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. ________

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

SUMMARY OF THE CASE

1. The 2011 Amendments to the Delaware Renewable Energy Portfolio Standards Act ("REPSA"), codified at 26 *Del. C.* §§ 351 *et seq.*, were motivated by economic protectionism; facially, and as applied, discriminate against and deny out-of-state companies equal competitive footing with the in-state "crony company" favored by Delaware government officials; facially, and as applied, force a unique, discrete class of Delaware consumers to subsidize this discrimination through higher electricity bills; and unconstitutionally burden interstate commerce.

2. Plaintiff FuelCell Energy, Inc. ("FuelCell Energy"), is a manufacturer of fuel cells with its principal place of business in Connecticut. It aims to compete for fuel cell and renewable energy business from Delmarva Power & Light ("Delmarva"), the sole Delaware Public Service Commission ("DPSC")-regulated utility.

3. The REPSA, which was amended in 2011 in consideration for a promise by Bloom Energy, Inc. ("Bloom"), to manufacture fuel cells in Delaware, discriminates against FuelCell Energy and other similarly situated out-of-state renewable energy companies, denying them equal competitive footing and burdening interstate commerce.

4. The REPSA does this by creating a discriminatory qualification scheme, by requiring Delmarva to extract a "tariff" from its Delaware ratepayers to subsidize patronage of Bloom, and by incentivizing Delmarva to meet "renewable energy portfolio standards" using energy generation by fuel cells that are both manufactured and operated in Delaware only by qualified in-state fuel cell manufacturers (those hiring specified numbers of employees) — excluding fuel-cell firms in the interstate renewable-energy markets.

5. Plaintiff John A. Nichols ("Nichols") is a Delaware resident who purchases electricity from Delmarva.

6. The REPSA requires only Nichols and other Delmarva customers to pay a tariff, or "adjustable nonbypassable charge," which is used solely for the purpose of subsidizing Bloom's in-state economic activities, thereby shielding it from out-of-state competition. As a direct result of the tariff, Nichols will be forced to pay a higher price for his electricity than if Delmarva purchased renewable energy resources, such as fuel cells, and renewable energy in the competitive interstate market for those products.

7. FuelCell Energy and Nichols have each suffered an actual, concrete, and particularized injury that is causally connected to the REPSA's discriminatory and protectionist provisions and will be redressed by a favorable decision of this Court.

8. Therefore, a declaration that the REPSA violates the dormant Commerce Clause, Article I, Section 8 of the Constitution of the United States, and the Fourteenth Amendment's Equal Protection Clause, and injunctive relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, are appropriate.

PARTIES

9. Plaintiff FuelCell Energy is a Delaware corporation with its principal place of business in Danbury, Connecticut. It manufactures ultra-clean stationary fuel cells in Torrington, Connecticut. Its customers include utilities, municipalities, universities, government entities, and commercial and industrial enterprises.

10. Plaintiff Nichols is a Delaware resident who purchases electricity from Delmarva.

11. Defendant Jack Markell is the Governor of Delaware. The agencies that report to him include the DPSC, the State agency that implements the REPSA. He is named as a defendant in his official capacity.

12. Defendant William O'Brien is the Executive Director of the DPSC, the State agency that implements the REPSA. He is named as a defendant in his official capacity.

13. Defendant Joann Conaway is a Commissioner on the DPSC, the State agency that implements the REPSA. She is named as a defendant in her official capacity.

14. Defendant Jaymes Lester is a Commissioner on the DPSC, the State agency that implements the REPSA. He is named as a defendant in his official capacity.

15. Defendant Dallas Winslow is a Commissioner on the DPSC, the State agency that implements the REPSA. He is named as a defendant in his official capacity.

16. Defendant Jeffrey Clark is a Commissioner on the DPSC, the State agency that implements the REPSA. He is named as a defendant in his official capacity.

JURISDICTION, VENUE AND RELIEF

17. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

18. Venue is proper pursuant to 28 U.S.C. § 1391(b), as all of the individual Defendants in this action are Delaware residents and/or are employed by the State of Delaware, are subject to this Court's personal jurisdiction, and a substantial part of the events giving rise to Plaintiffs' claims for relief occurred in the State of Delaware.

19. This Court may grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), and injunctive relief pursuant to 28 U.S.C. § 2202.

FACTS

20. The REPSA requires DPSC-regulated utilities and other covered electricity suppliers annually to meet renewable energy portfolio standards requiring a specified "minimum percentage of electrical energy sales" from renewable energy sources, including "eligible energy resources and solar photovoltaics."

