

**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,)

C.A. No. 12-777-CJB

Defendants.)

ORDER

WHEREAS, on June 20, 2012, Plaintiffs John A. Nichols (“Nichols”) and FuelCell Energy, Inc. (“FuelCell”) filed a complaint (the “Complaint”) in the above-captioned action against Defendants Governor Jack Markell, in his official capacity as the Governor of Delaware (“Governor Markell”), William O’Brien (“O’Brien”), in his official capacity as Executive Director of the Delaware Public Service Commission (the “PSC”), and Jaymes B. Lester (“Lester”), Joann Conaway (“Conaway”), Dallas Winslow (“Winslow”), and Jeffrey Clark (“Clark”), in their official capacities as commissioners of the PSC (and, collectively with Governor Markell, O’Brien, Lester, Conaway, and Winslow, “Defendants”);

WHEREAS, the Complaint alleged that the 2011 amendments to the Renewable Energy Portfolio Standards Act (“REPSA”), 26 *Del. C.* §§ 351, *et seq.*, facially, and as applied, violate the dormant commerce clause and the equal protection clause of the United States Constitution;

WHEREAS, on April 17, 2014, this Court denied Defendants’ motion to dismiss with respect to FuelCell, permitting FuelCell to proceed with its dormant commerce clause claim;

WHEREAS, on April 17, 2014, this Court granted Defendants’ motion to dismiss with respect to Nichols, holding that Nichols did not have standing to bring a dormant clause claim and did not state an equal protection clause claim;

WHEREAS, Defendants have denied and continue to deny that there is any merit to the dormant commerce clause claim and/or that FuelCell has standing to assert the claim;

WHEREAS, on October 19, 2015, desiring to mutually resolve all claims and disputes between them with respect to the Complaint and in consideration of mutual promises, agreements, covenants, and representations contained therein, FuelCell and Defendants entered into an agreement of settlement (the “Settlement Agreement”), attached hereto as Exhibit A and hereby incorporated by reference;

WHEREAS, pursuant to the Settlement Agreement, FuelCell and Defendants consent to the entry of this order (the “Order”);

THEREFORE, IT IS HEREBY ORDERED, this ____ day of _____, 2015, that judgment shall be entered in this matter pursuant to the following terms and conditions:

1. For the purpose of any deliberation, decision, and/or action requiring or relating to the interpretation or application of REPSA in their official capacities, Defendants shall consider any manufacturer of fuel cells that are capable of being powered by renewable fuels as a “qualified fuel cell provider” without regard to (a) whether the fuel cells are manufactured in the

State of Delaware, or (b) whether the manufacturer of such fuel cells or any qualified fuel cell provider project proposed by such a manufacturer is designated by the Director of the Delaware Economic Development Office and/or the Secretary of the Delaware Department of Natural Resources and Environmental Conservation as an economic development opportunity;

2. In considering and determining, in accordance with REPSA, whether to approve or deny a tariff that is proposed jointly by Delmarva Power & Light (“Delmarva”), the sole PSC-regulated electric utility (or any future PSC-regulated electric utility), and any qualified fuel cell provider in connection with a qualified fuel cell provider project, the PSC shall not give consideration to (a) whether the fuel cells were manufactured in the State of Delaware, or (b) whether the qualified fuel cell provider project promotes economic development in the State of Delaware;

3. The obligations set forth in paragraphs 1 and 2 of this Order shall continue to be binding and enforceable on Defendants in their official capacities, notwithstanding any amendment to REPSA or any other statute providing for additional fuel cell provider projects;

4. In accordance with the Settlement Agreement, upon entry of this Order, Defendants shall provide to Delmarva (or any future PSC-regulated electric utility) copies of this Order, the Settlement Agreement, and REPSA § 364, which statute provides, in part, that

Before a commission-regulated electric company [*e.g.*, Delmarva (or any future PSC-regulated electric utility)] may collect any charges on behalf of a qualified fuel cell provider project . . . , the [PSC] must adopt tariff provisions applicable to such project. . . . Tariff provisions . . . shall, at a minimum, provide for the following. . . . A project of 30 MW nominal nameplate, and future potential additions of up to an additional 20MW nominal nameplate The total allowable 50 MW of nominal nameplate shall be reduced by any customer sited installations referred to in § 353(d)(2) of this title or additional installations of qualified fuel cell provider fuel cells. Any additional MW beyond the 30MW . . . must be reviewed and approved by the [PSC].

26 *Del. C.* § 364(d);

5. In accordance with the Settlement Agreement, Defendants shall pay to FuelCell attorneys' fees in the amount of \$45,000 within five business days of entry of this Order;

6. Subject to paragraph 10 below, this Order does not preclude any separate, subsequent proceeding in which any of the parties allege a breach of the Settlement Agreement;

7. Subject to paragraph 9 below, in any action to enforce the terms of the Settlement Agreement or this Order, the prevailing party shall be awarded all reasonable attorneys' fees and costs incurred in the litigation of that enforcement action;

8. Subject to paragraph 10 below, Defendants shall defend the validity of this Order and the incorporated Settlement Agreement against any challenge by any third party. Defendants shall notify FuelCell of any court or administrative challenge to the provisions of this Order and the incorporated Settlement Agreement. Defendants shall require compliance with the validity of the Order by any and all persons acting by, through, under, or on their behalves in their official capacities, whether current or future.

9. The terms of this Order shall be binding and enforceable on Defendants in their official capacities and any and all persons acting by, through, under, or on their behalves in their official capacities, whether current or future, but shall not impose any obligations or liabilities on Defendants in their personal, individual capacities; and

10. This case shall be dismissed with prejudice, although either party may file a new case, should the need arise, to enforce any aspect of this Order.

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE