

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN A. NICHOLS and FUEL)
CELL ENERGY, INC., a)
Delaware corporation,)
)
Plaintiffs,)
) C.A. No. 12-777-CJB
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.)

Wednesday, November 14, 2012

2:05 p.m.

Motion to Dismiss Hearing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States Magistrate Judge

APPEARANCES:

PROCTOR & HEYMAN, LLP
BY: KURT M. HEYMAN, ESQ.
BY: MEGHAN A. ADAMS, ESQ.

-and-

CAUSE OF ACTION
BY: AMBER ABBASI, ESQ.
BY: MICHAEL PEPSON, ESQ.

Counsel for the Plaintiffs

YOUNG CONAWAY STARGATT & TAYLOR, P.A.
BY: DAVID C. McBRIDE, ESQ.
BY: MARTIN S. LESSNER, ESQ.
BY: ADAM W. POFF, ESQ.

Counsel for the Defendant
Governor Jack Markell

ASHBY & GEDDES
BY: JAMES McC. GEDDES, ESQ.
BY: F. TROUPE MICKLER, IV, ESQ.

Counsel for the Defendants
William O'Brien, Jaymes B. Lester
Joann Conaway, Dallas Winslow
and Jeffrey Clark

24

THE CLERK: All rise.

Hawkins Reporting Service
715 N. King Street - Wilmington, Delaware 19801

1 THE COURT: Please be seated.

2 Welcome. Good afternoon.

3 Thanks, everyone, for being here
4 today. And just for the record, before I ask for
5 introductions, we are on the record here for oral
6 argument on a Motion to Dismiss in the matter of
7 Nichols versus Markell.

8 It's Civil Action Number 12-777-CJB
9 here in this Court. And why don't we begin today
10 with introductions from both sides for the
11 record.

12 MR. HEYMAN: Good afternoon, Your
13 Honor. Kurt Heyman of Proctor Heyman for
14 plaintiffs. And I'm just rising to make
15 introductions.

16 THE COURT: Good afternoon.

17 MR. HEYMAN: From my office, Meghan
18 Adams and our corresponding counsel from
19 Washington D.C., Amber Abbasi and Michael Pepson.

20 MR. HEYMAN: And also Mr. Nichols,
21 the individual plaintiff, is in the courtroom as
22 well. With Your Honor's permission, Ms. Abbasi
23 will be making the argument today. She has been
24 admitted pro hac vice.

1 THE COURT: Okay. Thank you.

2 And for the defense?

3 MR. McBRIDE: Your Honor, David
4 McBride from Young Conaway for Governor Markell.
5 And along with me from Young Conaway at counsel
6 table, Martin Lessner and Adam Poff, and others
7 that I won't burden the Court with introductions
8 on.

9 Also at counsel table for the
10 defendants from the Public Service Commission,
11 Mr. James Geddes.

12 MR. GEDDES: And, Your Honor, also
13 assisted by Troupe Mickler, who is my associate
14 with me on this matter.

15 THE COURT: Welcome to all of you.

16 Who will be arguing for the
17 defendants?

18 MR. McBRIDE: Your Honor, I'll
19 address the dormant commerce clause, and
20 Mr. Geddes will address the equal protection.

21 THE COURT: That kind of leads to my
22 first question for counsel, which is, we have a
23 couple of different buckets of issues. Have the
24 parties decided or talked about how they might

1 make best sense to break up the discussion of
2 those issues?

3 MR. McBRIDE: We have not had
4 discussion among counsel. We were planning --
5 for me, I would make the dormant commerce clause
6 action. Mr. Geddes would make equal protection.

7 We were hoping to reserve 15 to 20
8 minutes of our time for rebuttal and allow
9 plaintiffs to go forward. But we can adjust that
10 if it would be more helpful to Your Honor to do
11 otherwise.

12 THE COURT: Why don't we break it up
13 in three ways. We'll first have, and I'll try to
14 keep -- we'll keep time roughly, but I do mean to
15 make sure that each side has the full ability to
16 make its arguments that it wants to make.

17 So --

18 MR. McBRIDE: We appreciate that,
19 Your Honor.

20 THE COURT: Why don't we think of it
21 in three buckets. First, we'll talk about
22 dormant commerce clause actions as they relate to
23 FuelCell, and I can hear from each side. Then we
24 can talk about standing issues as well.

1 And then we can talk about how those
2 arguments may relate to Mr. Nichols.

3 And then, lastly, we can talk about
4 the equal protection arguments. And I think that
5 way, we'll get a better record just in terms of
6 the back and forth to each of the perspective
7 sets of issues.

8 Does that make sense?

9 MR. McBRIDE: That's fine with
10 defendants, Your Honor.

11 MS. ABBASI: Yes.

12 THE COURT: So why don't we begin
13 with the defendants' presentation with respect to
14 the arguments as they relate to FuelCell as to
15 the dormant commerce clause and the standing and
16 ripe issues that those bring.

17 MR. McBRIDE: Your Honor, I was
18 planning to go through a brief outline, hopefully
19 brief outline of the statutory history that would
20 be helpful to the Court.

21 THE COURT: Please do. And I'll
22 interrupt with questions along the way for
23 counsel.

24 MR. McBRIDE: But I did want to

1 begin by summarizing for the Court the three
2 arguments we will make with respect to Fuel
3 Cell's lack of standing.

4 First, FuelCell has never done
5 business in Delaware for reasons wholly unrelated
6 to the statutory provision that they are now
7 challenging. There were other reasons that
8 are -- obviously other reasons why they never did
9 business in Delaware.

10 In the absence of having done
11 business in Delaware, in order to have standing,
12 FuelCell must take some concrete steps to do
13 business in Delaware. And they have done nothing
14 in that regard.

15 Most obviously and most critically,
16 they've made no proposal to the one customer that
17 they've identified that they want to do business
18 with, Delmarva. Reviewing their affidavits, it
19 is, at best, conjectural whether FuelCell will
20 ever do business in Delaware, even if the relief
21 they are seeking is granted.

22 And then, thirdly, in the affidavit
23 of Mr. Wolak, I hope I am pronouncing that name
24 correctly, and in Fuel Cell's answering brief,

1 FuelCell virtually admits that it will not do
2 business in Delaware, even if this Court strikes
3 the statutory provision that they're complaining
4 about.

5 Because what they say is they need
6 more relief than that in order to do business in
7 Delaware. They say they need Your Honor to
8 strike out the entire Bloom tariff, which is to
9 say, to virtually blow up the entire Bloom
10 transaction.

11 And for one, there are many reasons
12 why this Court could never grant that relief.
13 But, at this moment in this lawsuit, the Court
14 clearly cannot grant that relief because Bloom
15 and Delmarva are obviously indispensable parties
16 to any application to undo the tariff, and
17 neither of them have been made parties.

18 So when we get to the prong of
19 causation and redressability under the standing
20 requirement, it is virtually certain that
21 FuelCell has said it will not do business unless
22 the Bloom deal is eliminated. And in the current
23 posture of this case, that deal cannot be
24 eliminated. So their injury is not redressable.

1 Now, by way of background, Your
2 Honor, in 2005, the Delaware General Assembly
3 enacted REPSA. And the essential component of
4 that statute was to require that electric
5 suppliers in Delaware include a minimum, but
6 increasing percentage of electrical energy sales
7 from eligible energy resources and solar
8 photovoltaic.

9 Now, eligible energy resources were
10 defined to include, among many other things, fuel
11 cells powered by renewable energy. And the
12 company, FuelCell, alleges in their Complaint
13 that they manufacture fuel cells powered by
14 renewable energy.

15 So they produced an eligible energy
16 resource from the time this statute was adopted
17 in 2005 up until 2011 when the amendments were
18 enacted. They never, as far as we can tell and
19 they never allege or state in an affidavit, they
20 certainly never did any business in Delaware with
21 respect to fuel cells, eligible energy fuel
22 cells. They never attempted to.

23 Now, there are two ways in which a
24 utility can satisfy the REPSA obligations,

1 essentially either supplying or obtaining energy
2 generated by a renewable energy or from eligible
3 energy source or by purchasing what are called
4 REC and SREC.

5 Now, when the statute was adopted,
6 the General Assembly specifically set forth what
7 was the purpose of the statute. The General
8 Assembly expressly found that the -- and I'm
9 quoting now, the benefits of electricity from
10 renewable energy resources accrue to the public
11 at large. And the General Assembly, and this is
12 in Section 351(b) and (c), and the General
13 Assembly also specifically found that electric
14 suppliers and consumers, such as Mr. Nichols,
15 share an obligation to develop minimum level of
16 these resources in the electric supply portfolio
17 of the State of Delaware.

18 It was for that reason that the
19 General Assembly undertook to enact REPSA, for
20 the purpose of creating that market. A market
21 for that type of renewable energy.

22 The General Assembly specifically
23 identified the public benefits that it concluded
24 accrued from the use of renewable energy. And

1 those included environmental benefits, energy
2 benefits and economic development benefits.

3 In July of 2011, the Delaware Senate
4 and the House passed an amendment to the REPSA
5 statute. Now, the amendment had the same goals
6 as the original statute. The amendment
7 essentially provided or provides a regulatory
8 structure whereby a regulated electric utility --
9 and in Delaware the only regulated electric
10 utility is Delmarva -- is permitted, but not
11 required to deliver to its customers energy
12 produced from a qualified fuel cell project.

13 The incentive to Delmarva to do that
14 is that the energy that is supplied by that
15 project reduces Delmarva's obligation to purchase
16 REC or SREC. The cost of the project is passed
17 through to the Delmarva customers.

18 But I want to point out here that
19 the cost of the project does not include the cost
20 of Bloom's manufacturing facility. The cost of
21 the project includes the electrical substations
22 that are being constructed actually by a separate
23 entity, legal entity from the entity that's
24 constructing the manufacturing facility. So the

1 costs of the manufacturing facility are not being
2 assessed against the Delmarva customers.

3 Now, the substations will buy fuel
4 cells from that manufacturing facility, but they
5 would have to buy fuel cells from somebody, in
6 any event.

7 Now, the requirements to be a
8 qualified fuel cell provider are essentially
9 three. You must manufacture fuel cells in
10 Delaware. That's the statutory provision at
11 issue in the case.

12 You must be designated as an
13 economic development opportunity. And the
14 project must be operated under a tariff approved
15 by the Public Service Commission. And in our
16 brief, we outline all the various requirements of
17 that tariff.

18 Suffice it to say, the point of that
19 tariff is to assure that the qualified fuel cell
20 project is meeting its needs identified in the
21 original REPSA statute: Technological innovation
22 in the energy field and environmental benefits,
23 price stability and economic development. Those
24 were all factors that the Public Service

1 Commission was required to look at before
2 approving the tariff.

3 And in October of 2011, the Public
4 Service Commission did unanimously approve the
5 tariff as meeting all the specific requirements
6 of the statute, and there were many, and
7 concluding that the tariff was in the public
8 interest.

9 Now, subsequent to that approval in
10 October, the project has gone forward. There are
11 substations. There's a substation in operation
12 in Brookside.

13 There's another one, I believe,
14 about to go into operation at Red Lion that will
15 collectively, by the end of the year, be
16 providing 5.7 megawatts of power.

17 The manufacturing facility is going
18 forward beginning, I believe, in the spring. The
19 University of Delaware began to remediate the
20 site. The former Chrysler manufacturing facility
21 site began to remediate that site and construct
22 infrastructure so that, among other things, the
23 Bloom factory could be built there.

24 Bloom has now entered into a

1 contract with Buccini/Pollin to construct the
2 facility, so that production of fuel cells will
3 begin next year. And, of course, as Mr. Nichols
4 is complaining, the tariff is in effect.

5 Now, turning to the commerce clause
6 claim. The essence of the commerce clause claim
7 is that the requirement in the statute that a
8 qualified fuel cell provider manufacture fuel
9 cells in Delaware violates the dormant commerce
10 clause.

11 That, of course, is not the only
12 allegation that the plaintiffs have made. And in
13 paragraphs resounding, I would submit, more as a
14 political diatribe than a legal document, the
15 plaintiffs allege in their Complaint that the
16 2011 amendment "was motivated by economic
17 protectionism in support of an in-state crony
18 company favored by Delaware government officials
19 for the purpose of burdening interstate
20 commerce."

21 Well, Your Honor, none of those
22 facts, and the plaintiffs know, are true. The
23 genesis of the 2011 amendment was an amendment by
24 the Markell administration during an economic

1 crisis that was battering Delaware to pursue
2 opportunities, to develop jobs, including in the
3 renewable energy area, the very purpose for which
4 REPSA was originally enacted.

5 The administration learned of a fuel
6 cell manufacturer in California, Bloom, that was
7 touted, in fact, I believe actually on 60
8 Minutes, as having an innovative breakthrough
9 that made -- finally made fuel cells economical
10 in a way that they had never been before.

11 They contact Bloom and the State
12 began to meet together with Delmarva. And what
13 resulted was, in effect, a package put together
14 to facilitate the development of a renewable
15 energy technology and renewable energy resources
16 in the State of Delaware.

