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

PLAINTIFFS' ANSWERING BRIEF IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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NATURE AND STAGE OF THE PROCEEDINGS

On June 20, 2012, Plaintiffs John A. Nichols ("Nichols") and FuelCell Energy, Inc. ("FuelCell Energy"), filed a Complaint seeking a declaratory judgment that Delaware's Renewable Energy Standards Portfolio Act ("REPSA"), as amended in 2011, facially and as applied, violates the dormant Commerce Clause and Equal Protection Clause of the U.S. Constitution and requesting permanent injunctive and other appropriate relief. Count I of the Complaint raises a dormant Commerce Clause claim on behalf of both Nichols and FuelCell Energy. Count II raises an Equal Protection Clause claim on behalf of Nichols. On August 29, 2012, Defendants moved to dismiss the Complaint, contending that Count I must be dismissed under Rule 12(b)(1) because neither Nichols nor FuelCell Energy has standing to raise that claim, depriving the Court of subject-matter jurisdiction, and that Count II must be dismissed under Rule 12(b)(6) because Nichols failed to state a facially plausible claim for relief. Plaintiffs now respectfully submit this answering brief in opposition to Defendants' Motion to Dismiss.

SUMMARY OF ARGUMENT

1. This Court has subject-matter jurisdiction to adjudicate Count I because the REPSA has already directly injured and continues to injure FuelCell Energy's ability to do business in the State of Delaware. These injuries provide FuelCell Energy with Article III and prudential standing to assert a dormant Commerce Clause claim.

2. This Court has subject-matter jurisdiction to adjudicate Count I because the REPSA has already directly injured and continues to injure John Nichols, a Delmarva ratepayer, by statutorily requiring him to pay a tariff that subsidizes a single in-state fuel cell manufacturer and shields it from the effects of interstate competition. These injuries provide John Nichols with Article III and prudential standing to assert a dormant Commerce Clause claim.

3. Because requiring only John Nichols and other Delaware ratepayers of a single electric company to pay the aforementioned tariff is not rationally related to the purposes of REPSA or any legitimate government interest, Count II asserts a facially plausible claim under the Equal Protection Clause of the Fourteenth Amendment upon which relief can be granted.

STATEMENT OF FACTS

A. REPSA Establishes a Guaranteed Market in the State of Delaware for Electricity Produced by Eligible Renewable Energy Resources.

Delaware's REPSA, 26 *Del. C.* §§ 351-364, creates a mandatory market in the State of Delaware for electricity generated by renewable energy resources, or "eligible energy resources," such as fuel cells powered with renewable fuels, solar energy, and wind energy.[1] Specifically, REPSA requires "retail electricity suppliers,"[2] such as Delmarva Power & Light Company ("Delmarva"), to include in their energy portfolio "during any given compliance year … a minimum percentage of electrical energy sales with eligible energy resources," 26 *Del. C.* § 354(a), which increases on a yearly basis, *see id.* Retail electricity suppliers can satisfy these "RPS [Renewable Portfolio Standard] obligations" in several ways, including using "[e]lectricity generated by … fuel cell[s] powered by renewable fuels …." 26 *Del. C.* § 352(6).

B. The 2011 REPSA Amendments Were Passed for the Purpose of Creating In-State Fuel Cell Manufacturing Jobs and Protecting In-State Fuel Cell Manufacturing from Out-of-State Competition.

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1 *See* 26 *Del. C.* § 352(6) (defining "eligible energy resources"); 26 *Del. C.* § 354(a) (requiring covered electricity suppliers to use eligible energy resources). 26 *Del. C.* § 351(b) states that REPSA's "purpose and intent … [is] to establish a market for electricity from [renewable energy] … resources in Delaware."

2 26 *Del. C.* § 352(22) defines "retail electricity suppliers" broadly to "mean[] a person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to … electric utility distribution companies…."

In 2011, REPSA was amended to reserve part of the guaranteed market for renewable energy for the benefit of in-state fuel cell manufacturing and job creation. The amending legislation[3] changed, *inter alia*, the eligibility criteria for fuel-cell energy output to fulfill a Commission-regulated utility's RPS obligations, privileging output from fuel cells manufactured in Delaware.[4] The goal was to induce a single fuel cell manufacturing company, Bloom Energy, Inc. ("Bloom"), to build a manufacturing facility in Delaware. The 2011 Amendments created a statutory framework under which Bloom would receive generous subsidies — funded by a special tariff specifically earmarked to pay Bloom's costs, and solely paid by the customers of a single electric company[5] — and be shielded from out-of-state competition for many years:

> The Amendments provide for a regulatory framework pursuant to which Bloom Energy Corporation ... would build a manufacturing facility in ... Delaware ... to produce fuel cells, *and 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 30 MWs of fuel cells under a tariff ....[6]

These changes give Bloom, as Delaware's sole in-state manufacturer, substantial competitive advantages over its out-of-state competitors in Delaware's renewable-energy market.

C. The 2011 Amendments to REPSA, on Their Face and As Implemented by Defendant DPSC Commissioners, Directly Harm Out-of-State Fuel Cell Manufacturers, Such As FuelCell Energy.

