IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DAVID T. STEVENSON, R. CHRISTIAN HUDSON, JOHN W. MOORE, AND JACK PETERMAN,	:	C.A. No. S13C-12-025 RFS
Plaintiffs,	:	
v.	:	
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AND DAVID S. SMALL, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	:	
Defendants.	:	

MEMORANDUM OPINION

UPON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT - DENIED

UPON PLAINTIFFS' MOTION FOR A STAY - DENIED

DATE SUBMITTED: February 16, 2016

DATE DECIDED: April 5, 2016

Richard L. Abbott, Esquire, 724 Yorklyn Road, Suite 240, Hockessin, DE 19707, attorney for Plaintiffs

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STOKES, J.

This is a declaratory judgment action which plaintiffs David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman ("plaintiffs") have filed against the Department of Natural Resources and Environmental Control ("DNREC") and David S. Small, Secretary of the DNREC ("Secretary"), collectively referred to as "defendants". Plaintiffs seek relief with regard to the amendment of regulations[1] originally enacted pursuant to Delaware's Regional Greenhouse Gas Initiative and CO_2 Emission Trading Program Act ("Delaware's RGGI Act").[2] Currently pending before the Court are two motions plaintiffs have filed. One is for summary judgment on the issue of whether the amended regulations are lawful. The second seeks a stay of the enforcement of the amended regulations. Before the Court can consider these motions, plaintiffs must establish they have standing to pursue this action. As is explained below, plaintiffs have not met their burden with regard to standing and the standing issue must be considered at trial. Consequently, the pending motions are denied.

Background Information on the Amended Regulations

Delaware's RGGI Act resulted from the State's participation in the Regional Greenhouse Gas Initiative ("RGGI"). Before December, 2005, environmental representatives of some states in the Mid-Atlantic (including Delaware) and in the Northeastern regions met to discuss the effective regulation of greenhouse gas emissions from coal and other fossil fuel power plants. The RGGI Program was developed. A brief summary of the RGGI Program appears in the DNREC's Secretary's Order No.: 2013-A-0054:

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[1] 7 DE Admin. Code 1147.

[2] 7 *Del. C.* §§ 6043-47.

> The RGGI Program is the nation's first mandatory, market-based program to reduce emissions of carbon dioxide (CO_2), the principal human-caused greenhouse gas. The States participating in RGGI ... have established a regional cap on CO_2 emissions from the power sector, and are requiring power plants to possess a tradable CO_2 allowance for each ton of CO_2 they emit.
>
> This competitive carbon dioxide emissions trading program reduces CO_2 emissions from large coal and other fossil fuel fired electric generating units (units producing more than 25 Megawatts of electricity) in Delaware and the eight other States ... by establishing a regional cap on the amount of CO_2 that power plants can emit through the issuance of a limited number of tradable CO_2 allowances. These large polluting power plants are required by each Participating State's regulations to have and surrender one RGGI allowance for every ton of carbon dioxide they emit into the atmosphere. The Participating States make allowances available to generators through a[n] ... auction process. The proceeds from those auctions are returned to ratepayers in each state through energy efficiency investments and other clean energy programs.[3]

The states participating in the RGGI Program entered into a Memorandum of Understanding ("MOU") in December, 2005. The overall goal of the RGGI Program is set forth in the MOU as follows:

> The Signatory States commit to propose for legislative and/or regulatory approval a CO_2 Budget Trading Program (the "Program") aimed at stabilizing and then reducing CO_2 emissions within the Signatory States, and implementing a regional CO_2 emissions budget and allowance trading program that will regulate CO_2 emissions from fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts.[4]

The MOU established the regional base annual CO_2 emissions budget at 121,253,550 short tons.[5] It further established Delaware's initial base annual CO_2 emissions budget at 7,559,787 short

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[3]Secretary's Order No.: 2013-A-0054 at 1-2.

[4]MOU at 2.