17 Now, that package includes the
18 amendment that is at issue here. But it also
19 included a strategic grant or loan, depending on
20 how the project plays out, from the Delaware
21 strategic funds of up to 16.5 million to Bloom.

22 It also included a grant from the
23 same funds to the University of Delaware of seven
24 million to facilitate the remediation and the

1 development of the Chrysler site.

2 The university, for its part, is
3 providing a ground lease to Bloom on a rent-free
4 basis for the factory site for 25 years. The
5 Delaware economic development office estimates or
6 estimated that this project, if fully
7 implemented, would produce over 2,000 jobs for
8 Delaware. And the Delaware Public Service
9 Commission's consultant concluded that, even
10 after taking into account the cost of the tariff
11 and the incentives that were being provided as
12 part of this package, this project would net to
13 the State of Delaware and the economy of the
14 State of Delaware on an annual basis \$296 million
15 a year.

16 At the time this project was being
17 developed, there was no interstate or intrastate
18 commerce in Delaware pertaining to the fuel cell,
19 to the manufacture of fuel cells or the use of
20 fuel cells.

21 This project did not burden
22 interstate commerce. It promoted interstate
23 commerce by bringing a California company into
24 Delaware to do business with a Delaware utility

1 and supply energy to Delaware consumers.

2 In addition, the plan here is that
3 the manufacturing facility will produce fuel
4 cells to be sold throughout the Northeast,
5 further enhancing interstate commerce. And by
6 the way, Bloom will be competing with FuelCell in
7 Connecticut.

8 Third, this wasn't enacted to
9 protect in-state companies. There were no
10 in-state companies to be protected. There was no
11 one.

12 Nor was it enacted to advantage a
13 crony company that was favored by government
14 officials. It was a project put together for a
15 California company that had no prior contacts
16 with the State of Delaware.

17 And, in fact, Your Honor, the
18 manufacturing requirement that the plaintiffs
19 focus on was not contrary to the legislations put
20 in place for the purpose of hindering interstate
21 commerce, because there was none to be hindered.
22 There was no out-of-state competition. Nobody
23 was providing anything to this market interstate
24 in Delaware.

1 It was put in place in order to
2 protect the state and obligate Bloom to go
3 forward on its commitment to build the
4 manufacturing facility. So to bring an
5 allegation alleging that this project was a
6 burden on interstate commerce is, at best,
7 ironic, if not hypocritical.

8 But I must say all of that is for
9 another day, if and only if FuelCell has standing
10 to raise the dormant commerce clause here.

11 And before turning to the
12 particulars of Fuel Cell's circumstances, I want
13 to highlight some of the reasons for its standing
14 requirement in the first place, because I think
15 those reasons speak directly to the situation we
16 are in. The first and most important reason is
17 this Court has an extraordinary power that not
18 all courts, not all legal systems have. The
19 power to declare a statute unconstitutional.

20 Because of the extraordinary nature
21 of that power, it is important that the judicial
22 system only use it when there is a real tangible
23 concrete dispute that requires it be used for the
24 purpose of resolving that dispute. The power of

1 judicial review is not there for this Court to
2 serve as some sort of forum for a debate of
3 constitutional issues. It's there to be used, if
4 and only if, someone has a real injury that
5 requires remedy.

6 Secondly, the Supreme Court has said
7 that the standing requirement is intended to
8 preclude a flood of lawsuits by those who have
9 only an ideological stake in the matter of
10 dispute. I submit, Your Honor, that this lawsuit
11 implicates both of those problems.

12 Now, the Supreme Court has said
13 under the standing doctrine that there are three
14 requirements, personal injury.

15 Secondly, that the injury be caused
16 by the alleged constitutional violation.

17 And, thirdly, that a Court remedy in
18 this case is "substantially likely to fix the
19 plaintiff's injury." Now, there are also
20 prudential standing requirements. Those
21 relate -- in this case, there's only one and it
22 relates to Mr. Nichols. So I will skip over
23 that.

24 The essence of the injury inquiry is

1 where there's a real and immediate, not
2 conjectural or hypothetical injury. And the
3 proposition by a plaintiff that they some day may
4 want to do something that the statute in question
5 would preclude them from doing is not sufficient.
6 The Supreme Court has expressly held to create
7 standing.

8 And the test on redressability, the
9 plaintiffs admit at Page 12 of their brief -- I'm
10 going to read what they say -- they must
11 establish -- in order to establish the
12 redressability prong under the standing doctrine,
13 they say they must establish that "it is
14 substantially likely that a judicial decision
15 striking down the unconstitutional provisions of
16 the 2011 amendments" will remedy the injury
17 caused by the constitutional violation.

18 And they cite the Third Circuit
19 decision in Freeman versus Corzine, which, in
20 fact, does hold that. So when we come to the
21 question of whether an injunction that Your Honor
22 might enter in this case is going to redress
23 their injury, it's not just may it or could it.
24 It's is it substantially likely to?

1 Now, let me turn to their injury.

2 First, there's no dispute that Fuel Cell's never
3 done business or attempted to do business in
4 Delaware, notwithstanding the fact that the fuel
5 cells they manufacture, which can be -- which are
6 powered by renewable energy sources, do not have
7 to be manufactured in Delaware in order to be
8 used in Delaware, or sold in Delaware, or provide
9 electricity in Delaware, or for Delmarva to get
10 credit for their use.

11 In fact, Delmarva gets a 300-percent
12 credit against the REC and SREC requirements to
13 use the fuel cells that FuelCell manufactures.
14 That's been the case for six years. Never have
15 they sold, as far as we can tell, never attempted
16 to sell any in the State of Delaware.

17 Now, that fact has significance in
18 three ways. First, it means that they weren't
19 doing any business that was impacted, affected or
20 obstructed by this alleged dormant commerce
21 clause violation. I submit, in almost all of the
22 dormant commerce clause cases, that the typical
23 pattern is someone's in business doing business
24 in-state and the state enacts a statute that's

1 designed to either prevent them from continuing
2 or to obstruct it in some material way.

3 That's not here.

4 THE COURT: And let me stop there,
5 because this is a good jumping in point to talk
6 about injury in fact. And so, it seems one of
7 the questions here to you is: What you would say
8 is, Look, under the law, the plaintiff needs to
9 have a concrete plan in place to be able to take
10 advantage of this opportunity were it not
11 precluded by what it deems to be the
12 unconstitutional provision.

13 And so to put the question back to
14 you: What does that concrete plan look like in
15 your mind? What could they or should they have
16 had lined up to be able to assert to the Court?

17 Because I think a lot of the
18 briefing kind of goes back and forth on the idea
19 of the FuelCell saying, Look, we couldn't have
20 bid because we don't have this Delaware presence.
21 This Delaware presence was required.

22 Therefore, it's strange to talk
23 about our plan, our concrete plan when we were
24 precluded from even getting there. I think

1 that's a lot of the back and forth.

2 So what would that concrete plan
3 have looked like?

4 MR. McBRIDE: Well, I think -- first
5 of all, I think the answer to the question is in
6 one sense what any business would do if the
7 purpose was to do business, and that isn't file a
8 lawsuit. It's to go to the parties you want to
9 do business with and make a proposal.

10 I mean, I don't think there's any
11 reason to think that either Delmarva or the State
12 of Delaware is hostile to proposals and business.
13 It's not been the posture of the State of
14 Delaware to be hostile to business.

15 And so one would think that if you
16 have a legitimate desire to do business,
17 particularly where you're already permitted to do
18 so, the complaint that they have, the statutory
19 provision they complain about doesn't prevent
20 them from doing business in other -- for fuel
21 cells that meet the renewable energy terms which
22 they say they manufacture.

23 THE COURT: They're going to say,
24 How could we have made a proposal? What kind of

1 proposal, if one requirement of our being in the
2 mix here is that we "manufacture fuel cells in
3 Delaware" to be a qualified provider? We can't
4 do that because we don't have the physical
5 infrastructure.

6 MR. McBRIDE: But I think, Your
7 Honor, the reason to make the proposal here
8 is -- let me take a hypothetical. If they're not
9 required to make any proposal here, then anybody
10 could have standing. And I think the question,
11 and I don't mean to put this in -- I think the
12 question for the Court is this: The Court's
13 being asked here to invalidate a statute.
14 Indeed, if they get the relief they want,
15 invalidate the entire Bloom transaction.

16 And I think the question for the
17 Court is: If the Court were to do that, how
18 confident is the Court that FuelCell is going to
19 come forward and do business? And that's what's
20 missing here.

21 THE COURT: You say one way that I
22 couldn't be very confident about that is because
23 with respect to the kind of fuel cell related
24 business they could have been doing in Delaware

1 without a physical presence, they weren't doing
2 it?

3 MR. McBRIDE: Yes.

4 THE COURT: And I'd say another
5 reason is, because with respect to the other
6 requirements or things that would be looked to in
7 the statute to come up with a qualified provider,
8 they haven't sufficiently demonstrated that they
9 meet those requirements or could meet them.

10 MR. McBRIDE: That's true.

11 THE COURT: But the other side, they
12 may say, this industry generally, we're a
13 competitor. We're one of the couple of companies
14 that one might expect, if not Bloom, to be in the
15 mix here. So that, you know, that's a reason to
16 think we might well have been involved.

17 MR. McBRIDE: Well, let me turn to
18 that, because I think that goes back to -- I
19 think it also -- it goes back to the question of
20 the reason I started with the requirements of the
21 standing provision is because I think the real
22 question, at a very common sense way for the
23 Court, is I don't want to exercise a judicial
24 power in a circumstance where the alleged injury

1 is hypothetical or conjectural.

2 And, yes, FuelCell says the
3 statutory provision says I can't participate.
4 But that's not the real question here.

5 The question for the Court is: If
6 they get the relief they're asking for, will they
7 compete? Because if they won't, they're not
8 injured.

9 And here's a couple of facts that
10 suggest that it's -- that they won't. The fact
11 that they haven't been here for six years.

12 In addition, establishing that they
13 have no current business that's being injured,
14 also establishes that there's some reason
15 unrelated to the statutory provision that they're
16 challenging that keeps them out of Delaware.

17 For six years, it has kept them out
18 of Delaware, and it has nothing to do with this
19 statute. And that reason, whatever it is, will
20 exist whether the in-state manufacturing
21 requirement is stricken or not.

22 THE COURT: That sounds like it
23 bleeds a bit into causation.

24 MR. McBRIDE: Yes, that is where --

1 and that is where I'm going, because I think all
2 of this merges in the sense into that fundamental
3 question: If Your Honor exercises its
4 extraordinary power, they're asking Your Honor to
5 exercise and strike down a democratically-adopted
6 statute approved by a regulatory body tariff.

7 Will that have a real-world effect?
8 Do they really need this or is this lawsuit a
9 form for political and ideological battle?

10 THE COURT: There's part of your
11 brief where it almost sounded to me might have to
12 have a person from Delmarva stand up and say, You
13 know, if this manufacturing requirement weren't
14 there, we would have been interested with doing
15 business with them or we would have thought about
16 it.

17 I mean, how far would they have to
18 go? It sounds like you've built up a bunch of
19 steps in your briefs. Isn't that a step too far?

20 MR. McBRIDE: Well, I don't know
21 that they need. Delmarva -- I think Delmarva is
22 Delmarva.

23 I think, again, going back to the
24 question of will the Court be comfortable that,

1 if it enters the relief they're asking for, it
2 will matter. The prospect that they could do
3 business with Delmarva is obviously an important
4 inquiry.

5 But here, they never even made a
6 proposal. And the importance of making a
7 proposal in this regard is so that the Court can
8 understand the essence of the inquiry is: Can
9 you make a proposal that would engender you doing
10 business in Delaware if the statute, the in-state
11 manufacturing requirement is stricken?

12 THE COURT: And that's the thing I'm
13 trying to picture, what that proposal would have
14 been. It would have been them coming to the
15 state saying, We don't have a presence. We don't
16 have a physical presence in Delaware.

17 This law, these amendments require
18 us to. But if that wasn't there, here's our
19 proposal for what we would do.

20 Is that --

21 MR. McBRIDE: I think that's exactly
22 what, in fact, I would think that -- if I were a
23 business person and my objective were to actually
24 do business in the state, rather than file a

1 lawsuit and try to get a statute invalidated, I
2 think I'd go to someone and say, Look, there's a
3 statutory provision here and that is a problem.

4 But here's what I can do now. Can
5 we solve the problem?

6 I've been involved in enumerable
7 transactions, Your Honor, billions of dollars
8 where you start off with a very real, often
9 times, statutory problem that the parties need to
10 get around.

11 If you're really interested in doing
12 business, you work with your customer or partner
13 and try to get around it. The very fact that
14 they wouldn't even try speaks volumes about what
15 this lawsuit is really about.

16 THE COURT: Can I ask one question
17 about --

18 MR. McBRIDE: Yes.

19 THE COURT: I know you want to talk
20 about causation as well as it relates, but you
21 point out the American Energy Solutions case from
22 the Middle District of Alabama.

23 MR. McBRIDE: Yes.

24 THE COURT: I'm assuming it's the

1 case you point to, because when it comes to all
2 of these standing cases, it's hard to find cases
3 that are closer to the facts we have here as
4 opposed to people wanting to be at national
5 parks, for example.