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[3] An Act to Amend Title 26 of the Delaware Code Relating to Delaware's Renewable Energy Portfolio Standards and Delaware-Manufactured Fuel Cells, S.B. No. 124, 146th Gen. Assembly (Del. 2011) (hereinafter "2011 Amendments").

[4] Unlike fuel cells manufactured out-of-state, which must actually generate electricity using renewable fuels to qualify as eligible energy resources under REPSA, *see* 26 *Del. C.* 352(6), Delmarva can use energy generated by fuel cells that are manufactured in the State of Delaware using nonrenewable (and less expensive) fuels, such as natural gas, to reduce its REPSA obligations, *see* 26 *Del. C.* 352(6); New Energy Opportunities, Inc. et al., Report on Delmarva Power's Application for Approval of a New Electric Tariff Applicable to Proposed Bloom 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 1 (Oct. 3, 2011) (hereinafter "Consultant Report") (D.I. 21-1). *Cf.* 26 *Del. C.* 353(d) (inflated compliance values).

[5] *See* 26 *Del. C.* § 364(b)-(c).

[6] Consultant Report at 1 (emphasis added).

Generally, a retail electricity supplier can satisfy its RPS obligations either by producing electricity using eligible renewable-energy resources or by purchasing tradable instruments, referred to as Renewable Energy Credits (RECs) and Solar Renewable Energy Credits (SRECs), *see* 26 *Del. C.* § 352(18), (25), in an open, competitive interstate market. However, the 2011 Amendments allow a Commission-regulated electric company "to use the energy output from a Qualified Fuel Cell Provider Project … to 'fulfill' — technically, to reduce — a portion of" its REC and SREC requirements.[7] Consultant Report at 4. Delmarva is the sole Commission-regulated utility in Delaware. (*See Def's' Br.* 18, D.I. 20) This option for reducing compliance costs incentivizes Delmarva to satisfy its RPS obligations using fuel cells manufactured in the State of Delaware by a "qualified fuel cell provider project," *see* 26 *Del. C.* § 352(17), owned or operated by a "qualified fuel cell provider" (QFCP), *see* 26 *Del. C.* § 352(16).

The 2011 Amendments facially discriminate against out-of-state fuel cell manufacturers. Only "an entity that … "manufactures fuel cells *in Delaware* that are capable of being powered by renewable fuels, and … is designated … as an economic development opportunity" can qualify as a QFCP. 26 *Del. C.* § 352(16) (emphasis added). Likewise, out-of-state fuel cell companies' projects cannot qualify as QFCP projects, which must be "located in Delaware owned and/or operated by a qualified fuel cell provider …." 26 *Del. C.* § 352(17).

This preferential treatment for in-state fuel cell manufacturers places out-of-state competitors, such as FuelCell Energy, at an unfair disadvantage for several reasons. First, the 2011 Amendments allow a QFCP project owned or operated by a QFCP to recoup costs it incurs, *see* 26 *Del. C.* § 364(b)-(c), through a special tariff-subsidy established for the sole purpose of funding in-state fuel

[7] Delmarva does not actually purchase or distribute Bloom-produced energy. *See* Consultant Report at 1. And Delmarva does not directly pay Bloom, instead acting "solely" as Bloom's collection agent — collecting the tariff directly from its customers. *See* 26 *Del. C.* § 364(b).

cell manufacturing, *see* 26 *Del. C.* § 364; 26 *Del. C.* § 352(17). Second, the 2011 Amendments create a perverse incentive structure that virtually guarantees that Delmarva will satisfy its REPSA compliance obligations using fuel cells manufactured in Delaware: the 2011 Amendments allow Delmarva to reduce its REC and SREC obligations at no cost and without taking any risks by acting solely as the QFCP project's "agent" and collecting the tariff, alternatively referred to as an "adjustable nonbypassable charge," from its customers. *See* 26 *Del. C.* 364(b),(d); Consultant Report at 9, 53, 60-61. Third, the 2011 Amendments operate to effectively guarantee a QFCP project's market for a period of over 20 years to manufacture and operate 30 MW of fuel cells and allow for the possibility of "future potential additions [to the contract] of up to an additional 20 MW...." 26 *Del. C.* 364(d)(1).a. (Bloom has already taken steps to expand the QFCP project by 20 MW.)[8] Fourth, the 2011 Amendments provide a QFCP project with a substantial competitive advantage over out-of-state fuel cell manufacturers with respect to future in-state contracts.[9] Fifth, and most importantly, out-of-state fuel cell companies are statutorily ineligible to compete for the 30 MW — and potentially 20 MW — fuel cell projects.

As the Consultant Report noted, "Bloom Energy has two major [out-of-state] competitors — Fuel Cell Energy, Inc., ... and UTC Power, Inc.," both of which "are headquartered in Connecticut."

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[8] Bloom's wholly owned subsidiary recently secured a permit enabling it to expand its fuel cell project to 47 MW — a necessary precondition to expanding its QFCP project. *See* Delaware Coastal Zone Act Permit No. 394 (April 30, 2012), *available at* http://www.dnrec.delaware.gov/Admin/CZA/Lists/Coastal%20Zone%20Act%20Application%20Status/Attachments/16/Bloom%20394-P%20Permit%20and%20Order.pdf (Sept. 13, 2012).