[5]MOU at 2.

tons.[6] The MOU also states that "[f]or the years 2009 through 2014, each state's base annual CO_2 emissions budget shall remain unchanged."[7] The MOU further provides:

> Scheduled Reductions. Beginning with the annual allocations for the year 2015, each state's base annual CO_2 emissions budget will decline by 2.5% per year so that each state's base annual emissions budget for 2018 will be 10% below its initial base annual CO_2 emissions budget.[8]

The states agreed, through the MOU, to develop a Model Rule which would provide a framework for writing legislation to implement the RGGI Program.[9] The MOU stipulated that a comprehensive review of the Program would occur in 2012 and determined that various aspects of the Program could be changed.[10] Finally, the MOU stated: "This MOU may be amended in writing upon the collective agreement of the authorized representatives of the Signatory States."[11]

In 2008, the Delaware Legislature enacted Delaware's RGGI Act. The synopsis of the bill states as follows:

> This bill grants legal authority for Delaware to participate in the Regional Greenhouse Gas Initiative (RGGI) CO_2 cap and trade program. The bill grants DNREC the authority to implement the program including promulgating regulations and implementing or participating in an allowance auction as necessary to fulfill the goals of the program.[12] This bill further requires that all proceeds from the sale of RGGI CO_2 allowances be used for public benefit

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[6] *Id.* at 2-3.

[7] *Id.* at 3.

[8] *Id.*

[9] *Id.* at 6-7.

[10] *Id.* at 10.

[11] *Id.* at 11.

[12] Again, the goals were to reduce CO_2 emissions and to set up a method for achieving those reductions.

> purposes and directs revenues to the Delaware Sustainable Energy Utility (SEU) for the promotion of energy efficiency and renewable energy technologies, to programs designed to help low income ratepayers, to a Greenhouse Gas Reduction Program and to DNREC for administration of the program.[13]

A review of Delaware's RGGI Act shows the following:

> The Memorandum of Understanding ("MOU") signed by the Governors of participating RGGI states requires each participating state to promulgate regulations to establish a cap-and-trade program for CO_2 with the goal of stabilizing CO_2 emissions at current levels through 2015 and reducing by 10 percent such emissions by 2019.[14]

Delaware's RGGI Act further explains that the MOU sets an initial emissions cap of 7,559,787 short tons of CO_2 for Delaware. It is specifically provided that this cap "may be adjusted in the future."[15] Delaware's RGGI Act authorizes the Secretary "to promulgate regulations to implement the RGGI cap and trade program consistent with the RGGI Memorandum of Understanding, as amended."[16] This Act also directs the Secretary to participate with the other states in the RGGI Program and any national program which might be implemented.[17]

Regulations No. 1147 were promulgated and implemented in November, 2008.[18] The following explanation was contained therein:

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[13] 144th General Assembly, S.B. #263.

[14] 7 *Del. C.* § 6043(a)(8).

[15] 7 *Del. C.* § 6043(a)(9).

[16] 7 *Del. C.* § 6044(c).

[17] 7 *Del. C.* §§ 6044(c) and 6047.

[18] Secretary's Order No.: 2008-A-0055.

> Beginning in 2009 through 2015, the emissions of CO_2 from any EGU [Electric Generating Unit] with a maximum rated heat input capacity of equal to or greater than 25 megawatts that is located in a RGGI state would be capped at current levels (emissions from Delaware affected facilities account for approximately 7.5 million tons). After 2015, the cap would be reduced incrementally to achieve a 10 percent reduction by 2019. Under the cap-and-trade program, one allowance is equivalent to one ton of CO_2 emissions allowed by the cap. Each subject EGU will be required to have enough allowances to cover its reported emissions during the three year compliance periods. The EGUs may buy or sell allowances, but individual EGU emissions shall not exceed the amount of allowances it possesses. The total amount of the allowances will be equal to the emissions cap for the RGGI states.[19]

The only entities in Delaware required to have a CO_2 permit under Regulations No. 1147 are the City of Dover, NRG Energy, Calpine and DEMEC.[20] No entity or person appealed the enactment of Regulations No. 1147.

