SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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RE: *David R. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman v. Delaware Department of Natural Resources and Environmental Control, and Collin O'Mara*
C.A. No. S13C-12-025 RFS

Date Submitted: June 13, 2014
Date Decided: September 22, 2014

Dear Counsel:

Before the Court is the Motion to Dismiss as a Matter of Law filed by Defendants Delaware Department of Natural Resources and Environmental Control ("DNREC") and Collin O'Mara ("Secretary O'Mara") (collectively "Defendants") against Plaintiffs David R. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman ("Plaintiffs"). For the reasons explained below, this Motion is **DENIED**.

Facts & Procedural Background

This Motion relates to an action for declaratory relief Plaintiffs brought regarding certain state regulations. Plaintiffs are individual residents of the State of Delaware (the "State") and customers of the utilities Delmarva Power ("Delmarva") or Delaware Electric Cooperative, Inc. ("DEC").[1] DNREC is an agency of the State which oversees issues concerning its natural resources, public health, and environment. Secretary O'Mara was formerly the agency's administrator and department head.

The following facts are taken from Plaintiffs' Complaint. In December 2005, the State entered into a Memorandum of Understanding (the "MOU") with six other states in the northeast region. The MOU related to a concerted effort for the reduction of greenhouse gases. Former Governor Ruth Ann Minner executed the MOU, which the other six states approved.[2]

Under the MOU, the signatory states promised to propose for legislative or regulatory consideration programs in accordance with the agreement by January 1, 2009. The MOU sought to establish a carbon dioxide ("CO2") trading program for

[1] In addition, one plaintiff owns businesses which are also customers of Delaware electric utilities.

[2] One state subsequently withdrew from the agreement. Two additional states then joined the agreement.

electric-generating facilities. It also set caps for each signatory's emissions of CO2, which would remain constant through 2014, and then drop by 2.5% and proceed unchanged from 2015 to 2018.[3] The agreement further provided that each signatory would allocate allowances for the emissions which would not exceed the caps, and conduct an evaluative review of the established programs in 2012.

For its part under the MOU, the Delaware General Assembly enacted the Regional Greenhouse Gas Initiative Act (the "RGGI Act" or the "Act").[4] Under the Act, CO2 was declared an "air contaminant" subject to regulation. It also established a "cap and trade" allowance program to control CO2 emissions, and stated that, in order to emit CO2, Delaware electric-generating facilities would be required to purchase government-issued "CO2 allowances."[5] These allowances would only last for a certain number of years, and then require being re-purchased. DNREC sets the price for the allowances and has sold them to Delaware electric-generating facilities. Plaintiffs claim that because no facility can operate without these allowances, the allowances constitute permits.

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[3] Under the MOU, the caps would not decrease further until 2018.

[4] *See* 7 *Del. C.* §§ 6043–47.

[5] The Complaint states that Delaware electric utilities purchase electricity from Delaware electric-generating facilities, which are subject to the RGGI Act. These facilities must purchase the CO2 allowances.

After the RGGI Act was adopted, Secretary O'Mara adopted regulations (the "RGGI regulations" or "regulations"). These regulations were supposedly consistent with the MOU, and issued by the Secretary pursuant to his authority under the Act.[6] On November 19, 2013, DNREC issued an order from the Secretary containing these regulations. The order was published on December 1, 2013, and effective as of December 11, 2013. The regulations concerned the size and structure of the CO2 caps, and the price of the CO2 allowances.[7]

According to Plaintiffs, these regulations decrease the State's CO2 caps below levels provided for in the MOU. Also according to Plaintiffs, the regulations establish a higher pricing floor for the allowances and a new method for their trade, without any approval from the General Assembly. This price increase, Plaintiffs claim, is a violation of Article VIII, § 10 of the Delaware Constitution[8] and a grievance to them *per se*. They also claim injury in the form of increased rates

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[6] *See* 7 *Del. C.*§ 6044(c) ("The Secretary of [DNREC] . . . is herein authorized to promulgate regulations to implement the RGGI cap and trade program consistent with the RGGI [MOU] . . . .").