[9] The 2011 Amendments, which essentially pay for the creation and maintenance of this infrastructure network, provide a QFCP project with a significant first-mover and cost advantage for quoting service contracts in Delaware and the mid-Atlantic area for future projects. Initial project quotes that out-of-state manufacturers, such as Fuel Cell Energy, propose will be constrained by the requirement to hire field staff and create a spare parts depot. A QFCP project will already have this necessary infrastructure due to the 2011 Amendments, which can be readily leveraged to undercut out-of-state competitors constrained by their lack of in-state facilities compared with Bloom, especially for plants this large.

Consultant Report at 14. Because of the 2011 Amendments' discriminatory eligibility requirements, Bloom's major competitors are necessarily precluded from qualifying as QFCP projects, unless they build manufacturing facilities in Delaware that are designated as "economic development opportunities" — the very requirement that Plaintiffs aver is unconstitutional and violates the dormant Commerce Clause.

The lack of a competitive bidding process and a provision of the 2011 Amendments permitting Delmarva to reduce its REPSA compliance obligations without incurring any costs[10] only by using fuel cells manufactured in-state ensure that Delmarva will satisfy its REPSA obligations to the greatest extent possible using fuel cells manufactured in-state, even though power could be provided by fuel cells manufactured by out-of-state companies at lower cost and with the same innovation and environmental benefits.

Delmarva ratepayers are required by the 2011 Amendments to subsidize Bloom's State-designated QFCP project because Delmarva acts solely as an "agent" for the QFCP project and collects a tariff from its Delaware ratepayers that is paid directly to the QFCP project, *see* 26 *Del. C.* § 364(b)—even before the QFCP project generates a single watt of power.[11]

ARGUMENT

I. PLAINTIFF FUELCELL ENERGY, INC., HAS ARTICLE III AND PRUDENTIAL STANDING TO RAISE A DORMANT COMMERCE CLAUSE CHALLENGE TO REPSA.

To satisfy their burden, Plaintiffs must merely demonstrate that the allegations in their Complaint, accepted as true and viewed in the light most favorable to the Plaintiffs, establish that this

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[10] This feature of the 2011 Amendments strongly incentivizes Delmarva to use in-state-manufactured fuel cells: "From a utility standpoint, entering into a PPA with a cost pass-through provision to ratepayers is like being the 'cheese in the sandwich.' Being a collection agent through a tariff removes the utility from the risk, even if remote, that it pays costs to the project seller but does not recover the costs from its ratepayers." Consultant Report at 61.

[11] *See* Consultant Report at 29 (Delmarva customers must pay tariff before factory is built).

Court has subject-matter jurisdiction. *See Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010) (court must "determine whether, under any reasonable reading of the complaint, [Plaintiffs] may be entitled to relief" (citations and internal quotation marks omitted)); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011). For the purposes of reviewing a motion to dismiss for lack of standing, courts accept "all reasonable inferences that can be drawn" from the complaint's allegations. *See Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006). As this Court recently explained:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.... When ruling on a motion to dismiss for lack of standing, federal courts may consider affidavits and other factual materials in the record.

Zazzali v. Hirschler Fleischer, P.C., 2012 U.S. Dist. LEXIS 118090, *9-10 (D. Del. Aug. 21, 2012) (internal citations omitted). Under this standard, the allegations in Plaintiffs' Complaint suffice to confer standing, as their affidavits make patently clear.[12]

A. FuelCell Energy Has Suffered a Judicially Cognizable Injury-In-Fact Sufficient to Confer Article III Standing.

The 2011 Amendments, as implemented by Defendant DPSC Commissioners, confer numerous competitive advantages on in-state fuel cell manufacturing companies, such that FuelCell Energy has suffered competitive injuries sufficient for Article III standing.

To have Article III standing, a plaintiff must have suffered an injury-in-fact that is causally connected to the challenged conduct and redressable through the relief requested from the Court. *Freeman v. Corzine*, 629 F.3d 146, 153 (3d Cir. 2010). "'The contours of the injury-in-fact requirement, while not precisely defined, are very generous.' The standard is met as long as the party

[12] Although the allegations in Plaintiffs' Complaint suffice under these standards, Plaintiffs' standing is further supported by the affidavits of Frank Wolak ("Wolak Aff.") and John Nichols ("Nichols Aff.") filed simultaneously herewith.

alleges a 'specific, "identifiable trifle" of injury,' or a 'personal stake in the outcome of [the] litigation.'" *In re Global Indus. Techs.*, 645 F.3d 201, 210 (3d Cir. 2011) (citations omitted).