6 MR. McBRIDE: Yeah. Yes.

7 THE COURT: So if I'm looking at
8 that case and I'm trying to figure out: Is this
9 case like that or not, a question would be: You
10 know, the plaintiffs, there's a question about
11 they hadn't signed contracts with these other
12 providers, these out-of-state providers. And so
13 the Court said they hadn't done that, so their
14 injury was too speculative.

15 Maybe the other side here could say,
16 Look, but the plaintiffs really could have
17 easily -- it wasn't a nullity in a sense, you
18 know. In a way that they might say here, again,
19 us making the proposal you're talking about, was
20 kind of a nullity. It would have been beating
21 our head against the wall because we just don't
22 have the thing that one needed.

23 So I know the reason why you think
24 American Energy is similar. You point them out

1 in your brief.

2 But talk to me about that difference
3 just in terms of the factual difference of those
4 two cases, and how you would say, if there were
5 differences, they weren't that big of a
6 difference.

7 MR. McBRIDE: Well, actually I think
8 American Energy has even set an even higher
9 standard than what we're advocating here.
10 Because to the extent you had a contract to
11 actually switch before you had standing, that's a
12 step further than what we are saying should have
13 happened here.

14 What should have happened here is a
15 proposal made, so that we can know and so that
16 Your Honor can know that there's a real injury
17 that's occurring, and that issuing an injunction
18 will have a real effect. And not simply serve as
19 some sort of judicial participation in a
20 political ideological debate.

21 And that's why I started with the
22 reasons for the standing requirement, because
23 when you ask the question, Well, if they have
24 never done business, how far do they need to go

1 down the road to do business?

2 I think it, ultimately, in the final
3 analysis, comes down to a question of: Does the
4 Court conclude it is substantially likely that if
5 the relief they could get in this case is
6 granted, they will do business?

7 Because I would think the last thing
8 any court should do or want to do is let's take
9 the relief they're asking for. Let's suppose we
10 go down and the whole statutory scheme is blown
11 up, and the Bloom tariff is blown up, and the
12 whole thing collapses.

13 And then FuelCell says, Aww, well,
14 you know, we don't think we can come up with --
15 we don't think Delmarva's terms are commercially
16 reasonable.

17 I would submit to Your Honor, it
18 would be a travesty of the judicial power of this
19 Court if that's what happened here. And I submit
20 to you, that that is precisely -- we are
21 precisely in the situation where that is what's
22 going to happen here, for two reasons.

23 Let me turn now to Mr. Wolak's
24 Affidavit. And I should point out that their

1 Complaint was completely inadequate in
2 establishing any standing. The only allegation
3 was that they aim to do business in Delaware.

4 What's that about? No concrete
5 steps. No even concrete expression of intention.

6 So they submit an Affidavit because
7 they know they've lost the standing question on
8 the allegations of the Complaint. I would
9 submit, before Your Honor relies upon that and
10 before Your Honor takes the parties down the road
11 of litigating this case, we should at least get
12 some discovery with respect to what they have put
13 before the Court.

14 But I will also submit to Your Honor
15 that what they've put before the Court is in
16 itself patently inadequate for several reasons.

17 First, it doesn't cure the main
18 problem, which is they've never made a proposal.

19 But, secondly, I want to go to what
20 I think is the critical paragraph in
21 Mr. Wolak's Affidavit. It's Paragraph 27 where
22 FuelCell says what its business plans are for
23 Delaware.

24 And I'll quote, "If Delmarva

1 requests bids for future multi-MW fuel cell
2 transactions in the State of Delaware", and then
3 they go on and describe one type, "and fuel cell
4 manufacturers that do not manufacture fuel cells
5 in Delaware such as FuelCell Energy are eligible
6 to bid on such transactions and placed on equal
7 competitive footing with their in-state
8 counterparts, FuelCell will bid or otherwise
9 compete for that fuel cell project so long as it
10 is on commercially reasonable terms."

11 So what are they telling Your Honor?

12 What are their plans for Delaware?

13 This is after we put this in issue.

14 What are their plans for Delaware?

15 Well, you will look throughout, I
16 think, their Affidavit for anything that says
17 they plan to do anything affirmatively to come
18 into Delaware, to take any affirmative step.

19 This is from a business that wants to do business
20 in Delaware.

21 Every paragraph says, If we're asked
22 to come into Delaware, then we will respond.

23 What kind of injury is that?

24 But look at this, if Delmarva

1 requests bids. Well, Delmarva doesn't request
2 bids. Typically there's no -- this is not a
3 public bidding case. There's no process by which
4 Delmarva requests bids.

5 So first question: How likely is it
6 that Delmarva is going to request bids if Your
7 Honor issues an injunction? We have no history
8 of it. And we have no history of them bidding in
9 such a circumstance.

10 And then the next thing they say,
11 not only do they say that they want the statutory
12 provision that's at issue here stricken, they say
13 that they are placed on an equal competitive
14 footing with their in-state counterparts. So
15 even if Delmarva makes requests, the hypothetical
16 bids that Delmarva's never asked for in the past,
17 they're not going to bid.

18 THE COURT: Unless the terms are
19 commercially reasonable. You say that adds a
20 couple of layers of uncertainty, even if their
21 affirmative states --

22 MR. McBRIDE: Yes. And I'm going to
23 come to what relief do they say needs to be put
24 on equal competitive footing. This paragraph is

1 nothing, is nothing but a statement. Maybe we
2 will and maybe we won't.

3 And if that provides comfort to the
4 Court to strike down a statute that's vitally
5 important to the State of Delaware when the
6 litigant says, Maybe we will or maybe we won't,
7 then I don't understand the standing requirement.

8 But let's go to the redressability
9 issue. In their brief, they say in order -- they
10 admit that they must establish a substantial
11 likelihood that the judicial decision strikes
12 down the unconstitutional provisions of the 2011
13 amendment and will allow them to go forward.

14 What relief do they say they want?
15 At Page 12 of their brief, injoining collection
16 and dispersement of the tariff subsidy. That's
17 what they say they need to be put on an equal
18 competitive footing.

19 And throughout Mr. Wolak's
20 Affidavit, there's enumerable paragraphs where he
21 goes through and explains why it wouldn't be
22 sufficient just to eliminate the statutory
23 provision that's the real alleged constitutional
24 violation. You need to blow up the Bloom deal as

1 well.

2 So if Delmarva requests bids that
3 it's never requested before, and if Your Honor
4 blows up the Bloom deal, and if Delmarva requests
5 bids on undefined commercially reasonable terms,
6 then maybe they will bid.

7 And God knows what that bid will be,
8 whether it will have any economic reality to it.
9 I would submit, Your Honor, Your Honor can't blow
10 up the Bloom deal for a multitude of reasons.

11 But there's one that's beyond any
12 question here and that is: Before that relief
13 could possibly be granted, Bloom and Delmarva
14 would have to be parties for this lawsuit. And I
15 would suggest that it speaks to the seriousness
16 of the claim that this Court is addressing.

17 When the plaintiff comes before Your
18 Honor and says the critical relief I need is to
19 blow up the Bloom transaction, otherwise, all of
20 this is hypothetical, and yet don't join the
21 parties that are necessary for that relief. And
22 I'm sorry, Your Honor. I've gone on too long. I
23 apologize. But --

24 THE COURT: Two questions of you,

1 Mr. McBride, before you sit down. One as to
2 causation.

3 MR. McBRIDE: Yes.

4 THE COURT: There's a lot of
5 discussion back and forth in the briefs as to the
6 nature of the various injuries that, you know,
7 you categorize the other side as asserting.
8 There's a part of your reply brief where you say,
9 Look, you might say there's five different kinds
10 of injuries that are asserted somewhere in there.
11 And then you say, the only arguably recognizable
12 injury to FuelCell is identified as out-of-state
13 fuel cell companies statutorily being ineligible
14 to compete for these projects.

15 I guess the question is: Is that an
16 acknowledgement?

17 And then you go on to say, but for
18 the reasons we say, but for the injury in fact
19 inquiry, that's a non-starter. Is that an
20 acknowledgement as to that particular alleged
21 injury?

22 There might well be causation, but
23 they don't get there on the injury in fact prong.
24 You know what I'm asking?

1 MR. McBRIDE: I think so, and let me
2 state it this way: If FuelCell had established
3 in the record for this Court that they were
4 likely to come forward and do business in
5 Delaware and that there was some reason and that
6 Delmarva -- and there was some reasonable
7 prospect that Delmarva would do business with
8 them, and there wasn't some other obstacle to
9 them doing business that would prevent them from
10 doing business here. And if striking the
11 in-state manufacturing requirement would free
12 them to go forward, then I would say they
13 probably have standing. But they miss on all
14 three of those counts, Your Honor.

15 THE COURT: And then, lastly, as to
16 redressability, the issue with that as to any
17 other number of reasons, one huge hindrance in
18 the ability to redress the grievance here, even
19 if the relief sought is granted is that, in part,
20 Bloom, among other people, would need to be a
21 part of this case.

22 Can that fairly be said to be a part
23 of the argument in your briefs? I'm looking at
24 the redress -- I'm reading redressability,

1 looking back to -- because, you know, remembering
2 what I read, and I remember a very, very short
3 paragraph on redressability in your opening
4 brief.

5 And I don't remember a lot in the
6 reply brief. Can it be said that that argument
7 was made so the other side can respond to it
8 here?

9 MR. McBRIDE: Oh, I'm certainly
10 prepared to have them respond to it here. It was
11 made in our opening brief.

12 At the time of the opening brief, we
13 didn't have the Wolak Affidavit. And we didn't
14 have the answering brief. It was the
15 redressability argument that was reiterated in
16 the reply brief.

17 And --

18 THE COURT: I mean, I thought the
19 gist of the redressability argument in the briefs
20 was, you know, redressability relates to
21 speculative speculation. And that sounds a lot
22 like the nature of the injury in fact argument
23 you were making, that this out-of-state company
24 would have, in fact, been a presence here was a

1 very speculative argument. That seems like the
2 gist of the redressability argument you were
3 making in the brief.

4 The issue of the practical
5 impediment of Bloom's non-presence and what that
6 means or doesn't mean here, can it be fairly said
7 that that was at play here?

8 MR. McBRIDE: Well, I think what was
9 at play is we said that the relief they said they
10 wanted, all the various factors, we said that
11 doesn't relate to any relief you can get in this
12 Court. Because the relief you get needs to be --
13 needs to address the constitutional violation.

14 And none of those other provisions
15 that you're talking about, the SREC or the REC or
16 Bloom, the fact that Bloom has a manufacturing
17 facility, none of that is the result of a
18 constitutional violation.

19 Now, we did not mention the
20 indispensable party point, because we, frankly,
21 just didn't focus on it until the brief was in.
22 And if Your Honor wants to give our opponents an
23 opportunity to respond and us to respond again on
24 that issue, but I really don't think there is any

1 legal debate that Your Honor could not injoin a
2 tariff to which Delmarva and Bloom are parties in
3 effect without them being here present.

4 Because we certainly don't represent
5 either of their interests stated in connection
6 with that application in-state.

7 THE COURT: Okay. Thank you, sir.

8 All right. Ms. Abbasi.

9 MS. ABBASI: Good afternoon, Your
10 Honor.

11 THE COURT: I should say, I know the
12 courtroom is small. I see a few folks standing
13 in the back.

14 If it's possible for everyone to
15 scooch in as much as possible as you can in your
16 seat to allow people to sit, if they can, I'd
17 appreciate it.

18 But now we're getting close to
19 capacity, so thanks for everyone's patience.

20 Okay. Ms. Abbasi.

21 MS. ABBASI: So what I want to
22 directly address is why we're here today, which
23 is whether there is standing such that this case
24 can go forward on the part of my clients,

1 FuelCell Energy and John Nichols, with respect to
2 the dormant commerce clause claim as counsel
3 addressed.

4 At one point, you asked, Your Honor,
5 what would that proposal look like? Wouldn't it
6 have been futile?

7 I think that is exactly the crux of
8 the matter here, which is that there's the
9 standing standard that defendants advocate is
10 based on, I think, a misunderstanding of the case
11 law. The only case that I think we talked about
12 at any length was from the Middle District of
13 Alabama.

14 There is, however, case law from the
15 Supreme Court, the Third Circuit and very recent
16 case law here in the District of Delaware that
17 clearly demonstrates that an injury in fact in
18 this type of case is supported by the types of
19 allegations that FuelCell has advanced here.

20 So I want to start with the
21 competitive -- the nature of this injury is that
22 it is a competitive injury. The Supreme Court in
23 Northeastern -- sorry.

24 So the Supreme Court in Northeastern

1 Florida of the General Association of Contractors
2 stated that an injury in fact only required that
3 the plaintiff demonstrate that they were able and
4 ready to bid on the contract and that they were
5 excluded.

6 Defendants have claimed that this
7 line of cases is an equal protection line of
8 cases, that it's not in opposition there, that
9 that's not the standard.

10 Unfortunately, there's a plethora of
11 case law to demonstrate that that is not the
12 case. The ready, willing and able standard was
13 applied in Clinton versus City of New York by the
14 Supreme Court in terms of discussing a
15 competitive injury.