[7] Defendants state that Plaintiffs challenge DNREC's amendments to regulations under the RGGI Act. These amendments, apparently, were effective December 20, 2013. Although this issue should be clarified by the parties, whether Plaintiffs are challenging regulations, or amendments to regulations, does not affect the Court's analysis.

[8] "The effective rate of any tax levied or license fee imposed by the State may not be increased except pursuant to an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House." Del. Const. Art. VIII, § 10(a).

Plaintiffs must pay, which they claim are caused by the lowering of the CO2 caps. These lowered caps, Plaintiffs argue, will increase the costs of the mandatory CO2 permits, which will inevitably be passed along to the ultimate consumers.[9]

Plaintiffs also assert that the regulations are illegal under the principles of legislative delegation. DNREC and Secretary O'Mara only could have acted with the authority granted to them by the RGGI Act. Thus, because the regulations did not conform with the Act, in that the newly established CO2 caps were not consistent with the MOU, the regulations should be rendered invalid.

This Motion was originally submitted to the Court, along with the parties' arguments, on February 20, 2014. On May 1, 2014, Plaintiffs' counsel requested oral argument to be scheduled. Alternatively, it was requested that the Court permit the parties to submit supplemental memoranda before the Court rendered a decision. On May 16, 2014, after reviewing the parties' arguments, the Court requested supplemental memoranda addressing only the issue of Plaintiffs' standing to bring this action. Specifically, the Court instructed the parties to address how Plaintiffs, as mere consumers of electricity, had standing to challenge regulations relating to a

[9] Plaintiffs assert that this pass-along of costs is a certainty, in that pursuant to 26 *Del. C.* § 303(d)(1)(c), the Public Service Commission shall authorize public utilities to establish rates where the Commission finds that the rate provides for the recovery of at least the incremental costs of furnishing its products.

statute that did not directly target them.

The parties timely submitted their responses to the Court's request. Based on those responses and the parties' original papers, the Court decides the present Motion.

Standard of Review

This Court's Civil Rule 12(b) provides, *inter alia*, that parties may move to dismiss actions on the following grounds: "(1) [l]ack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19."[10]

Defendants move to dismiss Plaintiffs' action under subsections (1) and (6) of that Rule.[11] The standard of review for a motion under Rule 12(b)(1) is clearly iterated:

> [T]his Court "is a court of general common-law jurisdiction; however, as to matters embraced within a statute, it exercises jurisdiction, special, limited, and summary and not according to the course of common law." It "will dismiss a case pursuant to . . . Rule 12(b)(1) when it lacks jurisdiction over the subject matter of a plaintiff's complaint."[12]

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[10] Super. Ct. Civ. R. 12(b).

[11] Defendants seek for the complaint to be dismissed with prejudice, with an award to them for costs and fees. Alternatively, they seek that any legal issues surviving this Motion be put on a briefing schedule prior to discovery taking place.

[12] *Sonitrol Corp. v. Signature Flight Support Corp.*, 2006 WL 1134775, at *1 (Del. Super. Mar. 24, 2006) (citation omitted).

The standard for a motion under Rule 12(b)(6) is also commonly stated:

> Upon a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint is subjected to a broad test of sufficiency. Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle [him] to relief." The complaint will not be dismissed unless it clearly lacks factual or legal merit. When considering a motion to dismiss, the court will accept all well-pleaded allegations as true. In addition, every reasonable factual inference will be drawn in favor of the plaintiff. The complaint must, however, contain "sufficient facts to state a recognizable claim."[13]

Analysis

The Court first examines the standing issue. "The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing."[14] The standard to judge a plaintiff's ability to bring suit is liberal in the early stages of a litigation. "At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is presumed that general allegations embrace those specific facts that are necessary to support the claim."[15]

The issue of a litigant's standing has previously been outlined by the Delaware Supreme Court:

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[13] *Jones v. Psychotherapeutic Cmty. Sys. Ass'n*, 2011 WL 2739658, at *1 (Del. Super. Apr. 15, 2011) (citations omitted).

[14] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) (citation omitted).

[15] *Id.* at 1110 (citation omitted) (internal quotation marks omitted).