FuelCell Energy need only show that it was "able and ready to bid on contracts" that are covered by the challenged law "and that a discriminatory policy prevents … [it] from doing so on an equal basis." *Tri-M Group, LLC v. Sharp*, 705 F. Supp. 2d 335, 342-343 (D. Del. 2010) (citing *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 995-996 (3d Cir. 1993)). FuelCell Energy is not required to allege or prove that it would have been awarded the 30 MW project but for the discriminatory provisions. *See Northeastern Fla. Ch. of Assoc. Gen. Contrs. of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (the challenging party "need not allege that he would have obtained the benefit but for the barrier [. . .] [he] need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis."); *Assoc. Gen. Contrs. of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) ("Nor is it significant that these companies, which would like to bid, may not actually be selected. They are able and ready to bid and the PLAs prevent them from, or penalize them for, doing so."); *Assoc. Builders & Contrs. v. City of Providence*, 108 F. Supp. 2d 73, 77-78 (D.R.I. 2000) (allegation that plaintiffs wanted to bid for the contracts "but [were] deterred from doing so because of the City's policy" was enough to identify a concrete and particularized injury); *see also Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) (injury properly conceptualized as prohibition of Plaintiff's desired business transaction by challenged provision of statute that prevents competition on equal terms).

FuelCell Energy has standing to challenge the 2011 Amendments because it would have bid for and was ready, willing, and able to compete for the 30 MW fuel cell project but could not do so because of REPSA's exclusion of out-of-state firms. (Wolak Aff. ¶¶ 21-28.) By rendering only in-state manufacturers (of which Bloom is the sole firm) eligible for the original 30 MW fuel cell

transaction, the 2011 Amendments exclude FuelCell Energy and others from a competitive public bidding process, and similarly exclude out-of-state firms from competing for other fuel cell projects specifically contemplated by REPSA. *See* 26 *Del. C.* § 353(d)(2). FuelCell Energy was not permitted to compete — let alone compete on an equal basis.[13]

But FuelCell Energy was not simply injured by its ineligibility to compete for the 30 MW contract: it suffers ongoing injury as a direct result of the discriminatory portions of the 2011 Amendments. Because Delmarva can reduce its REPSA compliance obligations by using energy generated by Bloom's "in-state" fuel cells, for the duration of the 30 MW project FuelCell Energy is essentially shut out from competing for Delmarva's business. "[A] state may not insulate part of its market from out-of-state competition," even if other parts are left open. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 266-67 (3d Cir. 2006). In the event that Delmarva and/or Bloom seek to expand the in-state QFCP project to cover another 20 MW of fuel cells, FuelCell Energy will be prevented from competing for that business, although it would otherwise bid on that contract. (*See* Wolak Aff. ¶ 28.)

The initial exclusion of FuelCell Energy and other out-of-state manufacturers from competing for Delmarva's fuel cell business also provides ongoing and cumulative collateral advantages to the favored in-state firm. The infrastructure advantages Bloom will enjoy as a direct result of the challenged provisions of REPSA will cause ongoing competitive injury to FuelCell Energy, which will be prevented from competing in Delaware on an equal basis. And even if

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[13] The competitive injury in this case is particularly problematic given the federal government's current and increasing focus on development of fuel cell technology nationwide. *See, e.g.*, U.S. Dep't of Energy, *Fuel Cell Technologies Program, available at* http://www1.eere.energy.gov/hydrogenandfuelcells/ (last visited Sept. 15, 2012). Under the Third Circuit's standard for dormant Commerce Clause violations, "state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny." *Tri-M Group.* 705 F. Supp. 2d at, 342.

FuelCell Energy gains traction in the Delaware energy market, the infrastructure advantages Bloom will possess as first mover will alter market conditions to lessen demand for FuelCell Energy's products.[14] (*See* Wolak Aff. ¶ 29). A plaintiff "who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies [the injury-in-fact] part of the standing test."[15] *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (citation omitted); *see Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993); *Green Mt. Chrysler Plymouth Dodge Jeep v. Dalmasse*, 2006 U.S. Dist. LEXIS 86805, *14 (D. Vt. 2006), *judgment on merits*, 508 F. Supp. 2d 295, 309 (D. Vt. 2007). The continuing subsidy to Bloom and the opportunity that the 2011 Amendments afford Bloom to establish a support and service infrastructure in Delaware for its products place a weighty thumb on the scales of Delaware energy markets in a manner that inflicts a present and continuing harm on out-of-state competitors.

B. FuelCell Energy's Injury Was Directly Caused by the Challenged Portions of the 2011 Amendments to REPSA and Actions of Defendant DPSC Commissioners.

This injury is directly caused by the 2011 Amendments' discrimination against out-of-state businesses. To establish causation, Plaintiffs need only show an "indirect causal relationship" between Defendants' actions and the competitive harms they have suffered. *See Freeman*, 629 F.3d at 153. The 2011 Amendments and Defendant DPSC Commissioners' approval of the tariff are the direct causes of the tariff-subsidy to Bloom as an in-state manufacturer and FuelCell Energy's legal ineligibility to compete for the 30 MW fuel cell transaction. Therefore, they are responsible for the

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[14] *Cf. Cloverland-Green Spring Dairies, Inc.*, 462 F.3d at 264 ("[A] state law that 'cause[s] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market' is unconstitutional ...." (citation omitted)).

[15] *Cf. Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008) ("[I]n most 'competitor standing' cases, ... it is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors.").

injuries that these discriminatory provisions inflict upon FuelCell's relative ability to compete for business in Delaware.

