presence in Delaware. *See* Wolak Aff. ¶10 (detailing the broad market FuelCell has established outside of Delaware). The only arguably cognizable injury to FuelCell is identified as "out-of-state fuel cell companies are statutorily ineligible to compete" for QFCP projects. PAB 5. But this alleged injury is only caused by the "in state" manufacturing requirement if FuelCell can establish an ability and intent to compete in this market in the absence of that requirement. As explained above, FuelCell has not done so.

In sum, FuelCell asks the Court to exercise its extraordinary power of judicial review to remedy a hypothetical injury. The standing requirement of Article III is not some technicality to be danced around. It exists to assure that the Court's power to void democratically-enacted statutes is only exercised when necessary to redress real, not manufactured or hypothetical, injuries. It is an essential component of judicial restraint. This Court exercises that power only when necessary to remedy real injuries. In asking this Court to invalidate the duly-adopted laws of the State of

[5] FuelCell characterizes the tariff and the modification of the REC and SREC provisions of the law as "subsidies." But subsidies do not offend the Dormant Commerce Clause; and, in any event, any injury to FuelCell resulting from those provisions cannot provide standing for a Dormant Commerce Clause challenge to the "in-state manufacturing requirement." *See New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace . . . . Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]").

Delaware, FuelCell must do more than simply tell this Court that it would come to Delaware if invited on undefined "commercially reasonable" terms.[6]

B. Nichols Lacks Standing

Nichols argues that he has standing to challenge the in-state manufacturing requirement because "consumers who suffer injury in the form of prices higher than other consumers" as result of an unconstitutional restriction on interstate commerce have standing to challenge the restriction as violating the Dormant Commerce Clause. PAB 15-17. Nichols argues that his "electricity bill is quantifiably higher than it otherwise would have been but for the tariff-subsidy authorized by the 2011 Amendments." PAB 13. But to establish standing Nichols must allege more than a higher price; he must allege that his price is higher *because* REPSA limited qualified fuel cell providers to those with manufacturing facilities in Delaware. He does not make that allegation. Even if he did, he would still need to allege that there are out-of-state suppliers who would (and could) serve as "qualified fuel cell providers" in the absence of the manufacturing requirement. The Complaint does not allege that there is any such supplier, except possibly FuelCell, but for all the reasons identified above, there are no allegations (including in the contested allegations in the Wolak Affidavit) that FuelCell will actually compete in Delaware. Moreover, Nichols cannot credibly argue that FuelCell will provide electricity at a price lower than those reflected in the tariff when FuelCell—his co-plaintiff—refuses even to identify the terms on which it would contract with Delmarva.

Nichols does allege that his electric bill is higher than it would have been if the tariff had never been approved. However, this does not establish standing. REPSA—before the Amendments—envisioned that the development of renewable energy sources would cost more than the lowest cost energy otherwise available. The reasons for allowing Delmarva to charge higher prices for renewable energy are set forth in the statutorily identified purposes of REPSA when

[6] *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 161, 162 (3d Cir. 2007)(standing requirements ensure that a federal court respects its limited role in a democratic society; "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing."); *see Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007)(federal courts "must refrain from passing upon the constitutionality of an act" where standing is questionable); *American Energy Solutions*, 16 F. Supp. 2d at 1350 ("where the court is asked to determine the constitutionality of a state statute, the court's standing inquiry is especially rigorous.").

originally adopted and are repeated in the criteria for a tariff under the 2011 Amendments. The fact that renewable energy costs more than other energy forms does not establish a Dormant Commerce Clause injury to Nichols, nor does alleging that Bloom energy is more expensive than other forms of renewable energy. PAB 15 n.24. Rather, there must be a fuel cell provider who would provide energy at a lower cost if the in-state manufacturing requirement were eliminated.

Nichols cites several (distinguishable) cases for the proposition that consumers have prudential standing to challenge a "tax" that violates the Dormant Commerce Clause. PAB 15-17. Those cases each involved a tax that allegedly raised the price of out-of-state articles-in-commerce for in-state consumers without a comparative tax on comparative in-state articles-in-commerce; in such cases, standing exists because the alleged Dormant Commerce Clause violation—the tax—causes the price of the out-of-state articles to be higher.[7] In this case, the tariff—which Nichols mislabels as a tax—is not a tax on out-of-state fuel cell manufacturers and it is not alleged to increase the price that FuelCell would charge. Those cases actually support Defendants' proposition that Nichols must allege that the price he is paying would be less if the in-state manufacturing requirement were not included in the 2011 Amendments. Thus, Nichols' standing turns on whether FuelCell would actually be competing in Delaware in the absence of that requirement.