16 Recent cases in this circuit,
17 Contract Association of Eastern Pennsylvania,
18 which was then embraced by the District of
19 Delaware in a very recent case called Tri-M,
20 which dealt with a dormant commerce clause claim.

21 So what they are asking for is
22 FuelCell Energy to provide this sort of concrete
23 proposal, which would have been futile because
24 they were statutorily excluded from being

1 eligible to compete with Bloom on equal
2 competitive footing here.

3 That is not what they were required
4 to prove. That is is not what they were required
5 to show.

6 And what we have put forth in both
7 our Complaint and Mr. Wolak's Affidavit clearly
8 demonstrates that FuelCell Energy was ready,
9 willing and able to bid on, yes, commercially
10 reasonable terms, because I think it would be
11 inaccurate for someone to say they would do
12 business on any terms, no matter how
13 unreasonable.

14 But that is all that we are required
15 to show for standing and an injury in fact here,
16 because this is a competitive injury. This law
17 created a change in market conditions.

18 And the defendants attached to their
19 Motion to Dismiss the consultant's report, which
20 discusses at great length the fact that this is
21 intended to create a change in market conditions.
22 That this favoring of Bloom as an in-state
23 company, a company that now has an in-state
24 presence, the purpose of that is to permit them

1 to compete more effectively on the East Coast
2 when it identified their true competitors, one of
3 which is FuelCell Energy.

4 So this is the dramatic kind of
5 competitive injury. Sorry.

6 THE COURT: And a couple questions
7 there, since it's a good stopping point. So one
8 question could be, you know, the ready and able
9 line of case law that tends to often come up with
10 respect to contracting cases, contractors cases
11 and affirmative action cases, et cetera. I mean,
12 one question is: There is a bunch of case law
13 out there, and I think including in the Middle
14 District of Alabama case, which indicates in the
15 standing world, you do have kind of different
16 kinds of cases.

17 You have your First Amendment cases,
18 which talk about a particular kind of chill of
19 speech and that those kind of have their own
20 context. And then there are other kinds of
21 cases, too.

22 Because the standing inquiry, you
23 know, may depend on the kind of case that you
24 have and the kind of facts that you have. And so

1 a first question would be: Why does it make
2 sense to use kind of the ready and able language
3 in those cases here in the context of this kind
4 of a case involving an economic regulation?

5 So that's the first piece.

6 And then a related question would
7 be: What does it mean to be ready and able even
8 with respect to the cases you cite? So, for
9 example, like Tri-M, you've got there, you know,
10 in the original opinion, dealing with the
11 standing issue. I think you had a company that,
12 by all accounts, was, in fact, doing business in
13 Delaware.

14 It was just a question of what these
15 particular laborers were going to get paid or
16 not. So does it make sense to use ready and
17 able? And what does it mean to be ready and able
18 other than an expression of intent?

19 MS. ABBASI: Right. Well, first, to
20 address your first point, the case Clinton versus
21 City of New York, which embraces this sort of
22 ready, willing and able standard, that's a
23 line -- that case was a challenge to the Line
24 Item Act. The point was that an injury was

1 inflicted "because a denial of a benefit in the
2 bargaining process can itself create an Article
3 III injury irrespective of the end result."

4 So, not to get ahead of myself, but
5 it's not that it's not required to prove that
6 FuelCell Energy would have obtained a deal with
7 Delmarva in order to have an injury in fact.

8 THE COURT: And so in terms of what
9 was required, what does it mean to be ready and
10 able?

11 MS. ABBASI: What it means to be
12 willing and able, I think we've given that --
13 with as much specificity as is possible, given
14 that we were statutorily excluded from competing
15 for the 30-megawatts contract and are currently
16 excluded for competing for the anticipated
17 20-megawatts contract, the cases that the
18 defendants have cited don't actually stand for
19 proposition of supporting the idea that this is
20 sufficient in terms of demonstrating what it
21 means to be willing and able. Defendants in
22 their brief cite Jamaica Ash where the Court
23 actually reached the level of the dormant
24 commerce claims. And in that case, the

1 plaintiffs made no effort to do business in New
2 York at all.

3 But they expressed a clear intention
4 that they desired to do business in New York, and
5 that they were prevented from doing so. So I
6 sympathize with your questions earlier asking
7 what exactly the proposal would look like.

8 I can say that Mr. Wolak's Affidavit
9 discusses in detail the fact that FuelCell Energy
10 has constructed multi-megawatt installations up
11 and down the Eastern Seaboard. In fact, to my
12 knowledge, this is the first multi-megawatt
13 installation in Delaware.

14 So the fact that there's no previous
15 record of bids or sales of multi-megawatt fuel
16 cell installation in Delaware is a little bit
17 unfair.

18 THE COURT: But could your client
19 have been in business involving Delaware, even if
20 not having a physical presence in Delaware
21 earlier, wouldn't it be better for your argument,
22 you know, if they had a closer connection to the
23 provision of energy in the state? Is that a fair
24 statement?

1 MS. ABBASI: I'm sure it could have.

2 In very hypothetical terms, it would have been
3 better, yes.

4 But, in this case, this is the first
5 time, to my knowledge, that Delmarva has decided
6 to go for a fuel cell as an energy generation
7 method. So there were -- if there weren't any
8 offers for them to do business, if there was no
9 customer looking for fuel cells, then it's kind
10 of hard for them to already be present in the
11 market.

12 THE COURT: I guess another way of
13 asking is: Does the able and ready standard
14 require anything more than an expression of
15 intent? Does it require some manifest action or
16 something like it in these cases?

17 And to put it another way: You
18 know, the other side cites the American Energy
19 Solution case. Again, it's a case involving this
20 standing issue involving the issue of energy
21 regulation.

22 Now, albeit not exactly -- the facts
23 aren't exact. But the other side, I think, is
24 saying, Look, this is the best case we can find

1 and it goes our way.

2 What's the best case you can find
3 that's the best, that if I'm going to look at one
4 case as to whether or not FuelCell has standing
5 or doesn't, they're pointing me to that case.
6 And they're saying, Hey, the other side doesn't
7 even talk about it.

8 What's the best case you point me to
9 or the best line of cases?

10 MS. ABBASI: I think the best case
11 to point you to in terms of the ready, willing,
12 able being the appropriate standard is Tri-M.
13 The best case that I can point you to in terms of
14 the degree of specificity of intention that we
15 should follow, I would say, is probably
16 Northeastern Florida Association versus General
17 Contractors.

18 THE COURT: Okay.

19 MS. ABBASI: They only had to
20 demonstrate that they were able and ready in that
21 case. They didn't have to allege that they would
22 have obtained the deal. And they didn't, and
23 therefore, didn't have to allege how they would
24 have obtained the deal.

1 It was enough that they were
2 competitors in the market who clearly engaged in
3 those kind of transactions, and then were being
4 prevented from doing so by the statute, which is
5 exactly what's going on here.

6 FuelCell has multi-megawatt
7 installations across the United States and across
8 even in other countries. And the idea that they
9 wouldn't -- it wouldn't do business in Delaware
10 is somewhat strange.

11 And they have, in fact, said that
12 they would like to do business in Delaware if
13 they're not being discriminated against.

14 THE COURT: And, lastly, as to the
15 American Energy Case, if I'm at least going to
16 look -- if I have to look at that, and if your
17 side is to prevail on this issue, try to
18 distinguish it, the other side is going to say,
19 Look, in that case, one of the things the
20 plaintiffs argued was these costs, these
21 additional costs are stopping us. They're
22 preventing us from actually engaging in the kind
23 of contractual relationship that the Court
24 ultimately found was required.

1 And the other side is going to say,
2 That's analogy. You guys are saying, Look, this
3 regulation, this requirement of in-state presence
4 was kind of the barrier. We couldn't do it.

5 And so, you know, and they're going
6 to say, Hey, well, that's -- you know, that's
7 analogous. Your inability to do something, you
8 can't get out of that by saying we were chilled.

9 How would you respond? Why are they
10 different cases?

11 MS. ABBASI: Well, the obvious
12 distinction is that they could have applied for
13 the contracts in American Energy Solution and
14 they didn't.

15 The second point would be that they
16 did not allege that they could have met all the
17 other requirements of the transaction. FuelCell
18 Energy has.

19 FuelCell Energy in Wolak's Affidavit
20 clearly states that they could have met all the
21 various aspects in which the transaction was
22 evaluated with the sole exception of being
23 someone who manufactured fuel cells in Delaware.
24 And, in fact, contends that they could have done

1 so at a lower cost than Bloom.

2 THE COURT: Well, that's a question.

3 So one of the lines of argument the other side
4 says is, Look, there are other things that would
5 have had to have been taken into account before
6 someone could have been a supplied fuel cell
7 provider.

8 Here, not just in-state presence,
9 but the things that have to do with size and
10 efficiency and price, et cetera. Is it your
11 contention that if I look hard enough in the
12 Wolak Affidavit, I'll find representations that
13 get to each of those issues or that get enough to
14 those issues?

15 MS. ABBASI: Yes, Your Honor.

16 THE COURT: Okay. I won't make you
17 go through those now. I can certainly look to
18 them.

19 Okay. I didn't mean to cut you off.
20 I know there are a number of points with respect
21 to the standing inquiry here, so I want you to
22 make whatever argument you want to make.

23 MS. ABBASI: Right. I guess our
24 main point is that they've suffered two injuries,

1 and this goes a little bit toward the declaratory
2 relief standard as well. Because FuelCell was
3 excluded from competing in the 30-megawatt
4 transaction. That transaction is already -- the
5 tariff was submitted and it -- you know, that's
6 already occurred.

7 They are incurring a continuing
8 injury by the change to market conditions. So
9 this is Clinton versus New York, a change in
10 market conditions due to government action that
11 burdens a competitor. While it can qualify as an
12 injury in fact by virtue of building up Bloom's
13 East Coast construction, the consultant's report
14 explicitly says, This deal will do and is
15 intended to do. They are being burdened on a
16 relative basis to Bloom, and only because Bloom
17 is receiving these benefits that are targeted
18 only towards in-state providers.

19 They are also -- sorry.

20 THE COURT: What I was going to say:
21 At a minimum, would you acknowledge that the
22 injuries you're talking about now are a step
23 removed in terms of immediacy from what I would
24 take to be your main injury argument, which is we

1 were injured because of this requirement because
2 we couldn't bid for this very significant
3 financial opportunity?

4 MS. ABBASI: Mm-hmm.

5 THE COURT: Would you acknowledge
6 that the additional arguments you're making now
7 are kind of the next step removed from that?

8 MS. ABBASI: Yes. Clearly the
9 exclusion due to the -- on the face of the
10 statute for competing in the 30-megawatt contract
11 is the most concrete injury that we can point to.
12 But it is also the case that this sort of
13 imminent or less tangible injury can still
14 qualify as an injury in fact for purposes of
15 standing on a Motion to Dismiss.

16 And, furthermore, they are excluded
17 from competing for the anticipated future
18 20-megawatt transaction. So in terms of relief
19 that Your Honor could provide, simply being
20 allowed to compete for the 20-megawatt
21 transaction would address part of the issue here,
22 although not all of it. And, clearly, we would
23 also like relief with respect to our other
24 injuries.

1 THE COURT: And I may have one more
2 question for you, but I want to make sure that
3 you're able to finish your argument you'd like to
4 make as to FuelCell and the standing issue.

5 MS. ABBASI: Sure. In terms of the
6 level of injury that needs to be specified, I
7 want to continue to push back against the idea
8 that FuelCell, because they didn't field a
9 concrete proposal for the 30-megawatt
10 transaction, a futile concrete proposal, that,
11 therefore, they weren't injured.

12 Because the case law on competitive
13 injury does not go that far. And, in fact, it
14 recognizes the kind of more speculative work,
15 sorry, step-removed type of injuries that you're
16 talking about.

17 Recently in the Third Circuit, the
18 case of UPS Worldwide versus USPS, that was a
19 case in which a competitive injury was found to
20 exist for purposes of standing, even though no
21 lost business had been demonstrated yet. It was
22 merely that by virtue of the discriminatory --
23 the benefit to one party and the burden to the
24 competitor, that they were in imminent danger of

1 losing clientele.

2 So if being in imminent danger of
3 losing clientele and anticipating, but not
4 actually having suffered lost business qualifies
5 as an injury in fact, clearly more than that has
6 been inflicted on FuelCell here. Because they've
7 already lost the 30-megawatt transaction and are
8 imminently going to lose the 20-megawatt
9 transaction, and are also undergoing the
10 competitive injury in terms of having their East
11 Coast market propped up by the discriminatory
12 provision and the tariff subsidy that Bloom has
13 received in Delaware.

14 And that begs the question: Have
15 they lost? Did they lose in the sense that they
16 would have sought it or would seek it?

17 And I think even if -- the other
18 side might say, even if the proposal isn't
19 required, at least cite to us some kind of
20 augmenting facts that give comfort to the idea
21 that this is a company that would be in this
22 market, or would have been in this market or
23 would still be in this market.

24 MS. ABBASI: Right.

1 THE COURT: And there you would say,
2 you would cite to the Affidavit, the company's
3 status in this industry. Are there other things
4 you would point me to?