C. FuelCell Energy's Dormant Commerce Clause Claim is Ripe for Adjudication.

Because FuelCell Energy has *already been* — and continues to be — concretely injured by the challenged provisions of REPSA, FuelCell Energy's dormant Commerce Clause claim is ripe for adjudication. A claim is ripe if it presents a "'real, substantial controversy between parties' involving a 'dispute definite and concrete.'" *Peachlum v. City of York*, 333 F.3d 429, 434 (3d Cir. 2003) (citation omitted).[16]

FuelCell Energy has specified its concrete plans regarding when and how it intends to (and currently does) compete for the Delaware fuel cell market.[17] (*See* Wolak Aff. ¶¶ 14-17, 27-28.) However, its ability to compete for business on an equal basis with in-state fuel cell manufacturers has already been frustrated by Delaware's unconstitutional regime. Pursuant to the 2011 Amendments, final administrative action was taken to approve the Bloom-Delmarva Tariff Application and Bloom was awarded the 30 MW fuel cell project. FuelCell could — and would — have bid if there had been a public bidding process in which out-of-state fuel cell manufacturers were eligible to compete. (Wolak Aff. ¶¶ 23-24.) These injuries are not speculative: they have already occurred, and their effects continue to injure FuelCell Energy.

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[16] The "refined test for ripeness in declaratory judgment actions" Defendants rely upon (*Def's' Br.* 12, D.I. 20) is inapposite to this case, as *Step-Saver* analysis is limited to pre-enforcement actions. *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003); *see Save Ardmore Coalition v. Lower Merion Twp.*, 419 F. Supp. 2d 663, 670 (E.D. Pa. 2005). *Step-Saver* analysis does not apply unless a declaratory judgment is sought before a completed injury has occurred. *See, e.g., Lauderbaugh v. Hopewell Township*, 319 F.3d 568, 575 (3d Cir. 2003) (declining to apply *Step-Saver* factors in case where enforcement was pending); *Surrick v. Killion*, 2005 U.S. Dist. LEXIS 6755, *17-20 (E.D. Pa. Apr. 18, 2005). Here, the 2011 Amendments have already been applied and implemented: Bloom received QFCP and QFCP project designations from the Commission, its tariff application was approved, and it was awarded a 30 MW contract.

[17] *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 564 (1992).

Moreover, the issues are fit for judicial decision, and delay in adjudication will result in significant harms to FuelCell Energy. *Surrick v. Killion*, 449 F.3d 520, 527 (3d Cir. 2006) (ripeness further determined by examining both "(1) 'the fitness of the issues for judicial decision,' and (2) 'the hardship of the parties of withholding court consideration'") (citation omitted). The legal issues presented by the facially discriminatory 2011 Amendments are clear. If the Court's consideration is withheld, the ongoing injuries to FuelCell Energy — and discriminatory benefits conferred upon Bloom — will accumulate and potentially compound, with growing effects on the Delaware energy market. A judgment on the merits will conclusively determine whether FuelCell Energy can begin to formulate plans to compete for fuel cell projects currently awarded on a noncompetitive basis. *Cf. Khodara Envtl.*, 376 F.3d at 196-198 (case ripe when facts fully developed and judgment has practical value).

D. This Court Can Redress FuelCell Energy's Injury by Granting Appropriate Declaratory and Injunctive Relief.

To redress these injuries by enforcing the dormant Commerce Clause's bar on discrimination against out-of-state commerce, this Court need only grant the declaratory and injunctive relief Plaintiffs request. This relief satisfies the redressability requirement for Article III standing, because it is substantially likely that a judicial decision striking down the unconstitutional provisions of the 2011 Amendments and enjoining collection and disbursement of the tariff-subsidy will level the economic playing field vis-à-vis in-state and out-of-state energy firms. *See Freeman*, 629 F.3d at 154 (redressability requires a "'substantial likelihood' that the injury in fact can be remedied by a judicial decision." (citation omitted)). Likewise, this Court has the authority to void the DPSC-approved tariff and vacate the DPSC Order approving it.[18] Bloom — a major competitor of FuelCell Energy —

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[18] *See, e.g., Barringer v. Griffes*, 1 F.3d 1331, 1338-1339 (2d Cir. 1993) (declaring state tax "unconstitutional and void" to the extent that it violates dormant Commerce Clause); *see Pryor v. Nat'l*

would thereby lose the unfair infrastructure-related competitive advantages it enjoys in Delaware as a result of the 2011 Amendments. More importantly, the injury-in-fact that FuelCell suffered as a direct result of the challenged portions of the 2011 Amendments — i.e., its inability to compete for the 30MW project on an equal basis with in-state fuel cell manufacturers — will be redressed by the requested relief. If this Court grants the requested injunctive and declaratory relief, FuelCell Energy will bid on any commercially reasonable proposals subject to a public bidding process in which in-state and out-of-state manufacturers are treated equally. (Wolak Aff. ¶¶ 14-17, 27-28.)

II. PLAINTIFF NICHOLS HAS ARTICLE III AND PRUDENTIAL STANDING TO RAISE A DORMANT COMMERCE CLAUSE CHALLENGE TO REPSA.

A. Nichols Has Suffered Monetary Harm As a Direct Result of the 2011 Amendments to REPSA and Actions of Defendant DPSC Commissioners.

Nichols has Article III standing to bring a facial and as-applied dormant Commerce Clause challenge to the 2011 Amendments to REPSA, as he has been forced to expend money against his will in the form of a tariff that he is statutorily required to pay as a Delmarva ratepayer as a direct result of the 2011 Amendments.[19] *See Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (holding that "forced expenditures of money ... are [a] sufficiently concrete [injury] for the purposes of Article III" to confer standing). Nichols's electricity bill is quantifiably higher than it otherwise would have been but for the tariff-subsidy authorized by the 2011 Amendments to REPSA

Collegiate Athletic Assn., 288 F.3d 548, 569 (3d Cir. 2002) ("A contract term or condition that violates public policy is void and is thus unenforceable.").

[19] *See* 26 *Del. C.* § 364(b) ("All funds disbursed to a qualified fuel cell provider project [i.e., Bloom] by a commission-regulated electric company [i.e., Delmarva] . . . shall be collected from the entire Delaware customer base of such company through adjustable nonbypassable charges ... established by the [DPSC]."); 26 *Del. C.* § 364(c). Contrary to Defendants' assertion, *see* D.I. 20 at 14, Plaintiffs' Complaint raises a dormant Commerce Clause claim on behalf of both FuelCell Energy and Nichols, who is directly injured by the 2011 Amendments, facially and as applied. Nichols does not seek to "piggyback" his Article III and prudential standing to raise a dormant Commerce Clause claim on that of FuelCell Energy. Rather, he independently has standing as a Delmarva ratepayer to raise this claim: his injury is distinguishable from that suffered by FuelCell Energy but no less concrete, particularized, actual, and imminent.

— alternately referred to in REPSA as an "adjustable nonbypassable charge"[20] — and Defendant DPSC Commissioners' decision to approve the Bloom-Delmarva Tariff Application.[21] (*See* Nichols Aff. ¶¶ 12-17 & Exs. A-D.) "Monetary harm is a classic form of injury-in-fact." *Danvers Motor Co.*, 432 F.3d at 293. A monetary injury can be exceedingly small — even economic harm measured in terms of a few cents (as opposed to dollars) per year is sufficient. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 106 (1968). And "[t]he obvious fact" that Nichols is "forced to pay money … [he] otherwise would have kept for [himself]," but for the 2011 Amendments to REPSA and Defendant DPSC Commissioners' approval of the Tariff Application, "itself … [is] sufficient to confer Article III standing." *Danvers Motor Co.*, 432 F.3d at 293. The pecuniary harm Nichols has sustained, and will continue to sustain, because of REPSA's tariff provisions is sufficient to confer Article III standing to raise a dormant Commerce Clause claim.

Defendants do not dispute that the 2011 Amendments, facially and as applied, have caused injury to Nichols that this Court may redress, and they acknowledge that Nichols has Article III standing to challenge to the 2011 Amendments to REPSA.[22] Instead, they appear to argue that while Nichols has standing to raise his Equal Protection Clause claim, he lacks prudential standing to raise a dormant Commerce Clause claim.

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20 *See, e.g.*, 26 *Del. C.* § 364(b).

21 This Court can redress Nichols's injury by vacating the challenged DPSC Orders and declaring the REPSA tariff unconstitutional and void and enjoining its enforcement. *See supra* note 18.

22 Defendants do not question Nichols's Article III and prudential standing to raise his Equal Protection Clause claim; rather, Defendants merely assert that Nichols has failed to state a plausible Equal Protection Clause claim. (*See Def's' Br.* 15-20, D.I. 20) The injury Nichols suffered — and continues to suffer — as a direct result of the 2011 Amendments to REPSA that gives him Article III standing to challenge the 2011 Amendments to REPSA on equal protection grounds is identical to that which confers Article III standing to raise a dormant Commerce Clause claim: the 2011 Amendments, facially and as applied, force him to pay a special tax (i.e., expend money against his will (Nichols Aff. ¶¶ 17-20)) and thereby directly cause him to suffer monetary harm.

B. Nichols, as a Delmarva Ratepayer Who is Forced to Pay a Tariff by Provisions of REPSA that Discriminate Against Out-of-State Fuel Cell Manufacturers, is Within the Zone of Interests Protected by the Dormant Commerce Clause.

The 2011 Amendments to REPSA, facially and as applied, directly affect and regulate Nichols as a consumer participating in commerce, forcing him to pay a tax used exclusively to provide a single in-state fuel cell manufacturer with a subsidy that discriminates against out-of-state fuel cell manufacturers *and* energy generated by fuel cells manufactured outside of Delaware.[23] Nichols, as a Delmarva ratepayer, must pay a tax used to give in-state fuel cell manufacturer Bloom a competitive advantage over its out-of-state competitors, and is thereby compelled to pay a higher rate for his electricity than he otherwise would have but for the discriminatory provisions within the scope of Plaintiffs' dormant Commerce Clause claim.[24] He thus has prudential standing to raise a dormant Commerce Clause claim.