In 2012, as provided for in the RGGI MOU, a review took place of the RGGI Program and, in particular, the CO_2 Budget Trading Program. It was determined that changes in the market and changes in the program required a modification of the RGGI Program. As defendants explained, the review showed:

> [T]he initial emissions allocations were too generous with respect to actual emissions. To achieve emissions reductions, it was necessary to reduce all of the states' allocations. However, since it was always a concern that allowance prices could be driven too high, other changes were made to the Model Rule to prevent such occurrence.[21]

It was determined:

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[19] *Id.* at 2.

[20] Defendants' Answering Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 7.

[21] Defendants' Answering Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 26.

> * The Regional Emissions Cap in 2014 will be equal to 91 million tons. The Regional Emissions Cap and each Participating State's individual emissions budget will decline 2.5% each year 2015 through 2020.
> * The Participating States will address the bank of allowances held by market participants with two interim adjustments for banked allowances. The first adjustment will be made over a 7-year period (2014-2020) for the first control period private bank of allowances and a second adjustment will be made over a 6-year period (2015-2020) for the 2012-2013 period private bank of allowances.[22]

This agreement was not implemented by any amendment to the MOU. Instead, changes were made by way of an Updated Model Rule.[23] The Participating States agreed to revise their regulations or statutes based on the Updated Model Rule and to do so by January 1, 2014.[24]

In accordance with this agreement, Delaware amended 7 DE Admin. Code 1147, stating:

> The amendments to the Model Rule will be incorporated into the Department's proposed amendments to 7 DE Admin. Code 1147, to ensure that Delaware's RGGI regulations are current with market conditions and continue to support reductions of CO_2 in the electricity generation sector.[25]

In Secretary's Order No.: 2013-A-0054, the Secretary explained that 7 *Del. C.* § 6043(a)(9) specifically states that the emissions "'cap and Delaware's allocation may be adjusted in the future'", and concluded: "[T]he Department believes that the statute grants the DNREC Secretary the authority to further reduce the emissions cap to comply with the emissions reduction goal."[26]

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[22]RGGI 2012 Program Review: Summary of Recommendations to Accompany Model Rule Amendments at 2.

[23]This 137 page long Updated Model Rule may be found at www.rggi.org.

[24]RGGI 2012 Program Review: Summary of Recommendations to Accompany Model Rule Amendments at 3.

[25]Secretary's Order No.: 2013-A-0054 at 3.

[26]*Id.*

These amended regulations went into effect on December 11, 2013.[27] No regulated entity (the City of Dover, NRG Energy, Calpine and DEMEC) appealed. Only plaintiffs appealed.

The result of the reduction of CO_2 permits has been, and will be, an increase in the costs of CO_2 allowances.

Plaintiffs' Contentions

Plaintiffs maintain that they are harmed by the amended regulations because the increase in the costs of CO_2 allowances are passed on to them in their electric bills, and thus, they have standing to pursue this action. As for the merits of the action, they argue the amended regulations are invalid for two reasons. The first is that Delaware's RGGI Act does not authorize the Secretary's actions. They argue the Secretary is not authorized to make any changes to the statute unless that change is contained in the MOU, as amended. Because the MOU was not amended to allow for the changes effected by the regulations, the Secretary's actions were invalid. The second reason they advance is that the amendments violate Article VIII, § 10(a) of Delaware's Constitution of 1897, which provides in pertinent part:

> The effective rate of any ... 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.

Plaintiffs argue as follows. The increased costs the regulated entities must pay constitute license fees. The General Assembly did not, with the concurrence of three-fifths of its members, vote for such an increase. Thus, the amended regulations are unconstitutional.

The Court will not consider the merits of plaintiffs arguments unless they have standing.

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[27] *Id.* at 1.

The courts of this state require establishment of standing "'to avoid rendering advisory opinions at the behest of parties who are "mere intermeddlers"'".[28]

Discussion

1) Summary Judgment Standard

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[29] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[30] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[31] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted.[32] If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it,

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[28]*Brohawn v. Town of Laurel*, 2009 WL 1449109, *3 (Del. Ch. May 13, 2009) (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

[29]*Moore v. Sizemore*, Del. Supr., 405 A.2d 679, 680 (1979).