5 MS. ABBASI: I would just point out
6 that, as I said, to my knowledge, this is the
7 first multi-megawatt installation in Delaware.
8 So this is the entry point for any firm to the
9 market in terms of an installation of this kind.

10 And the fact that once this market
11 was created, once it was opened up, that before a
12 market was even created, that the door was closed
13 to outside competitors is a problem. You can't
14 say that nobody was in the market because it
15 didn't exist. So it's okay for us to wall it off
16 and prevent out-of-state competitors from being
17 on equal footing with in-state companies.

18 THE COURT: Well, last question as
19 to injury in fact would be: You know, in Lujan,
20 you have the quote, "this can't be a some day
21 injury." Right.

22 You can't have a scenario where you
23 say I've gone to this national park before. Some
24 day I'd like to go back. I would like to go back

1 some day, Judge.

2 And that's not enough. It has to be
3 more concrete.

4 Again, it's a different factual
5 scenario. But if you're thinking of the idea
6 that I would bid, or I might bid or could be
7 enough to take it out of the some day world, is
8 there anything more required than your say so?

9 MS. ABBASI: Well, the Affidavit has
10 Mr. Wolak who speaks for FuelCell saying that
11 they have a specific intention to compete for the
12 20-megawatt contract, for example, in the future.

13 That is contemplated by the statute.
14 Everyone, I think, expects it to happen. And
15 beyond saying that they would compete on
16 commercially reasonable terms, it's hard to put
17 forth a proposal for something that hasn't
18 occurred yet.

19 But I would, again, also point to
20 the ongoing injury in terms of change of market
21 conditions, which is not a some day intention.
22 That's a today reality that Bloom is being
23 propped up in the market right now and having
24 their position buoyed as compared to competitor,

1 FuelCell, by the tariff subsidy.

2 THE COURT: And do you have a
3 question -- and the redressability that, to the
4 extent that the elimination of the tariff is a
5 type of relief sought, that is that it's not a
6 practicable type of relief, absent a necessary
7 party in the case who's not in the case?

8 MS. ABBASI: If Your Honor believes
9 that necessary parties should be joined, they
10 could be joined pursuant to Rule 19(a)(2).
11 There's no need to dismiss the case on the basis
12 of their absence. They could be joined.

13 So...

14 THE COURT: All right. Thank you.

15 Let's talk, at least briefly, about
16 Mr. Nichols and his standing. And then, lastly,
17 we'll hit on equal protection.

18 Go ahead, Mr. McBride.

19 MR. McBRIDE: Your Honor, I'll be
20 brief. Uncharacteristically, with respect to
21 Mr. Nichols, I think there are essentially two
22 arguments. The first is that Mr. Nichols
23 doesn't -- has not sustained an Article III
24 injury because of the alleged dormant commerce

1 clause violation.

2 He says when he attempts to
3 establish injury, that the prices for his
4 electricity have gone up because of this tariff
5 that was put in place. That's true.

6 But they went up not because of the
7 alleged constitutional violation, but because
8 renewable energy is more expensive than
9 conventionally generated energy. That's why the
10 state had to pass a statute requiring that it be
11 used in order to develop the market.

12 And I won't go into all the very
13 good reasons why that structure was put in place.
14 But his price didn't go up because FuelCell was
15 precluded by this statute from becoming a
16 qualified fuel cell provider. It went up because
17 renewable energy costs more than conventionally
18 generated energy.

19 THE COURT: Doesn't he say it went
20 up in part because of the tariff and the tariff
21 is linked to this particular in-state
22 manufacturing provision? And so, the provision
23 begets the tariff. The tariff begets "X" cents
24 per hour increase in my bill. My bill gets

1 raised directly because of this particular issue.

2 MR. McBRIDE: I think the answer to
3 that, Your Honor, is the tariff is not the
4 dormant commerce clause violation. The tariff
5 does not impact FuelCell. The existence of the
6 tariff doesn't increase Fuel Cell's costs to
7 provide energy in this market.

8 If this statute had been passed
9 without the in-state manufacturing requirement,
10 and yet Bloom was prepared to go forward with the
11 manufacturing facility in Delaware, in order to
12 get the other benefits that the statute provided
13 to them, we wouldn't be here. The tariff has
14 absolutely nothing to do with the dormant
15 commerce clause.

16 Because it doesn't increase fuel
17 cell costs to do business in Delaware. In fact,
18 the real irony here is that what FuelCell is
19 basically saying is, We want to be a beneficiary
20 of that tariff.

21 And that leads me to another point.
22 I guess this may relate back to FuelCell, but in
23 some sense it also relates to Mr. Nichols.
24 FuelCell wasn't excluded from bidding on the

1 transaction that resulted in the Bloom deal.

2 When the Bloom transaction was
3 negotiated, and I will say, frankly, the tariff
4 provisions and the statute that we're under was
5 all part of a package of attempting to facilitate
6 development in the state. When it was
7 negotiated, there was nothing keeping FuelCell
8 out of this market.

9 There was no dormant commerce clause
10 obstruction. In fact, we were dealing with a
11 California company.

12 THE COURT: It didn't have prior to
13 this any kind of physical presence?

14 MR. McBRIDE: Any facilities in
15 Delaware. So the idea that FuelCell was
16 precluded from bidding on the 30-megawatt project
17 because of a dormant commerce clause violation is
18 absurd. There was no such requirement when the
19 Bloom transaction was put together.

20 And as I said before, the irony here
21 is that that provision was included in the
22 statute, not for the purpose of keeping anybody
23 else out, but for the purpose of making sure
24 Bloom complied with the manufacturing commitment

1 which, frankly, it would have had to have made
2 for other reasons for the other benefits that
3 it's receiving under this package.

4 But FuelCell was not excluded. In
5 fact, I suspect -- I mean, I don't know.

6 I wasn't involved, but I suspect
7 that the state would have been delighted if they
8 had another fuel cell provider willing to compete
9 with Bloom to develop an opportunity in Delaware.
10 But, in any event, there was no dormant commerce
11 clause violation that kept them out.

12 THE COURT: But if the reason why it
13 didn't bid was because of the requirement,
14 then --

15 MR. McBRIDE: But the problem, Your
16 Honor, is the bidding. And there was no
17 formal -- there was no bidding. But the
18 negotiation occurred before the statute was
19 adopted.

20 There was nothing in the law or, as
21 a practical matter, to preclude FuelCell from
22 coming in and saying, Hey, we heard you're in
23 negotiations with this Bloom company. And we
24 think we've got a better deal for you.

1 In fact, that goes back to the
2 question of whether they're really here. Whether
3 if Your Honor grants the relief they ask for,
4 that they would even be here.

5 But to go back to Mr. Nichols,
6 Mr. Nichols' price went up because renewable
7 energy costs more than conventional energy. It
8 has nothing to do with FuelCell.

9 For two reasons. FuelCell wasn't
10 excluded from making an offer at the time the
11 Bloom transaction was being put together.

12 And, secondly, because there's been
13 nothing established that the offer would have
14 been better than -- I mean, that FuelCell was
15 excluded at the time of the Bloom deal.

16 THE COURT: He says in his
17 Affidavit, among other things, I have to --
18 citing the nature of the tariff, I have to pay an
19 additional 82 cents for the sole purpose of
20 subsidizing an in-state fuel cell manufacturer.

21 He links the increase in his rate to
22 the tariff. And he links the tariff to the
23 challenge provision.

24 You keep saying there's nothing.

1 There's no impact on FuelCell as it relates to
2 Mr. Nichols.

3 But does he have to link the injury
4 to him, increased payments to the underlying
5 provision being challenged or does he have to
6 link it to some harm to his co-defendant?

7 MR. MCBRIDE: No. I think he has to
8 link his injury to the dormant commerce clause
9 violation. And the dormant commerce clause or
10 the alleged dormant clause violation is that the
11 statute requires in-state manufacturing.

12 That requirement wasn't in effect at
13 the time the Bloom deal came together. So it
14 didn't affect Fuel Cell's ability to compete or
15 not for the transaction that Bloom ultimately
16 negotiated with the state.

17 And Delmarva is -- and let me ask
18 this question, as a very practical sense: Let's
19 suppose Your Honor grants the relief of striking
20 the in-state manufacturing requirement. Would
21 Mr. Nichols' tariff rate go down?

22 No. It has nothing to do with the
23 in-state manufacturing requirement.

24 And I don't know of -- and I don't

1 know of a case they have cited that stands for
2 the proposition that, because there's a provision
3 in the statute that says to be a qualified fuel
4 cell provider, you must manufacture in-state,
5 which would only have a prospective application
6 once the statute was enacted.

7 That says, and everything else goes
8 with it, because nothing else is a dormant
9 commerce clause violation. As I said, if this
10 statute had been adopted without that in-state
11 manufacturing requirement, we wouldn't be here.

12 THE COURT: And so putting it
13 another way, the purpose of the tariff -- the
14 tariff's purpose is what? How would you describe
15 it?

16 MR. McBRIDE: And that -- I'm sorry,
17 Your Honor. Thank you for asking me that
18 question, because they assert the tariff is
19 subsidizing Bloom. The tariff is not subsidizing
20 Bloom.

21 As I mentioned before, the monies
22 that the Delmarva customers are paying are not
23 going to build the manufacturing plant. They are
24 going to pay for the energy that Bloom is

1 generating, just as if FuelCell were in Bloom's
2 place and had the tariff that they want
3 apparently for themselves. It would be going to
4 pay for the cost of generating the energy.

5 That's all that's happened. It's
6 not subsidizing anybody.

7 THE COURT: So the record's clear
8 enough, that if the in-state manufacturing
9 requirement didn't exist, the tariff might still
10 well exist?

11 MR. McBRIDE: Absolutely.

12 THE COURT: Okay.

13 MR. McBRIDE: It would have to.

14 THE COURT: All right.

15 MR. McBRIDE: Because --

16 THE COURT: All right. Thank you,
17 Mr. McBride.

18 MR. McBRIDE: Thank you. Oh, I'm
19 sorry.

20 The second point on Mr. Nichols.

21 THE COURT: Sure.

22 MR. McBRIDE: I always say I'm going
23 to be short and I never am. Even if he had an
24 Article III injury, he lacks prudential standing.

1 Because he's not in the zone of interest. And on
2 this, we rely upon the Freeman versus Corzine
3 case that both sides have cited to, Your Honor.

4 In that case, the Third Circuit held
5 that a consumer does not have standing where the
6 consumer is only affected indirectly. In other
7 words, where the consumer is not the party doing
8 business with the out-of-state entity.

9 In this circumstance, Mr. Nichols
10 does business with Delmarva, which is something
11 that apparently aggravates him to no end. But
12 he's not doing business with FuelCell, and he's
13 not doing business with Bloom.

14 And he wouldn't do business with
15 either of them. And so he doesn't come within
16 the dormant commerce clause zone of interest.

17 THE COURT: Even if there's kind of
18 this middle man relationship, it could be said
19 he's doing business with Bloom via Delmarva. I
20 mean, I guess that's what the other side would
21 say here is that it's hard to make exact
22 pronouncements here, but there is a nexus,
23 perhaps one could say.

24 MR. McBRIDE: Well, there's no

1 more -- I will submit, Your Honor, there's no
2 more nexus between Mr. Nichols and Bloom than, as
3 a practical matter, there is between Mr. Nichols
4 and any other energy supply source that Delmarva
5 does business with or from whom it gets energy.

6 Because, as a practical matter,
7 those costs get passed through. And so the fact
8 that the statute says they get passed through, as
9 a practical matter, he's not the consumer.

10 In fact, I mean, in a very real
11 sense, and that is pointed out in the Public
12 Service Commission of record that we've provided
13 to Your Honor, the reason this tariff exists is
14 because Delmarva did not want to do a power
15 purchase agreement with Bloom for accounting
16 purposes.

17 Delmarva didn't want to be on the
18 contract in a direct -- in a contract with Bloom
19 for power service, which would be, as the Public
20 Service Commission consultant report points out,
21 the typical way. So they wanted this, in effect,
22 contract to be embodied in a tariff, which was
23 done.

24 But as a practical matter, the

1 negotiations to the terms of the arrangement, the
2 negotiations of the conditions of the
3 arrangement, the structure of the arrangement,
4 those were all negotiated between Bloom and
5 Delmarva. And it is a transaction between Bloom
6 and Delmarva just as it would be if Your Honor
7 granted relief.

8 Who is FuelCell going to come to to
9 try to negotiate? Not Mr. Nichols, I can assure
10 you of that.

11 THE COURT: All right. Thank you.

12 MR. McBRIDE: Thank you, Your Honor.

13 THE COURT: Ms. Abbasi.

14 MS. ABBASI: Your Honor, first of
15 all, the relationship between the in-state
16 manufacturing requirement and the tariff, they're
17 inextricably intertwined. And I think that's fairly
18 clear from the consultant's report that
19 defendants attach to their motion.

20 For example, on Page 6 of the
21 consultant report, Bloom has made it clear that
22 it will not build the manufacturing facility
23 unless the commission approves the proposed
24 tariff.