To have prudential standing to bring a dormant Commerce Clause claim, Nichols need only demonstrate that his interests "are arguably within the zone of interests intended to be protected by" the dormant Commerce Clause.[25] *Freeman*, 629 F.3d at 154 (citation and internal quotation omitted). The U.S. Supreme Court has repeatedly recognized that consumers' interests are within the zone of

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[23] Nichols is suing as a ratepayer of a single electric company, Delmarva, not as a taxpayer. Only Delmarva's Delaware ratepayers are uniquely obligated to pay the special tariff used solely for the purpose of funding a company-specific subsidy specifically designed to promote in-state fuel cell manufacturing and shield it from out-of-state competition. His concrete monetary injury is only shared by Delmarva's other Delaware ratepayers and thus not merely a generalized taxpayer grievance. *See generally FEC v. Akins*, 524 U.S. 11, 24 (1998) (explaining that "where a harm is concrete, though widely shared, the Court has found "injury in fact" and listing cases).

[24] Nichols would pay less for his electricity if Delmarva satisfied its REPSA compliance obligations via the competitive interstate market. *See* Consultant Report at 18 (recognizing the "levelized above-market cost" of the in-state Bloom Fuel Cell Project and explaining that "one would have to pay $33.18 per MWh (3.3 cents/kWh) more per MWh of production to purchase output from the Fuel Cell Project per MWh of generation"); Nichols Aff. at ¶¶ 19-20.

[25] Under this undemanding test, only plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in" the dormant Commerce Clause can be denied a right to make this claim. *See Freeman*, 629 F.3d at 154 (citation and internal quotation marks omitted). *See generally Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 147 (3d Cir. 2001) ("Commerce Clause protects … consumers who seek to benefit from free competition").

interests protected by the dormant Commerce Clause when consumers must pay a tax that operates to discriminate against interstate commerce and that in those circumstances consumers may bring a dormant Commerce Clause claim. *See, e.g., GMC v. Tracy*, 519 U.S. 278, 286 (1997) ("[C]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of … [a] tax …."); *Bacchus Imps. v. Dias*, 468 U.S. 263, 267 (1984) (in-state purchasers who "are liable for the tax" that allegedly violated dormant Commerce Clause "plainly have standing to challenge the tax"); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (in-state stockholder challenged tax regime imposing higher taxes on stock from issuers with out-of-state operations than on stock from purely in-state issuers); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (in-state milk dealers challenged tax and subsidy scheme discriminating against out-of-state milk producers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (in-state camp subject to state real and property tax had standing to raise dormant Commerce Clause claim). The provisions of REPSA that Plaintiffs challenge under the dormant Commerce Clause, on their face and as applied, directly operate to injure Delmarva customers by compelling them to pay an "adjustable nonbypassable" tariff, *i.e.*, tax, used to fund a discriminatory subsidy scheme.[26] Thus, under well-established Supreme Court precedent, Nichols has standing to bring a dormant Commerce Clause claim.[27]

Moreover, the Third Circuit has recently reaffirmed that consumers have prudential and Article III standing to challenge regulations or statutory provisions that "directly affect," i.e., directly regulate, consumers "as individuals 'participating in commerce,' … to redress 'their dormant

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[26] Because Delmarva does not pay the tariff but instead acts solely as Bloom's collection agent, *see* 26 *Del. C.* § 364(b), its Delaware ratepayers are directly subject to the tariff.

[27] Like the plaintiffs in *West Lynn*, *see* 512 U.S. at 188, Nichols is the party on whom a tax used exclusively to fund a discriminatory subsidy is directly levied, *see id.* at 201-04.

Commerce Clause right to access interstate markets."[28] *Freeman*, 629 F.3d at 156 (citation omitted); *accord, Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009) (consumers who suffer injury in the form of prices higher than other consumers from state action that implicates the dormant Commerce Clause satisfy the standing requirements of Article III). As a Delmarva customer, Nichols is directly regulated by the challenged REPSA tariff provisions, which require Nichols to pay a tax for the sole purpose of subsidizing in-state fuel cell manufacturing.[29] Thus, under recent Third Circuit precedent, Nichols has prudential standing to bring his dormant Commerce Clause claim for a second reason.

III. BECAUSE PLAINTIFF NICHOLS ASSERTED A PLAUSIBLE CLAIM THAT REPSA VIOLATES THE EQUAL PROTECTION CLAUSE, DISMISSAL OF THAT CLAIM UNDER RULE 12(b)(6) IS INAPPROPRIATE.

In evaluating Defendants' 12(b)(6) claims, this Court should "accept as true all well-pleaded allegations and construe the complaint in the light most favorable to the" Plaintiffs. *Reilly*, 664 F.3d at 41. Plaintiffs' Complaint must merely "state[] a plausible claim for relief" to survive a 12(b)(6) motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *accord, Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and need only "allege facts suggestive of [the unconstitutional] conduct," *i.e.,* " 'enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element,' " *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 177 (3d Cir. 2010) (citations omitted).

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[28] Unlike "plaintiffs who 'allege only that a party with whom they contract is subject to an undue burden on its ability to freely participate in interstate commerce'" or those "whose interest is merely avoiding a passed-on fee or cost," *see Freeman*, 629 F.3d at 156-57(citation omitted), Nichols is directly regulated by the provisions of REPSA Plaintiffs challenge under the dormant Commerce Clause.