21. DPSC-regulated utilities and other covered electricity suppliers can generally satisfy this obligation in one of two ways: they can either own and operate a qualifying renewable-energy facility or purchase tradable instruments, referred to as Renewable Energy Credits (RECs) and Solar Renewable Energy Credits (SRECs), in an open, competitive interstate market.

22. Delmarva is the only DPSC-regulated utility, and it exclusively distributes power to approximately half of all Delaware residents. Other Delaware residents obtain electricity from non-DPSC-regulated entities.

23. Under the REPSA, "Eligible energy resources" include fuel cells manufactured by FuelCell Energy.

24. There is an interstate market for fuel cells, operational and technical support for fuel cell facilities, and renewable energy generated by fuel cell facilities.

25. The REPSA was enacted and is applied to deny FuelCell Energy and other similarly situated companies equal competitive footing with in-state fuel cell companies, such as Bloom, through discriminatory eligibility requirements, subsidies, and in-state renewable energy compliance-value multipliers.

26. In consideration for Bloom's promise to build a fuel cell factory in Delaware employing 900 full-time employees, the REPSA shields a particular company, Bloom, from out-of-state competition, and Bloom will receive a grant award of up to $16.5 million and a firm order for thirty megawatts (MW) of fuel cell power plants.

27. Under the REPSA, only a company that manufactures fuel cells in Delaware and that is also designated by the Delaware State government as an "economic development opportunity" can be a "qualified fuel cell provider."

28. Under the REPSA, only a "qualified fuel cell provider" can own or operate a "qualified fuel cell provider project." Such projects must be located in Delaware and operate under a tariff approved by the DPSC.

29. The REPSA provides Delmarva with financial and legal incentives linked to generation of electricity from "qualified fuel cell provider projects."

30. The REPSA allows Delmarva to meet its renewable energy portfolio standards by applying compliance-value multipliers that afford increased weight to energy generated by an in-state "qualified fuel cell provider project" — even though complying in this manner increases costs to ratepayers.

31. Upon information and belief, public filings indicate that Delmarva's ratepayers will pay approximately $0.22 per kilowatt hour (kWh) for energy generated by the Bloom fuel cell plants, before renewable energy credits are accounted for.

32. This $0.22/kWh rate is well above the market price for electric power generation and well above the rate for power generation from FuelCell Energy's products.

33. The REPSA directs Delmarva to extract a tariff from Nichols and other Delmarva ratepayers, which is then paid to an in-state fuel cell company (*e.g.*, Bloom) as a subsidy. Delaware residents who are not Delmarva ratepayers do not pay the tariff.

34. Under the REPSA, Delmarva "shall collect and disburse funds [from its entire Delaware customer base] solely as the agent" for an in-state qualified fuel cell provider project, such as the Bloom project, which funds are used to pay the in-state fuel cell project's filing, administrative, incremental site preparation, fuel, operation and maintenance, and other costs.

35. Pursuant to the REPSA, Delmarva and Bloom jointly applied to the DPSC for authority to impose the tariff. The DPSC then retained a consultant to review the application. The consultant issued a "Report on Delmarva Power's Application for Approval of a New Electric Tariff Applicable to Proposed Bloom Energy Fuel Cell Project" (the "Report") to the DPSC on October 3, 2011.

36. The Report stated that the REPSA was "a regulatory framework pursuant to which Bloom ... would build a fuel cell manufacturing facility in Newark, Delaware."

37. The Report stated "in consideration of the associated employment and other economic benefits accruing to Delaware, Delmarva's ratepayers would pay over a 21-year period charges for the output of 30MWs of fuel cells under a tariff" — thereby guaranteeing Bloom's market.

38. The Report stated that construction of the proposed Bloom manufacturing facility was contingent on DPSC approval of the tariff-subsidy.

39. The Report stated that "under any reasonable scenario the proposed [Bloom project] will impose substantial net costs on Delmarva's ratepayers." The Report estimated these costs at $133 million on a net present value basis.

40. The Report stated that there were "equity issues associated with the fact that Delmarva distribution customers — approximately half of the State's population — would be paying the great bulk of the costs to attract Bloom . . . ."