1 This is a quid pro quo. The only
2 reason Bloom became an in-state manufacturer is
3 because it was going to be offered this tariff.
4 And the tariff directly increases Mr. Nichols'
5 electricity bills.

6 This is, again -- you know, monetary
7 injury is the most classic form of injury.
8 Mr. Wolak's Affidavit, I believe, discusses how
9 if FuelCell Energy were providing the energy,
10 that it would have been at a lower cost. So even
11 if renewable energy is more expensive than
12 conventionally generated energy, Bloom Energy is
13 not the low-cost solution for Delmarva rate
14 payors.

15 So he suffered a concrete injury.
16 The causation is that the statute directly
17 establishes the tariff which, again, is a quid
18 pro quo for Bloom becoming an in-state
19 manufacturer, and is referring back to the case,
20 Tri-M, that we discussed earlier. It states it
21 cannot require an out-of-state business to become
22 a resident in order to compete on equal terms.

23 So the idea that there's no
24 relationship between this tariff, which was a

1 condition of this new in-state manufacturer
2 coming in, that is what's absurd. I believe that
3 the consultant report is quite clear that only in
4 consideration of the tariff will the new
5 manufacturing facility be constructed.

6 So the redressability obviously
7 would be to strike down the tariff to cause
8 Mr. Nichols' bills to go down, in terms of
9 whether Mr. Nichols has prudential standing,
10 whether he's within the zone of interest such
11 that he has standing to challenge the statute for
12 this violation of dormant commerce clause claim.

13 And we both cited Freeman versus
14 Corzine. Freeman versus Corzine adopted the
15 holding in Oxford Associates versus Waste System
16 Authority of East Montgomery County, which is
17 also a Third Circuit case from 2001 that was a
18 dormant commerce clause as well. And the
19 correspondence between the facts and the various
20 parties in Oxford Associates, and this case is
21 strangely close.

22 In Oxford, it was building owners
23 who had trash that then went to truckers, which
24 then could either dump it in-state or at

1 out-of-state waste facilities.

2 Now, here we have Delmarva rate
3 payors who get their energy from Delmarva, who
4 then can either deal with in-state or
5 out-of-state companies, Bloom, or FuelCell Energy
6 or the third competitor, UST.

7 In that case, the building owners
8 had standing, even though they were not directly
9 doing business with the in-state and out-of-state
10 companies. The fact that they were participants
11 directly affected their participation in
12 commerce, which the regulation was enough to come
13 for standing.

14 So by citing to Freeman versus
15 Corzine, both of us, I think, think this supports
16 us. But the underlying holding that Freeman
17 versus Corzine was applying is a dormant commerce
18 clause case in which an indirect participant was
19 found to have standing to challenge a regulation
20 that burdened someone that it did business with.

21 So Mr. Nichols is directly regulated
22 by the statute. He pays the tariff. So the idea
23 that he doesn't have standing here is very
24 strange.

1 THE COURT: And you would say that's
2 a necessary consequence? In other words, in
3 Corzine, if the plaintiffs weren't wine buyers,
4 if they were just upset about discrimination,
5 these vis-a-vis in-state versus out-of-state wine
6 producers, presumably is not enough.

7 MS. ABBASI: Right. If they were --
8 sorry.

9 THE COURT: Go ahead. And so the
10 Court talks about ways in which the plaintiffs
11 themselves made purchases, even, you know, were
12 interested in making out-of-state purchases that
13 they couldn't make.

14 I mean, interestingly, they also
15 talk about how the plaintiffs actually tried to
16 make purchases from out of state, which they, in
17 essence, base on the regulation they couldn't
18 make. But they tried. They made a physical
19 effort and tried.

20 So going back to -- if I'm looking
21 at that case, it doesn't have to do so much with
22 Mr. Nichols, per se, but as an analogy back on
23 the injury in fact issue with respect to
24 FuelCell. I mean, you might read that and

1 suggest, Look, the Third Circuit thought that was
2 really helpful.

3 That even though they should have
4 been precluded even from trying to purchase wine
5 out of state, and they knew they wouldn't get it,
6 they actually made those attempts five times and
7 that helped make their record here.

8 Why isn't that an analogy that I
9 should draw on, back on the FuelCell?

10 MS. ABBASI: The fact that they
11 tried to make the purchases, it does help create
12 a record for that case. However, I think trying
13 to buy a bottle of wine over the internet versus
14 trying to anticipate the needs of a hypothetical
15 fuel cell installation with Delmarva without
16 recourse to an RFP or anything of that nature, is
17 a lot more complicated. It's a lot more to ask
18 from someone and it's not what's required.

19 The fact that the plaintiffs in
20 Corzine did do so, that's great. But --

21 THE COURT: Well, and --

22 MS. ABBASI: -- they weren't
23 required to.

24 THE COURT: You say that's well

1 beyond the pail?

2 MS. ABBASI: Right. I would, again,
3 refer back to Oxford where, you know, the
4 building owners were doing no business whatsoever
5 with in-state and out-of-state dumps. But they
6 still had standing by virtue of their status as
7 participants in that chain of commerce.

8 So I believe that it's fairly
9 straight forward in terms of Mr. Nichols' injury,
10 and that the causation aspect is addressed by the
11 cost issues and Wolak's Affidavit.

12 THE COURT: Okay. Thank you.

13 MS. ABBASI: Okay.

14 THE COURT: Mr. McBride, we're going
15 to pass off for the last argument. Did you have
16 brief rebuttal that you wanted to make on that
17 point?

18 MR. McBRIDE: There was just on the
19 Oxford case, Your Honor. First of all, the
20 Oxford case was decided before Corzine.

21 So I don't know that Oxford survives
22 Corzine. But Oxford is distinguishable for this
23 reason.

24 In Oxford, the tax or fee that the

1 plaintiff was paying was itself the dormant
2 commerce clause violation. Here, the tariff is
3 not the dormant commerce clause violation.

4 And, frankly, I don't even begin to
5 understand the argument that because the tariff
6 was part of a statute, that has a provision
7 that's being challenged under the dormant
8 commerce clause in the statute. Because being a
9 dormant commerce clause, I don't think there's
10 been any authority cited for that.

11 But the difference between Oxford
12 and here, if Oxford is even still good law, is
13 that the assessment that was being made there was
14 the wrong was the dormant commerce clause
15 violation itself.

16 THE COURT: On the former point, is
17 what you're saying, regardless of whether or not
18 Bloom would have done the deal, if the tariff was
19 in play, the tariff itself just is so unconnected
20 to the underlying, you know, allegedly
21 problematic, you know, provision of this statute?

22 MR. McBRIDE: Yeah, Your Honor. The
23 opposing counsel made the point that Bloom
24 wouldn't have done the deal. It wouldn't have

1 built the manufacturing plant, but for the
2 tariff.

3 Well, the manufacturing plant is not
4 the dormant commerce clause violation. Bloom
5 could have built hundreds of plants in Delaware
6 and not one of them would have been a dormant
7 commerce clause violation.

8 The alleged dormant clause violation
9 is excluding -- is alleged to be excluding
10 FuelCell. That's the wrong. Building the
11 manufacturing plant wasn't the wrong.

12 And that's the difference. That's
13 why this case relates to one thing and one thing
14 only. And that is, a provision in a statute that
15 says, To be a qualified fuel cell provider, you
16 must have in-state manufacturing.

17 Now, if you're injured by that
18 provision and you're in the zone of interest,
19 then you have standing. But Mr. Nichols wasn't
20 injured because his prices weren't the product of
21 that alleged violation. And FuelCell wasn't
22 because it's not demonstrated that it would have
23 been here.

24 And on the argument that they were

1 restricted from the 30 megawatts, that is just
2 absolutely wrong. That transaction was
3 negotiated before the statute was in place.

4 The statute was the product of that
5 negotiation. FuelCell could have been here if
6 they had wanted to be.

7 THE COURT: Okay. Thank you.

8 MR. McBRIDE: Thank you, Your Honor.

9 MS. ABBASI: Your Honor, may I?

10 THE COURT: Why don't we do this,

11 Ms. Abbasi: You might want to add something with
12 that. Just to make sure we get in enough time
13 for the equal protection argument, why don't we
14 hear about that argument.

15 We will give you a chance to respond
16 at the end of your presentation, if you'd like,
17 to make some additional points with Mr. Nichols'
18 standing issue. You can do that.

19 I just want to make sure we get
20 enough time to cover everything. And so why
21 don't we pick up with our final argument relating
22 to the equal protection issue.

23 MR. GEDDES: Your Honor, may it
24 please the Court. My apologies to the Court and

1 court reporter for the quality of my voice. I've
2 been trying to take care of it, but,
3 unfortunately, I still have laryngitis.

4 James Geddes and I represent the
5 other individual defendants, the Commissioners
6 and the Executive Director. Dealing with the
7 equal protection argument, the plaintiffs here
8 made three particular arguments.

9 One is that the amendments now
10 discriminate with Mr. Nichols and the other
11 Delmarva-related customers, and that that
12 discrimination has no rational basis.

13 The second issue is that dividing or
14 segmenting Delaware residents into classes based
15 on their fuel providers or their electric
16 providers is not connected with the legitimate
17 government interests.

18 And the final argument that they
19 make is the benefits that the Delmarva customers
20 receive from this, subject to the tax, are also
21 received by other Delaware associates.

22 If the Court reviews the Complaint
23 and all the answering materials, briefing, our
24 briefing materials, you can see that the parties

1 agree on the appropriate standard. That is the
2 rational basis standard, which is the least
3 invasive of all the judicial review here.

4 There is no suspect classification
5 or fundamental right at issue. It is merely a
6 question of whether the statute question is
7 rationally related to a legitimate Government
8 interest.

9 And that's the appropriate standard
10 review. Since the plaintiffs have accepted that
11 standard of review, they must also accept the
12 progeny of case law cited by Justice Thomas in
13 the FCC vs. Beach decision in which the
14 commensurate burden in attacking the rationale of
15 legislative classification is to negate every
16 conceivable basis that might support it.

17 Stated another way, if there is any
18 rational basis to support the statute, whether it
19 is stated or otherwise, then it stands the
20 judicial scrutiny under the equal protection
21 clause.

22 Thus, that was the reason why the
23 Court in the decision in New Orleans versus Duke
24 was able to say that there had been only one case

1 in 50 years that had ever challenged, under the
2 equal protection clause, an economic regulation.
3 And they were overturning that case. It is
4 rarely done and it's rarely done successfully.

5 As was previously stated by
6 Mr. McBride, the purpose of the REC statute was
7 set forth in 2005. It was amended in 2007, and
8 then again in 2011.

9 There can be no question that
10 increasing reliance on and creating a market for
11 renewables in Delaware is a legitimate government
12 interest. Reducing the carbon footprint of all
13 Delaware energy users is certainly an allowable
14 goal, and I'm sure that Governor Christie would
15 agree with that, since they are downwind from
16 Delaware. And that whatever efforts we make to
17 reduce our carbon footprint is to the benefit of
18 the citizens here, as well as other citizens in
19 the neighboring locale.

20 If you look at the development of
21 the statute, it shows that over a period of time
22 beginning in 2005, that it has been amended to
23 increase its dependency on renewable resources.
24 If you've been doing regulations as long as I

1 have, a short footnote, you would not support, as
2 the Commission was asked to do in the 1980s, that
3 Delmarva built the largest article contract
4 concrete structure in Sussex County for the sole
5 purpose to blow fly ash into New Jersey rather
6 than the Delaware River.

7 We have come a long way since the
8 1980s and I'm sure that the Secretary of DNREC,
9 Secretary O'Mara is happy that we are not in this
10 day and age coming up with such ideas as building
11 smokestacks so that we can blow ash into other
12 states.

13 Renewable energy is important. It's
14 an important, legitimate goal of the government.

15 There are over 30 states that have
16 RPS standards, and approximately 40 percent of
17 the energy in those states -- I'm sorry, they
18 represent approximately 40 percent of all the
19 energy that is used in the United States.

20 So, this is clearly something that
21 is timely. And these goals are something that
22 the state has a significant interest in.

23 I don't believe that the plaintiffs
24 take issue with the goals of the statute. I

1 think it would be difficult for them to say that
2 the government does not have a legitimate
3 interest in the environment and reducing
4 dependency on fossil fuels.

5 With respect to Mr. Nichols'
6 specific criticisms of the statute and the tariff
7 as it is applied, he first says that there is no
8 rational basis. In order to understand that, you
9 need to understand why Mr. Nichols is a regulated
10 customer of Delmarva.

11 And it, obviously, goes back to the
12 last century and the beginning of central-based
13 generation, as well as the development of co-ops
14 to provide energy for those that invest in their
15 own utilities would not provide.

16 So, as a result of the historical
17 exercise, we came up with three different groups
18 of energy consumers in the State of Delaware.
19 Historically, the co-op originally was not
20 regulated by the Commission. Before it was.
21 Before it wasn't and now it's not. It has had a
22 checkered career with the Commission.

23 But now in 2001, it had opted out of
24 regulation. Although, historically it has been

1 regulated off and on.

2 With respect to municipals,
3 otherwise known as DMAC, which are the cities
4 including Dover, which has its own generation,
5 the only one that does, they have historically
6 not been subject to Commission regulation.