[29] Under REPSA, "[a]ll funds disbursed to a qualified fuel cell provider project by a commission-regulated electric company [i.e., Delmarva] ... *shall be collected from the entire Delaware customer base of such company* through adjustable nonbypassable charges *which shall be established by the Commission*." 26 *Del. C.* § 364(b) (emphasis added); *see* 26 *Del. C.* § 364(c) (same payment structure for in-state fuel cell manufacturer's "miscellaneous costs").

To state a facially plausible Equal Protection claim, Nichols must allege that the 2011 Amendments to REPSA, facially and as applied, unreasonably and arbitrarily separate Delaware residents into classes on "some ground of difference [that does not] hav[e] a fair and substantial relation to the object of the legislation" and thereby fails to treat "all persons similarly situated ... alike." *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992) (citation and internal quotation marks omitted). "Laws that cannot meet this minimum rationality requirement are constitutionally infirm." *Id.* (citation omitted).

A. The 2011 Amendments Facially Distinguish Between the *Customers* of a Single Electric Company and All Other Delaware Residents.

Although Defendants suggest otherwise (*see Def's' Br.* 16, D.I. 20) because Delmarva is the only Commission-regulated company in Delaware, Delmarva is the only retail electricity supplier affected by the 2011 Amendments to REPSA, i.e., S.B. 124.[30] But Nichols's equal protection claim is not based on the distinction between the sole Commission-regulated electric company in Delaware and all other Delaware electricity suppliers. Rather, Nichols's equal protection clause claim is based the fact that the 2011 Amendments, facially and as applied, arbitrarily and unreasonably distinguish between the customers of a single electricity company and all other Delaware residents.[31]

B. The Challenged Classification — Between Customers of One Electric Company and All Other Delaware Residents — Is Unrelated to the Purposes of REPSA, As Amended in 2011, and Does Not Further a Legitimate Government Interest.

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[30] S.B. 124 is reproduced in full in Defendants' Exhibit A. *See* D.I 21-1 at 74-81. On the DPSC's website, the "REGULATED UTILITIES" section, only has two links: "Delmarva Power" and "Delaware Tariff." http://depsc.delaware.gov/electric.shtml#regulated (last visited Sept. 9, 2012). Both links redirect visitors to Delmarva's website.

[31] A footnote in DPSC Order No. 8079 indicates that at least one DPSC Commissioner had reservations about the 2011 Amendments' rationality: "We have a tariff with one entity and an agreement between the State and some other entity not obligated by the tariff taking up obligations for a third party. It is not a good way of doing business ...." D.I. 21-2 at 21 (citations omitted.)

Arbitrarily creating two separate classes of Delaware residents — Delmarva customers and non-Delmarva customers — is not rationally related to any of REPSA's purposes identified by Defendants: "'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.'" (*Def's' Br.* 2, D.I. 20 (citation omitted).) Likewise, this irrational classification is unrelated to the object of the 2011 Amendments, which, as Defendants note, is "promot[ing] new economic development in Delaware," if other REPSA requirements are met. (*Def's' Br.* 5, D.I. 20).

Forcing the customers of a single company to shoulder the burden of paying for an in-state fuel cell manufacturing project designed to promote economic development in the entire State of Delaware is not rationally related to any of these purposes, as Defendant DPSC Commissioners were made aware.[32] Statutorily requiring the customers of a single electric company to pay increased electricity costs, instead of distributing the burden of supporting the favored in-state company to all Delaware residents (or, alternatively, all Delaware electricity consumers) bears no conceivable relationship to improving Delaware's air quality, protecting against price volatility and supply disruption, improving electric performance, or in-state economic development. And even if promoting and protecting in-state fuel cell manufacturing was a legitimate, constitutional State interest, forcing the customers of one electric company to pay a special "nonadjustable nonbypassable charge" on a monthly basis is not rationally related to this goal, which would be advanced to the same extent if in-state fuel cell manufacturing was promoted and protected using general tax revenue from the public fisc. No rational legislature could believe that separating

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[32] *See* Consultant Report at 27 (noting "equity issues associated with the fact that Delmarva customers — about half of the State's population — "are solely responsible for the tariff while "the economic benefits of the manufacturing project, if built, would diffused [sic] statewide").

Delaware residents who purchase electricity from a single company and all other Delaware residents would advance any of these goals. *See Guam Power Authority v. Bishop of Guam*, 383 F. Supp. 476, 482 (D. Guam 1974) (no rational basis to force electricity consumers, as opposed to taxpayers, to subsidize private and public functions).

The rational basis standard is "not entirely toothless," *Schumacher*, 965 F.2d at 1269 (citation and internal quotation omitted), and as the Third Circuit recently made clear in the course of striking down a classification under this standard, "there will be situations where [the State's] proffered reasons are not rational," *Doe* v. *Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008); *see, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (classification based on length of residency in state does not survive rational basis scrutiny and violates Equal Protection Clause); *see also Allegheny Pittsburgh Coal Co. v. County Com.*, 488 U.S. 336, 343 (1989) (Under the rational basis standard, a "constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."). Plaintiffs have plausibly alleged that this is one of those situations and accordingly have stated a claim for relief sufficient to survive a Rule 12(b)(6) challenge.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in all respects.

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