II. PLAINTIFFS' COMMERCE CLAUSE CLAIM IS NOT RIPE.

Defendants' Opening Brief explained why, under Third Circuit precedent, FuelCell's claim is not ripe. DOB 11-14. In response, FuelCell argues its claim is ripe because its conditional plan to participate in a hypothetical RFP from Delmarva is sufficiently concrete. PAB 11-12 (FuelCell has not even started "to formulate plans to compete for fuel cell projects"). For the same reasons that these allegations fail to demonstrate standing, they are insufficient to demonstrate ripeness. *See* DOB 14; *supra* pp. 1-6. Until FuelCell makes an offer to Delmarva from which it could be determined that FuelCell could satisfy the requirements to form a QFCP project with Delmarva absent the in-state manufacturing requirement, FuelCell's claim is mere speculation, and FuelCell

[7] *See, e.g., GMC v. Tracy*, 519 U.S. 278, 286 (1997) (consumer standing because tax raised the price of out-of-state products relative to the exempted in-state products); *Bacchus Imps. Ltd. v. Dias,* 468 U.S. 263, 267 (1984) (same); *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996) (same).

has not demonstrated ripeness. Furthermore, Nichols' claim is unripe because he fails to allege a controversy that exists as a result of the in-state manufacturing requirement of the Amendments.

III. COUNT II MUST BE DISMISSED BECAUSE NICHOLS FAILS TO ALLEGE A CLAIM FOR DENIAL OF EQUAL PROTECTION.

Nichols concedes that in considering his equal protection claim this Court should judge the Amendments under the lenient rational basis standard. PAB 18; DOB 16-17. Under this standard, "the burden is upon [Nichols] to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." DOB 17. The classification at issue is the application of the tariff only to Delmarva customers. In our Opening Brief, Defendants explained that the tariff is rationally related to accomplishing the objectives of REPSA. DOB 19-20. Nichols does not challenge those objectives as legitimate governmental purposes, and he does not challenge the DPSC determinations that the tariff meets those objectives—thus conceding that the tariff is rationally related to legitimate governmental objectives. For that reason, Count II must be dismissed.

Defendants' Opening Brief explained that (a) REPSA applies to all electricity providers in Delaware and (b) that the tariff at issue exists because Delmarva is a regulated utility and that there is a well-established rationale for the regulation of utilities. DOB 18-19. Nichols continues to assert a "facial" challenge to the tariff. PAB 13. Yet, Nichols affirmatively disclaims any intent to challenge the rationality of subjecting Delmarva to regulation. PAB 18. By conceding the rationality of this regulatory structure, Nichols effectively concedes that there is a rational basis for the only facial discrimination at issue.

Nichols' as applied equal protection claim turns on the assertion that the Delaware General Assembly acted "irrationally" when it adopted a statute permitting Delmarva to submit this tariff to the DPSC for approval. The sole basis for the alleged equal protection violation is that the tariff—which Nichols repeatedly mislabels as a "tax"—imposes on Delmarva customers the costs of economic development resulting from the fuel cell project from which the entire state benefits. PAB 19. There are at least five reasons why this argument must fail.

First, the tariff allowed by the General Assembly and approved by the DPSC must simply be a rational means to accomplish legitimate governmental objectives in order to survive equal

protection scrutiny. Nothing more is required. DOB 16-17. As outlined in Defendants' Opening Brief, a tariff submitted under the Amendments must be evaluated based upon the purposes for which REPSA was created. DOB 19-20. The DPSC found that the tariff at issue "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(a), DOB 19-20; DPSC Opinion at 45-55. Nichols does not dispute that these purposes are valid public purposes, including economic development, and he does not dispute the reasonableness, much less the rationality, of the DPSC's conclusion that those purposes were met in this case. Nothing more is required to establish the rationality of the tariff at issue. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). The analysis could end here, but Nichols' argument suffers from other flaws.

Second, under REPSA, all electric customers in Delaware must pay costs associated with an electricity supplier meeting its REPSA obligations, not just Delmarva customers. As Plaintiffs now expressly concede, every Delaware electricity supplier is subject to the REPSA requirements. PAB 2; 26 *Del. C.* §351(b). Consequently, every Delaware citizen who purchases electricity—directly or indirectly—pays the costs of that electricity supplier meeting its obligations under REPSA. Delmarva is the only such provider that is regulated. For that reason, it is the only provider of electricity that must have its prices approved by the DPSC in a tariff allowed by law. The state's other electricity customers bear similar costs imposed through alternate means. As a result, the imposition of the REPSA costs on Delmarva customers pursuant to the tariff provision does not irrationally discriminate between Delmarva customers and customers of municipal or cooperative utilities that meet REPSA requirements in other ways.