7 So you have three groups of
8 customers. Three groups of consumers.

9 One being served by a company that
10 has stockholders, what we call an IOU, an
11 investor-owned utility.

12 We then have a group of citizens who
13 receive their energy from municipalities through
14 the arrangement referred to as DMAC.

15 And then, of course, we have about
16 70,000 customers mostly located in Sussex County
17 that are served by the co-op. Each one of these
18 customers is in a different position. Delmarva
19 is the only regulated IOU in the State of
20 Delaware and is regulated to avoid price gouging
21 and to create, if you will, a surrogate market
22 for competition.

23 The Commission tries to establish
24 rates for Delmarva customers that represent

1 market conditions. But it is a monopoly and it
2 is regulated. And Mr. Nichols' rates are subject
3 to the Commission's oversight.

4 As a result of that and of the
5 history that Delmarva has incurred or been
6 subject to in this state, the rates that
7 Mr. Nichols pays are not reflective of costs that
8 other customers in municipal areas or those that
9 our co-op customers pay.

10 For instance, Delmarva used to be a
11 vertically-integrated company. It had its own
12 generation, transmission and distribution.

13 In 1999, the legislature decided to
14 deregulate generation. After six years of price
15 raises, in 2006, the price raises came off and
16 freezes, and Delaware customers ended up paying a
17 half a billion dollars more for energy as a
18 result of that.

19 The legislature passed a statute in
20 2006 to say, Delmarva, you need to go out and try
21 to stabilize this market. And so they started to
22 enter into long-term contracts.

23 This is the context by which we get
24 to Bloom, because the history of how Delmarva

1 became involved with Bloom and entered into this
2 tariff rather than a purchase power contract that
3 Mr. McBride referred to is a product of this
4 history. And as a result of EURSA, which was the
5 legislation that was passed in 2006, the Electric
6 Utility Retail Supply Act, Delmarva was
7 encouraged and, in fact, instructed to go out and
8 find long-term contracts that would reduce the
9 dependency and thereby its customers on PJM
10 market pricing. And it did that.

11 And one of those contracts was Blue
12 Water Wind, which I'm sure Your Honor is familiar
13 with, was a purchase power agreement that was
14 negotiated, approved by the Commission in three
15 other states' agencies where Delmarva signed up
16 to buy energy from an off-shore wind site.

17 The history of Blue Water Wind is
18 torturous and I will not bore the Court with the
19 details, other than the ultimate result, which
20 was essentially the project did not come to
21 fruition eventually.

22 But the point of informing the Court
23 of that is that that was a contract that was
24 approved, that set the cap, that was used to

1 determine the reasonableness of this tariff.

2 Because after that contract was signed and the
3 rates were established, it was used as a
4 benchmark.

5 And so when this tariff was proposed
6 and the Commission was asked to review it, the
7 Commissioner reviewed it in the context of that
8 approved purchase power contract. It set the
9 ceiling, if you will.

10 And if you look at the report done
11 by New Energy Opportunities that is part of our
12 declaration, you will see reference to that
13 contract and the analysis by ICF as well that
14 determined that the Bloom project to rate payors
15 in Delaware was about 40 percent, 40 percent of
16 the estimated cost of the Blue Water Wind project
17 that was previously approved by the Commission
18 and three other states' agencies.

19 I am sorry.

20 THE COURT: Excuse me. To focus,
21 you know, on what I think is the other side's
22 main argument, if we're alleging your
23 rationality, not so much with respect to the goal
24 of renewable energy, but to how it is paid for,

1 i.e. that the payors for this tariff at issue are
2 Delmarva customers versus the 50 percent of the
3 states that aren't, one big part, I think, of
4 your argument here is: There are rational
5 reasons, plenty of them as to why it is that
6 Delmarva customers would be the ones that pay for
7 that.

8 So, I assume that one can't make out
9 a plausible claim of irrationality.

10 MR. GEDDES: That is correct.

11 THE COURT: I think a lot of this
12 comes in on Page 10 of your reply brief. And
13 albeit with the context that you've talked about,
14 why does it make rational sense for Delmarva rate
15 payors and not other states' citizens to be the
16 ones that bear whatever cost there are to put
17 this regime into play?

18 MR. GEDDES: It bears -- it is
19 rational because Delmarva customers are receiving
20 the REC and the SREC from this project. In other
21 words, Delmarva -- actually Delmarva -- let me
22 just clarify something that was discussed in the
23 prior argument.

24 Delmarva really is not involved in

1 this other than they're taking money from the
2 rate payors and they're giving it to Bloom. They
3 are, in my parlance, the pay master. That is
4 their sole responsibility here.

5 Bloom is obligated to sell the
6 energy into the PJM and get credit back. As a
7 result of Delmarva taking the funds from the rate
8 payors, it is then allowed to apply to reduce the
9 obligations under the statute for REC and SREC.
10 And there's a formula there and it's set forth in
11 the expert's report.

12 So, as a result, what Delmarva is
13 receiving are credits against the obligation to
14 have these certificates, if you will, in their
15 hand. It's an annual review, and they have to
16 have so many by the end of the year. And by
17 2019, they have to have 20 percent.

18 So, in essence, the rate payors are
19 benefiting because they are getting those
20 certificates, those credits, those reductions in
21 REC and SREC. And also under the statute, which
22 goes to the market issue, Delmarva's obligation
23 with respect to REC and SREC is increased because
24 it now has to supply REC and SREC for all

1 third-party suppliers.

2 Understand, Delmarva's system or its
3 responsibility is divided in several different
4 ways. It is the distribution company. We call
5 it the wires company.

6 But there are customers such as
7 myself, and I would assume most people in this
8 room, who I take it are Delmarva Power, who are
9 what we call SOS, standard office service. We
10 don't want to go out and find third-party
11 suppliers or third-party suppliers, have them
12 come to us.

13 Maybe some people here have decided
14 to use somebody else to supply their energies,
15 but commercial customers are not standard office
16 service customers. They go out and they buy
17 their energy.

18 And as a result of that, they go out
19 and buy short-term REC and SREC as part of that
20 energy purchase. Those are short-term
21 obligations.

22 The advantage of the statute by
23 making Delmarva now responsible for the whole
24 supply chain, i.e. for all the third parties as

1 well as the SOS customers, is it creates a larger
2 market.

3 So now Delmarva, rather than saying,
4 Well, I just need REC for a year, or I need REC
5 for two years, they can now create through this
6 larger obligation the opportunity for people to
7 finance these projects, because you need the
8 revenue stream to be able to do it.

9 So, in essence, this is another way
10 that the statute is helping and trying to support
11 the development of renewable resources. And it's
12 a very important change in the statute and, in
13 essence, leaves people like Bloom or FuelCell in
14 the same place as before the statute, because
15 this additional obligation is now being fulfilled
16 by Bloom.

17 That doesn't mean that in the future
18 Delmarva does not need more REC and SREC because
19 of this increased obligation. The rate payors
20 are receiving the advantage of those REC and
21 SREC.

22 THE COURT: That's really what I'm
23 asking. There's a sentence in this. Nichols
24 overlooks the unique benefits Delmarva customers

1 receive from the Bloom project such as price
2 stability, reduction in the REC and SREC.

3 So what I'm asking, in clearer
4 terms: If I'm a Delmarva customer and I, on the
5 one hand, could be said to be a paying, normal
6 non-payor customer for this regime, your brief is
7 saying I'm benefiting, too. I'm benefiting in a
8 unique way that makes it rational, clearly
9 rational.

10 MR. GEDDES: Yes.

11 THE COURT: To make me incur the
12 cost for this, I hear you saying one benefit is,
13 if this wasn't happening, that the way of REC and
14 SREC that Delmarva would have to purchase would
15 go up and presumably my cost of my power would go
16 up; is that right?

17 MR. GEDDES: Yes.

18 THE COURT: And then, but there are
19 other benefits, I might get to?

20 MR. GEDDES: Yes. There are other
21 benefits. And again, putting it in context,
22 these same standards, 364(d)(2), the four
23 criteria that I would caution the Commission had
24 to make sure existed, that wasn't exclusive of

1 other conditions. Because the Commission always
2 looks, when it reviews tariffs for the public
3 interest, and I would suggest that the public
4 interest is broader than those four
5 characteristics.

6 But, yes, innovative base load
7 technology. Remember that the capacity rate of
8 these fuel cells is 99 percent or 96 percent.
9 That's very important, because that means that
10 that is a base load unit.

11 It's on all the time. And,
12 therefore, there are benefits to that to the
13 customers.

14 It also had to be innovative. It
15 also had to reduce the carbon footprint,
16 environmentally helpful and economic development.

17 Now, the Commission historically has
18 been involved in "economic" --

19 THE COURT: I've got to stop you.
20 I'm really looking for -- I'm looking to try to
21 put meat on the bone for two particular sentences
22 that struck me on Page 10 here. One is the one I
23 read to you and the other is the sentence that
24 says, The General Assembly could rationally have

1 involved only DSPC regulated and largest
2 electricity suppliers in an economic development
3 partnership due to the practical difficulties of
4 including numerous small unregulated power
5 suppliers without offending the equal protection
6 clause.

7 When I read those two sentences, I
8 thought, That is the clear way in which the
9 defendants are going to articulate why it is that
10 it would be clearly rational to have a payment
11 scheme of the kind that exists here.

12 It's rational because there are
13 reasons why we did it. Understandable reasons
14 why these people pay, but these people don't pay.
15 Because the other side is saying, It's not
16 rational for only one half of the state to pay
17 and one half not to pay.

18 And I understand your point to be
19 there is so much rationality that they can't even
20 make out a plausible claim of irrationality.

21 MR. GEDDES: Exactly.

22 THE COURT: So I'm thinking you're
23 going to tell me all the reasons why it makes
24 sense that one half pays and the other half

1 doesn't pay. And I'm just not sure I'm getting
2 that.

3 And I want to make sure we get to
4 some of that here before I ask Ms. Abbasi to put
5 on the other side's argument.

6 MR. GEDDES: No. Thank you for
7 trying to reign me in.

8 THE COURT: No. No.

9 I just want to make sure we get that
10 because we are limited by time.

11 MR. GEDDES: No, I understand.

12 The reason is, one, structurally
13 Delmarva is the only regulated entity. So, by
14 tariff, there is no other way to be able to
15 enforce a contract, if you will, or an obligation
16 such as this other than by tariff with Delmarva
17 customers.

18 The requirements for REC, as Your
19 Honor knows, and SREC for the other segmented
20 parts of the market municipals and for the co-op
21 are done in a different way. And they are not
22 subject to regulation. They are not subject to
23 commission oversight.

24 And so, when the statute was put

1 together and the tariff, which is part of it, it
2 was designed so that the economics of it were
3 beneficial to the rate payors as we just
4 discussed. And the requirements for SREC and REC
5 for the other people in other segments of the
6 market are being accomplished in other ways.

7 For instance, the Dover Sun Park,
8 which has been in the paper recently, that's a
9 solar project. And there are REC there that
10 municipalities participate in as well as
11 Delmarva.

12 So the benefits are there. The way
13 the statute is created reflects the structure of
14 the market, and that there is only one regulated
15 electric supplier.

16 THE COURT: Okay. All right.

17 Thank you, Mr. Geddes. Let me hear
18 from the other side on those points and --

19 MR. GEDDES: Thank you, Your Honor.

20 THE COURT: All right. Thank you.

21 MS. ABBASI: Your Honor, our
22 contention is that imposing the tariff on only
23 Delmarva rate payors, including Mr. Nichols, is
24 not a rational means to accomplish a legitimate

1 Government objective. Half of the State of
2 Delaware pays and half of it does not.

3 There may be benefits to the use of
4 green energy and price stabilization,
5 environmental benefits, to the extent that those
6 benefits exist. Mr. Wolak, I think, elaborated
7 on how FuelCell could have done all the same
8 things that Bloom is doing in terms of providing
9 those benefits to consumers in Delaware at a
10 lower cost.

11 But the problem here is that this
12 tariff and, again, the consultant report
13 repeatedly states, that this tariff exists
14 because they need to coax Bloom into coming to
15 Delaware. Bloom gets to be in Delaware. Bloom
16 gets to be protected from outside competition.

17 And in return, they get this stream
18 of income, which they're getting right now, even
19 though they're not generating any power or
20 employing any people in Delaware to manufacture
21 fuel cells.

22 The problem is economic
23 protectionism is not a legitimate government
24 objective. Protecting Delaware companies from

1 out-of-state competition is not a legitimate
2 government objective.

3 The case of West Lynn Creamery is
4 directly on point here with dormant commerce
5 challenge. It was found to violate the dormant
6 commerce clause. The idea that the tariff is
7 somehow unrelated to discrimination is belied by
8 defendants' own consultant's report.

9 So the idea that this is a rational
10 way to distinguish between people in Delaware to
11 accomplish legitimate Government --

12 THE COURT: Is your equal protection
13 challenge as to the end seeking to be achieved or
14 to the means of paying for it?

15 MS. ABBASI: Both.

16 THE COURT: Okay.

17 MS. ABBASI: So, first of all, you
18 can't legitimately distinguish between people to
19 protect in-state companies versus out-of-state
20 companies and burden out-of-state competition, as
21 an initial matter.