> The concept of "standing," in its procedural sense, refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance. It is concerned only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy. In order to achieve standing, the plaintiff's interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general. Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are "mere intermeddlers."[16]

Oftentimes, contentions surrounding a litigant's standing center on the construction of specific statutes.[17] "In the absence of a specific statutory grant of review, . . . a plaintiff . . . must demonstrate first, that he or she sustained an injury-in-fact; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected."[18] This test, in turn, requires making certain findings:

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[16] *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (citations omitted).

[17] *See e.g.*, *Nichols v. State Coastal Indus. Control Bd.*, 74 A.3d 636 (Del. 2013) (holding that the test announced by the United States Supreme Court in *Ass'n of Data Processing Serv. v. Camp*, 397 U.S. 150 (1970), and adopted by the Delaware Supreme Court in *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994) in construing the term "substantially affected" under 7 *Del. C.* §§ 6008 and 7210, applied equally to the term "aggrieved" under 7 *Del. C.* 7007(b)).

[18] *O'Neill v. Town of Middletown*, 2006 WL 205071, at *28 (Del. Ch. Jan. 18, 2006) (citations omitted) (internal quotation marks omitted). Interestingly, this is the same test which the Delaware Supreme Court adopted in construing the terms "substantially affected" under 7 *Del. C.* §§ 6008 and 7210 and "aggrieved" under 7 *Del. C.* 7007(b)) in *Oceanport* and *Nichols* respectively.

This Court also notes that bringing an action here under the general terms of the APA was not Plaintiffs' only route. Although the RGGI Act does not contain any language pertaining to the pursuance of a grievance, it does fall under Chapter 60 of Title 7 of the Delaware Code. The Delaware Supreme Court has stated that "7 *Del. C.* §§ 6008 and 7210[] govern the standing of

> (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[19]

It is important to note that while the litigant's injury must be concrete and particularized, "the fact that [the injury] is widely shared will not bar a finding of

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those who wish to challenge the actions of the Secretary or . . . DNREC under either Chapter 60 or 72 of Title 7." *Oceanport Indus.*, 636 A.2d at 899. Section 6008 states that "[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision." 7 *Del. C.* § 6008(a). Therefore, grievances could have been pursued under the RGGI Act through an appeal to the Environmental Appeals Board, if there were standing under § 6008. However, the availability of this route does not foreclose a direct action in this Court for declaratory relief under the Delaware APA. *Cf. Am. Ins. Ass'n v. Del. Dep't Transp.*, 2006 WL 3457623, at *2 ("This Court has jurisdiction to consider the lawfulness of a regulation promulgated by an administrative agency when an aggrieved party brings an action for declaratory relief." (citing, *inter alia*, 29 *Del. C.* § 10141(a))).

[19] *Id.* (citations omitted). In *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110–11 (Del. 2003), the Delaware Supreme Court adopted this language from *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176–76 (3d Cir. 2000), a case in which the United States Court of Appeals for the Third Circuit summarized the requirements for standing as a "case and controversy" under Article III of the United States Constitution, based upon the United States Supreme Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In *Dover Historical Soc'y*, the Delaware Supreme Court stated that it had "recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware." 838 A.2d at 1111 (citing *Oceanport Indus.*, 636 A.2d at 904). However, "some exceptions to Delaware's borrowing of the federal standing requirements may exist." *O'Neill*, 2006 WL 205071, at *28 n.251 (citations omitted) (emphasizing the Delaware Supreme Court's use of the word "generally" in *Dover Historical Soc'y*).

standing."[20]

With these principles in mind, the Court turns to the case at hand. Case law from other jurisdictions is helpful in analyzing the issue of the standing of customers of utilities. In *Hinkley v. Eugene Water & Electric Board*,[21] the Court of Appeals of Oregon ruled that Plaintiff Hinkley, a resident of the City of Eugene, Oregon and ratepayer of Defendant Eugene Water & Electric Board ("EWEB") had standing to bring an action seeking declaratory and injunctive relief against EWEB. Hinkley claimed that EWEB failed to follow a public contracting rule which required that all public contracts, with certain exceptions, be based on competitive bidding. EWEB, allegedly, contracted with two companies for janitorial services without complying with this rule. Using the liberal standard employed on a motion to dismiss, Hinkley argued that EWEB's noncompliance, *inter alia*, would equate to EWEB paying higher prices for goods and services, which would result in passing those costs off to EWEB's ratepayers. On the motion to dismiss, the court held that Hinkley had standing because he alleged that he was a ratepayer of EWEB and that EWEB's noncompliance caused EWEB to incur higher costs. He did not specifically allege that his rates would increase, but his "pleadings-and, particularly, the allegation that

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[20] *O'Neill*, 2006 WL 205071, at *29 (citations omitted).

[21] *Hinkley v. Eugene Water & Elec. Bd.*, 189 Or. App. 181 (Or. Ct. App. 2003).

the utility's incurring of higher costs would violate its obligation to its ratepayers-bear the reasonable inference that the resultant higher costs will be passed through to ratepayers, including Hinkley."[22]

In *Miles v. Idaho Power Company*,[23] the Supreme Court of Idaho ruled that Miles, a ratepayer of Idaho Power Company ("Idaho Power"), had standing to seek declaratory judgment seeking to have part of legislation declared unconstitutional. The legislation stemmed from an agreement entered into between the State of Idaho and Idaho Power, in which Idaho Power agreed to subordinate its claimed water rights in a particular river to those of subsequent upstream users. The consequent legislation stated that the Idaho Public Utilities Commission (the "IPUC") would accept this agreement. Miles alleged that the legislation precluded the IPUC, when setting rates, from factoring in Idaho Power's reduced water rights and resultant decrease in value. This, Miles claimed, would result in ratepayers paying disproportionate rates. The court noted that a litigant's standing cannot be affirmed if his injury is suffered alike by most of the population in general. However, in that particular case, "[t]he parties allegedly injured by the agreement [were] the ratepayers

[22] *Id.* at 186–87 (internal quotation marks omitted).

[23] *Miles v. Idaho Power Co.*, 778 P.2d 757 (Idaho 1989).

and customers of Idaho Power, and not the general populace of the State of Idaho."[24] The court considered the injury "specialized and peculiar . . . although it may affect a large class of individuals."[25] Further, "[w]hen the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum."[26]

The court in *Miles* also was not swayed by the argument that Miles could have brought a challenge to his unduly high rates before the IPUC, which would have allowed him judicial appellate rights. "Requiring Miles to begin this case anew before the IPUC and to then appeal from the decision of the IPUC would waste not only the resources of the judiciary, but also the IPUC's resources."[27] As Miles was challenging IPUC-related legislation, and not an IPUC rate-setting decision, his action was properly in the judiciary.

The Court finds these cases persuasive in the present case. First, Plaintiffs' injury is not conjectural. Plaintiffs at the motion to dismiss stage are entitled to the

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[24] *Id.* at 764.

[25] *Id.*

[26] *Id.*

[27] *Id.*

reasonable inferences drawn from the averred facts. Plaintiffs plead that the RGGI regulations will increase the costs of the utilities affected by those regulations. This is a reasonable inference. Further, like in *Hinkley*, the allegation that the increased costs will occur spawns the reasonable inference that these costs will ultimately be passed along to consumers. In fact, as Plaintiffs point out, the passing along of costs is more than just an inference. Under 26 *Del. C.* § 303, "[t]he [Public Service] Commission shall authorize a public utility to establish [a] . . . rate for any product supplied or service rendered . . . where prior to authorizing such individual or joint rate the Commission finds . . . [t]hat such rate shall provide recovery of at least the incremental cost . . . of providing the relevant utility services . . . ."[28]

Further, the fact that Plaintiffs' injury may be suffered by a vast amount of people does not raise doubt as to their standing. As in *Miles*, Plaintiffs bring this action as ratepayers of Delmarva and DEC, rather than as members of the general populace. While the class of plaintiffs may be large, this does not mean that their ability to challenge the RGGI regulations is diminished. The RGGI regulations affect Plaintiffs, as ratepayers, in a way that they do not affect the general populace.

The Court is also unpersuaded by Defendants' argument that the proper forum for Plaintiffs' challenge is before the Public Service Commission. Like the Court in

[28] 26 *Del. C.* § 303(d)(1)(c).