41. On October 18, 2011, the DPSC unanimously approved the tariff via Order No. 8062 (PSC Docket No. 11-362).

42. On December 1, 2011, Defendants Conaway, Lester and Clark issued Order No. 8079 (PSC Docket No. 11-362), stating:

> We received scores of written comments from the members of the public, not all of whom were Delaware residents or even Delmarva ratepayers. The overwhelming majority of the written comments exhorted us to reject the Project, and echoed certain general themes. Many compared the Project to Solyndra, the recently failed solar company in California. Many called it a "boondoggle" or "crony capitalism." . . . [O]thers expressed displeasure that Delmarva was not taking any risk since under the proposed tariff it will be made whole for all expenses it incurs. Many questioned the calculation of the $1.00 per month cost to Delmarva ratepayers. . . . Very few written comments supported the project.

43. Because of the REPSA's discriminatory eligibility requirements, in-state company-specific tariff and subsidies, and renewable energy compliance-value multipliers, all of

which were enacted and applied to advance, support, and protect Bloom, as well as the absence of a transparent, competitive public bidding process, FuelCell Energy and other out-of-state companies are denied equal competitive footing regarding the sale of fuel cell products and services to Delmarva and other potential customers in Delaware.

44. Delmarva's customers are uniquely obligated to pay subsidies to advance, support, and protect an in-state fuel cell company, Bloom, without any rational basis for doing so.

CAUSES OF ACTION

COUNT I: FOR VIOLATION OF THE DORMANT COMMERCE CLAUSE.

45. Plaintiffs repeat and reallege the allegations of paragraphs 1-44 above as if fully set forth herein.

46. The REPSA, facially and as applied, violates the dormant Commerce Clause in that:

a) It explicitly discriminates in favor of in-state economic interests through the creation of discriminatory qualification requirements for energy providers, a tariff-subsidy available only to support in-state companies, and use of discriminatory renewable energy multipliers that further encourage electricity generation by in-state energy providers and fuel cell manufacturers over their out-of-state competitors.

b) It is motivated by economic protectionism and has the purpose and effect of shielding a politically-favored, in-state crony company from competition and forcing a unique class of Delaware residents (Delmarva ratepayers) to subsidize its patronage.

c) It discriminates against out-of-state economic interests, denying them equal competitive footing with in-state companies and thereby burdening interstate commerce.

d) Moreover, the burdens on interstate commerce caused by the REPSA's discriminatory qualification requirements, tariff-subsidy, and renewable energy compliance multipliers outweigh its putative economic development and employment benefits.

COUNT II: FOR VIOLATION OF EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT.

47. Plaintiffs repeat and reallege the allegations of paragraphs 1-46 above as if fully set forth herein.

48. The REPSA, facially and as applied, violates the Equal Protection Clause in that:

a) The REPSA discriminates, without any rational basis, against Nichols and other Delmarva customers for the benefit of Bloom.

b) The REPSA facially and intentionally discriminates between Delaware residents who are Delmarva customers and all other Delaware residents.

c) The REPSA separates 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 Defendant DPSC Commissioners and is specifically earmarked to fund in-state fuel cell projects.

d) Delaware residents who are Delmarva customers will not receive benefits (if such benefits exist) from the in-state fuel cell projects funded by the in-state fuel cell tariff (economic or otherwise) that are different from those received by Delaware residents who are not Delmarva customers. Delaware residents who are Delmarva ratepayers, and those who are not, are in all relevant respects alike.

e) Separating Delaware residents based on their electricity supplier is not reasonably related to any legitimate government interest and has no rational basis.

f) The REPSA's facially discriminatory tariff provisions deny Nichols and other similarly situated Delmarva ratepayers equal protection of the law and thus violate the Equal Protection Clause.

REQUESTED RELIEF

Plaintiffs pray that this Court grant the following relief:

A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Rule 57 of the Federal Rules of Civil Procedure, declaring unconstitutional and unenforceable the provisions of REPSA and the rules implementing it that, facially or as applied, violate the dormant Commerce Clause or Equal Protection Clause of the U.S. Constitution, including but not limited to 26 *Del. C.* § 352(16)-(17), 26 *Del. C.* § 353(d), and 26 *Del. C.* § 364.

B. A declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Rule 57 of the Federal Rules of Civil Procedure, declaring invalid all Orders of the DPSC implementing these REPSA provisions, including without limitation Orders 8062 and 8079.

C. A permanent injunction barring enforcement of the unconstitutional provisions in REPSA and the rules implementing them.

D. Such other and further relief as the Court may deem just and proper.

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RULE 7.1 DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, the undersigned attorney of record for Plaintiff FuelCell Energy, Inc. ("FuelCell Energy"), certifies that FuelCell Energy has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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