22 The distinction between Delmarva
23 rate payors and non-Delmarva rate payors, then in
24 that context is irrational because the purported

1 benefit is economic development in Delaware.
2 That's the reason for discriminating against
3 out-of-state companies is that you want to reward
4 an in-state manufacturer.

5 Now, the way that that's phrased in
6 the consultant's report and the briefing is that
7 this is a benefit that resounds to everyone in
8 Delaware, that the entire Delaware economy is
9 going to benefit from the fact that Bloom is
10 going to come to the state and turn the Chrysler
11 plant into a fuel cell manufacturing facility.

12 Now, our contention is that if, in
13 fact, that is the end, which is a self
14 illegitimate end -- but setting that aside, if
15 that's the end, that it is irrational to have
16 Delmarva people pay and non-Delmarva rate payors
17 not pay to benefit the entire State of Delaware.

18 Now, there's not a lot of rational
19 basis challenge cases, as you pointed out. We
20 cite to the case of Quan Power, which is actually
21 an electricity case. And there, you have certain
22 electricity consumers being asked to subsidize
23 hospitals and schools.

24 Now, presumably because the benefit

1 of hospitals and schools, like the benefit of
2 more jobs in Delaware, is something that's
3 diffuse and helps everyone, they wanted to
4 incentivize. But, in that case, they said, Look,
5 if you want to have a benefit that goes to
6 everyone, then the proper way to do that is to
7 have it come out of the General Treasury.

8 The improper way to do it is to make
9 an irrational distinction and say that people,
10 you know, in this category arbitrarily need to
11 subsidize this, saying things that go to
12 everyone.

13 THE COURT: Is your point, if you
14 have a benefit that is meant to go to all state
15 residents, you must impose a tariff or tax on all
16 state residents in order to fund the benefit?

17 MS. ABBASI: I think that goes --
18 that's perhaps too far of a characterization of
19 it. So let me back up.

20 THE COURT: You acknowledge you
21 could pick certain residents to fund some
22 program --

23 MS. ABBASI: Right.

24 THE COURT: -- so long as there was

1 a rational basis for picking those residents?

2 MS. ABBASI: It has to be a fair and
3 substantial relation to the objective of the
4 legislation. The objective here was economic
5 development in Delaware, the Bloom facility.

6 Our argument is that the
7 distinction, Delmarva rate payors and
8 non-Delmarva rate payors, is not rationally
9 related to that objective. So, you know, if the
10 state can tax gas to build roads, the State
11 imposes tolls on roads and charges people to
12 drive on it. But even if it decided it was
13 really efficient because of, you know,
14 preexisting complex regulatory regime reaching
15 back years, they couldn't say, Well, we're going
16 to have everyone who has an odd-numbered license
17 plate to pay for roads in Delaware. That's
18 irrational.

19 Our argument is that just because
20 it's convenient for them to impose the cost of
21 this economic development scheme on Delmarva rate
22 payors doesn't make it rational.

23 THE COURT: Can it be said that
24 Delmarva rate payors and Delmarva itself gets a

1 benefit from the participation in this statutory
2 regime that non-Delmarva customers and other
3 entities like Delmarva don't get?

4 MS. ABBASI: They may receive other
5 benefits. But, again, those other benefits could
6 be provided without discriminating.

7 Discrimination is the crux of the
8 issue here. I think without discrimination, none
9 of this would exist.

10 Because the only reason the tariff
11 exists, the only reason that Mr. Nichols is
12 paying for economic development in Delaware is
13 that this deal was set up to coax one particular
14 company to come in, in-state presence and be
15 boosted up over out-of-state competition.

16 This is part of a complex scheme.
17 The parts cannot function independently of one
18 another and they would not function independently
19 of one another.

20 THE COURT: Okay. All right. Thank
21 you.

22 Mr. McBride, did you want to make
23 any other point about -- I know you had mentioned
24 you wanted to make a last point about the

1 standing issues as to Mr. Nichols. I just want
2 to give you the opportunity.

3 MS. ABBASI: It goes back a little
4 bit to what I was just saying, which is the
5 tariff is only here because of the
6 discrimination. Mr. Nichols' standing on the
7 basis of the dormant commerce clause is related
8 to his payments of the tariff. It's made clear
9 in the consultant's report that the reason the
10 tariff was passed was because that was the only
11 way Bloom would come to Delaware.

12 It makes very obvious that the
13 causation is direct. If they weren't trying to
14 give a benefit to an in-state competitor, and
15 therefore, burden out-of-state competitors and
16 render them illegible for competition or for a
17 given transaction and a future transaction, the
18 tariff would not have been passed.

19 That was their goal and that's what
20 they've done. And what we're asking for is that
21 the Court permit free competition and allow that
22 to benefit everyone in Delaware and not burden
23 some people in Delaware and some companies
24 outside of Delaware.

1 THE COURT: All right. Thank you.

2 MR. McBRIDE: Does Your Honor have
3 time for rebuttal for --

4 THE COURT: Very briefly, Mr.
5 McBride. Did you want to make rebuttal as to
6 what issue?

7 MR. McBRIDE: Equal protection and
8 -- three things.

9 First of all, the plaintiffs say
10 that the purpose of the statute is economic
11 development. The purpose is a statute and the
12 2011 amendment was not limited to economic
13 development.

14 The purposes are set forth in the
15 statute. They were identified to create
16 renewable energy because renewable energy
17 improves health, improves the environment and
18 improves energy, improves the distribution and
19 acquisition of energy and economic development.

20 Those were all factors. That's the
21 objective that's being -- those are the
22 objectives being accomplished by REPSA, and
23 including the 2011 amendment.

24 So to say that, Well, the only

1 objective of the 2011 amendment was to build the
2 Bloom factory is not correct. The Delaware
3 Public Service Commission made specific findings
4 as to what the purposes were for allowing that
5 tariff, and it wasn't limited to economic
6 development. And it wasn't limited to the Bloom
7 development of the Bloom factory.

8 That was an important factor. It
9 was maybe a necessary factor, but not a
10 sufficient factor. All the others were required.

11 Secondly, Delmarva customers are not
12 the only customers who pay for the cost of
13 renewable energy. Every other electrical
14 supplier in Delaware has the same obligations and
15 burdens under REPSA and imposed on them.

16 I have no doubt that those other
17 suppliers pass through to their customers the
18 cost of renewable energy, just as Delmarva does.
19 In fact, I'm reasonably certain from recent
20 newspaper articles that some of those municipal
21 electrical suppliers pass through costs unrelated
22 to electricity to their customers.

23 But, in any event, you can be
24 assured that Delmarva customers are not the only

1 ones paying for renewable energy, as Mr. Nichols
2 is paying for.

3 Lastly, they haven't, the other side
4 hasn't made this point yet, but I'm going to
5 address it now, so that if Your Honor turns to
6 it, you'll understand what our position is. The
7 qualified fuel cell provider project is limited
8 to Delmarva. And why is that?

9 Well, there are a number of reasons
10 for it. But the most basic reason is that you
11 look at the statute. The statute liberalizes the
12 renewable energy requirement.

13 Because what it does is it allows a
14 fuel cell to qualify for renewable energy
15 credits, not only if it is powered by renewable
16 energy, but if it is capable of being powered by
17 renewable energy. So that was a liberalization
18 of what would qualify for fuel cell credit for
19 renewable energy credits under REPSA.

20 The General Assembly, nonetheless,
21 wanted to make certain that by allowing for that
22 liberalization and what could be renewable
23 energy, the objectives of REPSA and economic
24 development, environmental equality, health, and

1 all those other things that are listed in the
2 statute would, nonetheless, be met.

3 And so, therefore, because the
4 Public Service Commission does not have
5 jurisdiction over other electric suppliers unless
6 you were going to create a mechanism, a new
7 regulatory mechanism to accomplish, to regulate
8 them, the only electric to suppliers you could be
9 confident you could control the structure of the
10 tariff and whether this liberalization was still
11 meeting the requirements of the statute was
12 Delmarva.

13 THE COURT: This is the gist of the
14 bottom page of your brief, the last of your five
15 points?

16 MR. McBRIDE: Yes. And I'll point
17 out this, also, Your Honor. This is an argument
18 what, in constitutional treatises, as I'm
19 becoming familiar with, is defined as an under
20 inclusive-overinclusive argument.

21 You know, there are other people
22 that you could have put in this camp. Like one
23 of the famous Supreme Court cases, the one where
24 there was a statute that required that you

1 couldn't have signs on the outside of your
2 commercial vehicle, because it distracted
3 traffic. But you could if they were your own --
4 it was your own business that you were
5 advertising.

6 But you couldn't advertise anybody
7 else's business. Somebody challenged it and
8 said, Well, the problem that we're addressing
9 there is that these signs are distracting. Well,
10 they're distracting for all vehicles.

11 The Supreme Court said the
12 legislature wanted to address this as a problem
13 that doesn't need to cover the waterfront. It
14 can do a partial cure as a first step.

15 So, the under
16 inclusive-overinclusive arguments under the equal
17 rational basis clause of the equal protection
18 doctrine are just -- are really anything will
19 suffice. It doesn't have to be a perfect match
20 between the purposes of the state and people
21 impacted.

22 But here there's a very rational
23 basis for why Delmarva customers --

24 THE COURT: Does it matter that

1 we're dealing with this on a Motion to Dismiss?

2 All you have to do is make out a plausible --

3 MR. McBRIDE: No, because -- and
4 this is another thing, as I learned on these
5 constitutional treatises, is that the question
6 here is not: What was the actual motivation?
7 It's is there any conceivable rational
8 motivation?

9 Now, the actual -- in this case, the
10 actual motivation is set forth in the statute.
11 But if -- Your Honor and I can look at a statute
12 and say, Well, we can understand why the
13 legislature would do that, even though there's no
14 record as to why they did it.

15 Then it passes rational scrutiny
16 tests. And the Supreme Court, in fact, I think
17 it was Justice Scalia who explained in one
18 decision, said the reason we apply that standard
19 is not only deference to the legislature, but
20 legislatures rarely have a single reason they
21 adopt a statute. Every clause is voting for it
22 for different reasons.

23 THE COURT: Even if it's a Motion to
24 Dismiss? I know that's a standard.

1 MR. McBRIDE: Yes.

2 THE COURT: But proper to -- you
3 know, your claim is not just that there clearly
4 is a rational basis, legitimate basis for this
5 scheme, but that what they have to do is allege a
6 plausible claim that there is no rational basis
7 and they can't do that?

8 MR. McBRIDE: That's correct. They
9 have to allege something about this statute that
10 causes Your Honor to say, Oh, my God.

11 THE COURT: It's plausible that
12 there could be no rational basis?

13 MR. McBRIDE: It's plausible. This
14 is completely arbitrary, and what I'm saying is
15 we can look at statutory structure, and it's
16 quite obvious that the reason, first of all, that
17 there's no discrimination with respect to the
18 renewable, the cost associated with renewable
19 energy, there's no discrimination against
20 Delmarva customers. All electrical suppliers are
21 treated the same with respect to the qualified
22 fuel cell provider.

23 The obvious rational for that is
24 that the General Assembly wanted to make sure

1 that, in liberalizing this renewable energy
2 criteria, to allow something to count that
3 previously didn't count, that there they were
4 still going to -- that the electrical supplier
5 would use this in a way that would still meet the
6 objectives, all of the objectives of the REPSA
7 statute.

8 They put that in the statute. The
9 Delaware Public Service Commission looked at
10 every one of those factors and said, Yes, it does
11 meet it.

12 THE COURT: Okay.

13 MR. McBRIDE: Thank you, Your Honor.

14 THE COURT: Thank you very much.

15 Thank you to both sides for your arguments. I
16 appreciate them.

17 I know we went a little bit over the
18 two hours we allotted, but I think it's
19 worthwhile to do it. Certainly I have briefs and
20 a well-argued case here.

21 I'll turn to the issue as soon as I
22 reasonably can, and I know the parties are
23 looking for resolution. And I'll try to do that
24 as efficiently as possible.

1 With that said, is there anything
2 else further we need to address at this time from
3 the plaintiffs' perspective?

4 MS. ABBASI: No, Your Honor.

5 THE COURT: And from the defendants'
6 perspective?

7 MR. McBRIDE: No, Your Honor.

8 THE COURT: Thank you very much,
9 everyone. Court will stand in recess.

10 THE CLERK: All rise.

11 (Court was recessed at 4:12 p.m.)

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1 State of Delaware)
)
2 New Castle County)

3
4 CERTIFICATE OF REPORTER

5 I, Heather M. Triozzi, Certified
6 Professional Reporter, Registered Professional
7 Reporter and Notary Public in the State of
8 Delaware, do hereby certify that the foregoing
9 record, Pages 1 to 116 inclusive, is a true and
10 accurate transcript of my stenographic notes
11 taken on November 14, 2012, in the
12 above-captioned matter.

13 In witness whereof, I have hereunto
14 set my hand and seal this 20th day of November,
15 2012, at Wilmington.

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Heather M. Triozzi, CSR, RPR
Cert. No: 184-PS
Exp: Permanent

DATED: November 20, 2012

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