Miles, this Court will not require Plaintiffs to begin their case anew before the Commission, wasting the resources of both the Commission and the Court. Plaintiffs challenge regulations promulgated by Defendants, rather than a Commissioned-issued decision regarding rates. Thus, the proper forum is before this Court.

This injury is also traceable to the RGGI regulations. In *Collins v. State of Delaware*,[29] the Delaware Court of Chancery held that the consumer-plaintiffs' injury, in the form of hypothetical additional costs ultimately born by them because of a bill which implemented recycling requirements on bottle retailers and waste haulers, was not only conjectural, but an offshoot of the costs imposed on the retailers and haulers. The Court stated that "[i]n order for harm to be sufficient for standing, it is necessary that the injury be imposed directly on plaintiffs and not simply passed through to them by the actions of independent third parties who are not before the Court."[30]

In *Collins*, the Court cited the United States Supreme Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*.[31] In that case, the plaintiffs were indigent citizens and organizations of indigent citizens who sued the Secretary of the United States Treasury and the Commissioner of the Internal Revenue Service (the

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[29] *Collins v. State*, Del. Ch., C.A. No. 5838, Chandler, C. (Jan. 7, 2011) (TRANSCRIPT).

[30] *Id.* at 13: 1–24; 14:1.

[31] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

"IRS"). Their action stemmed from a revenue-ruling issued by the IRS allowing favorable tax treatment to nonprofit hospitals which offered only emergency room services to indigents. The interest sought to be protected by the plaintiffs was access to hospital services, and the plaintiffs had properly alleged instances of being denied services due to their indigence.

The high Court ruled, however, that the plaintiffs lacked standing. "[I]njury at the hands of a hospital [was] insufficient by itself to establish a case or controversy in the context of th[e] suit, for no hospital [was] a defendant."[32] Rather, the plaintiffs targeted only the actions of officials from the Treasury Department. This did not render standing because standing "require[d] that a . . . court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[33] The plaintiffs argued that the revenue-ruling "encouraged" hospitals to be less accommodating to indigent patients; and, therefore, a favorable ruling from the Court which would result in hospitals providing services to indigents in order to attain tax benefits would "discourage" hospitals from turning away indigent patients. The Court rejected this argument because it was pure speculation that hospitals' decisions

[32] *Id.* at 41.

[33] *Id.* at 41–42.

to admit or deny indigent patients stemmed from tax decisions at all. It was inferential that tax implications imposed by the defendants affected hospitals' decisions, but that inference was tentative at best and too case-specific to apply as a general proposition.

Based on *Collins* and *Eastern Kentucky*, if an independent third party's volitional actions are necessary to complete the plaintiff's injury, standing cannot be established. However, as Plaintiffs have explained, the passing along of costs to them is not a volitional act. As explained above, the rates approved by the Commission must incorporate recoupment of utilities' costs. Thus, Plaintiffs' injury is traceable to the RGGI regulations.

With standing established, the Court turns to the Plaintiffs' arguments as to the illegality of those regulations. In their complaint, Plaintiffs claim that the regulations violate both Article VIII, § 10 of the Delaware Constitution, and the RGGI Act itself. In *In Re Opinion of the Justices*, the Delaware Supreme Court answered affirmatively that Article VII, § 10 "require[s] an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House in order for the State to increase the environmental permit fees now charged and administered by" DNREC.[34] The question thus becomes whether the alleged costs incurred as a result of the RGGI

[34] *In re Opinion of the Justices*, 575 A.2d 1186, 1186 (Del. 1990).

regulations constitute "environmental permit fees."

Regarding the claim that the regulations run afoul of the RGGI Act, the Delaware APA states that "[a]ny person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief."[35] The APA also provides the standard by which to judge administrative action:

> Upon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful. The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted.[36]

The question thus becomes whether the RGGI regulations conform with that standard. These questions must be answered in the due course of this litigation. At present, however, Plaintiffs have alleged enough to survive the liberal standard employed by this Court on a motion to dismiss.

This case shall proceed to discovery. The Court is hereby referring the matter to the Commissioner in order for a scheduling conference to be held and a scheduling order to be entered.

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[35] 29 *Del. C.* § 10141(a).

[36] 29 *Del. C.* § 10141(e).

For the reasons discussed above, this Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary
Judicial Case Manager