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Court Holds That Challenge Brought in *Fuel Cell Energy, et al v. Markell, et al* Can Continue

WASHINGTON – On April 17, 2014, Magistrate Judge Christopher J. Burke held in *Fuel Cell Energy, et al v. Markell, et al* that a competitor disadvantaged by the Delaware Public Service Commission's tariff to Bloom Energy can continue its challenge under the U.S. Constitution, which prohibits state laws that discriminate against out-of-state competition. The decision affirms that the plaintiff does have standing to claim that Delaware's 2011 amendments to its Renewable Energy Portfolio Standards Act (REPSA) are unconstitutional. As Judge Burke stated, "Plaintiffs have sufficiently demonstrated the causal connection between the tariff and the competitive disadvantage that FuelCell alleges it will suffer." FuelCell is represented by Cause of Action, a nonprofit government accountability group based in Washington, D.C.

The decision can be found here.

Some highlights from the decision include:

- Page 32: "FuelCell makes sufficient allegations of injury in fact as to another relevant market. Pursuant to this argument, FuelCell asserts that the 2011 Amendments will cause it significant competitive injury in the "mid-Atlantic area" or on the "East Coast[.]" That is, when FuelCell complains that, via the 2011 Amendments, Bloom will be "protect[ed]" by "subsidies" affecting future fuel cell transactions, FuelCell is referencing the harm caused by these alleged "subsidies" not only to its future ability to compete with Bloom in Delaware, but also as to energy sales in other mid-Atlantic or East Coast states such as New Jersey, New York and Connecticut. As noted below, there is record evidence supporting this latter type of claimed future injury." (internal citations omitted).
- Page 33: "it is easier to conceive of a business opportunity gained by Bloom in a market as one that comes at the expense of FuelCell (and not one whose outcome is also subject to the action or inaction of numerous other third parties)-so long as there is some indication that the two companies are actually both likely to target that particular relevant market."
- Pages 34-35: "FuelCell has, therefore, sufficiently demonstrated injury in fact in this type of East Coast market."
- Page 38: "[A] challenged government action (here, the tariff) is said to be subsidizing the future energy production capability of Bloom, FuelCell's "direct competitor" in a given market. Similarly, FuelCell alleges that the funds from this tariff will allow a Bloom to increase the amount of that future production (or that absent those funds, it would have generated no such production at all). The challenged tariff thus is said to "ease" a "competitive burden" on

Bloom, but not FuelCell, in a way that "plainly disadvantages [FuelCell's] competitive position in the relevant marketplace." . . . Plaintiffs have sufficiently demonstrated the causal connection between the tariff and the competitive disadvantage that FuelCell alleges it will suffer."

- Page 39: "FuelCell argues that "this Court has the authority to void the ... tariff[, and Bloom] would thereby lose the unfair infrastructure-related competitive advantages it enjoys in Delaware[.]" and that "enjoining [the] collection and disbursement of the tariff-subsidy will level the economic playing field vis-a-vis [Bloom] and [FuelCell]." (D.I. 22 at 12-13) The Court agrees that FuelCell has sufficiently met its burden as to the "redressability" prong of the analysis."
- Page 39, Footnote 21: "FuelCell seeks declaratory and injunctive relief barring future use of (1) the provisions requiring that a QFCP have in-state manufacturing capabilities and (2) the provisions providing for a tariff for a QFCPP. And it argues, citing to evidence of record, that the "in-state manufacturing requirement and the tariff ... [are] inextricably int[er]twined." The Court has articulated above how the challenged tariff is sufficiently likely to cause future competitive injury to FuelCell; FuelCell is required to show no more at this stage." (internal citations omitted).
- Page 40: "Having concluded earlier that a sufficient causal connection exists between the tariff and FuelCell's alleged competitive harm, it follows that this harm is capable of being redressed by the tariff related relief that Plaintiffs seek."

About Cause of Action:

Cause of Action is a non-profit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending and cronyism threaten it. For more information, visit www.causeofaction.org.

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