Third, even if one ignored the unchallenged rationale for the tariff as approved by the DPSC and even if one treated the tariff as if it were a "tax" imposed by the State of Delaware (which it clearly is not), the Equal Protection Clause does not require that those who pay a tax must be those who benefit from the expenditures financed by the tax. *Clark v. Poor*, 274 U.S. 554, 557 (1927)("Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to

which the proceeds are put is not a matter which concerns the plaintiffs.").[8] Numerous courts have upheld as rational statutes allocating the cost of a law to a *subset* of those who benefit from the law, as well as requirements that certain individuals subsidize general benefits by paying a higher portion of the total cost.[9]

Nichols does not cite a single case for the proposition that the burden of a tax on those who pay the tax must be proportionate to the benefits they receive from the programs financed by the tax, and consideration of well-known taxes refutes that proposition. Those who pay property taxes to finance public schools are not limited to property owners with children, much less those with children in public schools; and many citizens benefit from public schools who do not pay a property tax. Many persons who do not pay any federal income tax benefit from federal programs financed by that tax. Groups like Cause of Action, Inc. and political activists like Nichols may find this politically objectionable—preferring a structure where each pays his or her own way—but "so long as distinctions are conceivably rational, the recourse of a disadvantaged entity lies in the democratic process." *Lamers Dairy, Inc. v. USDA*, 379 F.3d 466, 476 (7th Cir. 2004).

Plaintiffs' citation to *Guam Power Authority v. Bishop of Guam* (a case no court has followed) is inapposite. PAB 20. *Guam Power* held that a municipal power company could not charge lower rates to non-profit companies. 383 F. Supp. 476, 481 (D. Guam 1974). *Guam* does *not* hold that the burden of a tax for those who pay it must be proportionate to the benefits they receive.

[8] *See also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 46 (1973)(system in which some school districts, on a net basis, paid tax revenue into foundation program to support statewide education while other districts, on a net basis, received money from the program satisfied rational basis review); *Figueroa v. United States*, 466 F.3d 1023, 1033-34 (Fed. Cir. 2006)(rational basis existed for increasing patent filing fee beyond the cost of the patent system; allegation that cost of filing exceeded the cost of the service provided did not state an equal protection claim).

[9] *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 184 (4th Cir. 2001)(final maritime employer paying all benefits under LHWCA had rational basis); *Cranberry Promenade, Inc. v. Cranberry Twp.*, 2011 U.S. Dist. LEXIS 149222, at *94 (W.D. Pa. Dec. 29, 2011)(development plan to provide economic development benefit to the community had rational basis); *Yerger v. Mass. Tpk. Auth.*, 395 Fed. Appx. 878, 884 (3d Cir. 2010)(requiring non-commuters to pay higher tolls was rational); *Lamers Dairy*, 379 F.3d at 475-76 (regulations requiring Class I milk handlers to subsidize Class III milk handlers satisfied the Equal Protection Clause); *Allied Chemical Corp. v. Georgia Power Co.*, 236 Ga. 548, 555 (Ga. 1976)(providing lower electricity rates to residential customers was rational); *Barket, Levy & Fine v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 243 (8th Cir. 1994)(state utility permitted to charge some customers more than other customers for the same steam heat).

Rather, *Guam* found the distinction between non-profits and for-profit customers did not support different rates. The fact that there must be a rational basis for tax and rate classifications does not mean that the burden of the tax on a particular class must be proportionate to the benefits received by that class. There are rational reasons for a government determining that certain people should pay a tax that benefits others who do not pay the same tax.

Fourth, even if the Equal Protection Clause required proportionality between those who incur the costs of a government program and its beneficiaries, a rational proportionality exists here. Nichols overlooks the unique benefits Delmarva customers receive from the Bloom project, such as price stability, reduction in the RECs and SRECs that Delmarva must purchase, and diversity of electric supply available to Delmarva and utilized by Delmarva customers. DPSC Opinion at 27-28; 26 *Del. C.* §353(d)(1)(c). Nichols does not deny that he will receive the benefits that other Delaware citizens enjoy from REPSA and specifically the Bloom project; he only complains of paying for the enjoyment of those benefits by others. It does not violate rational basis review that, in practice, the burdens of REPSA are not precisely allocated between all Delaware electricity consumers.[10]

Fifth and finally, Delaware could rationally allocate the Bloom project and its cost solely to Delmarva customers based upon the exigencies of economic development. "Promoting economic development is a traditional and long-accepted function of government." *Kelo v. City of New London*, 545 U.S. 469, 484 (2005). Delmarva is Delaware's largest power supplier, Delaware's only regulated power supplier, and serves half of Delaware residents. Compl. ¶¶2, 22. The General Assembly could rationally have involved its only DPSC regulated, and largest, electricity supplier in an economic development partnership, due to the practical difficulties of including numerous small unregulated power suppliers, without offending the Equal Protection Clause. *See Fritz*, 449 U.S. at 175 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.").

[10] *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause" if the classification has some reasonable basis, even if it results in some inequality); *FCC v. Beach Communications*, 503 U.S. 307, 315 (1993) (defining the class of persons subject to a regulatory requirement is a matter for legislative, rather than judicial, consideration and is "virtually unreviewable").

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CERTIFICATE OF SERVICE

I, David C. McBride, Esquire, hereby certify that on September 28, 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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