[30]*Id*. at 681.

[31]Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[32]*Burkhart v. Davies*, Del. Supr., 602 A.2d 56, 59 (1991), *cert. den*., 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett*, *supra*.

then summary judgment is inappropriate.[33]

2) **Standing**

The Court has been concerned about plaintiffs' standing since the initiation of this lawsuit. When, early in the litigation, defendants filed a motion to dismiss, the Court required the parties to brief how plaintiffs, merely as consumers of electricity, had standing to challenge regulations relating to a statute that did not target them directly. The Court, employing the more liberal standard applicable to a motion to dismiss, accepted plaintiffs' contentions that the amended regulations would result in increased CO_2 costs which the utilities would pass on to them by way of increased electric bills, and thus, granted standing for purposes of the motion to dismiss.[34]

Thereafter, the parties conducted some discovery, and then plaintiffs filed this motion for summary judgment on the merits of the case. In support of its answering brief requesting denial of the summary judgment motion, defendants submitted an affidavit of Susan F. Tierney, Ph. D. ("Tierney"), an expert on the RGGI and its effects. The basic take from that affidavit is that Electric Generating Units[35] will incur increased costs associated with the amended regulations; however, other RGGI effects offset those increased costs, and consumers' electric bills actually decrease rather than increase. Tierney's affidavit disputes plaintiffs' assertions that they will

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[33]*Ebersole v. Lowengrub*, Del. Supr., 180 A.2d 467, 470 (1962).

[34]*Stevenson v. Delaware Department of Natural Resources and Environmental Control*, 2014 WL 4937023 (Del. Super. Sept. 22, 2014).

[35]This term references large coal and other fossil fuel fired electric generating units producing more than 25 megawatts of electricity.

suffer financial harm as a result of the amended regulations. Defendants have asserted that this standing issue prevents the granting of summary judgment in plaintiffs' favor.

After the completion of the summary judgment briefing and nearly two years after filing their complaint, plaintiffs moved for a stay of the implementation of the amended regulations. In response to this motion for a stay, defendants argued the Tierney affidavit as well as some other information show the amended regulations have not harmed plaintiffs and thus, they lack standing to pursue the motion for a stay.

Plaintiffs' response was to submit an affidavit of plaintiff David T. Stevenson ("Stevenson"), which attempts to undermine Tierney's affidavit. Plaintiffs argue that they do not have to produce any more information on standing because defendants, through their expert, have agreed there will be increases in costs of CO_2 allowances and, by law,[36] these increased costs will be passed on to the consumers. Plaintiffs also argue that, with regard to the motion seeking a stay, the Court must examine plaintiffs' standing not at the point when they actually filed the motion but at the point when they filed the initial complaint, and the Court already has ruled that plaintiffs had standing when they filed the complaint.

As is clear from the preceding recitation, the standing issue currently is before the Court.

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[36]In 26 *Del. C.* § 303(d)(1)c., it is provided:

> The [Public Service] Commission shall authorize a public utility to establish an individual or joint rate for any product supplied or service rendered within the State for the purposes of ensuring the State's current and future economic well-being and growth where prior to authorizing such individual or joint rate the Commission finds:
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> ***
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> c. That such rate shall provide recovery of at least the incremental cost (including capital cost) of providing the relevant utility services.

The parties are at a different phase of the litigation now. Summary judgment imposes a greater burden than does a motion to dismiss and the establishment of standing is plaintiffs' burden to bear.[37] Plaintiffs must establish standing with regard to their ability to attack the regulations as being beyond the scope of power granted the Secretary[38] as well as to challenge the constitutionality of the action.[39] Absent harm, the action will not proceed.

The increased allowance costs have been in effect for at least a year. Plaintiffs have not shown that a utility went before the Public Service Commission and sought an increase in rates because of increased costs of the CO_2 allowances. Not one plaintiff has produced an electric bill which shows an increase in electric rates which directly resulted from the increased costs of the CO_2 allowances. Plaintiffs, rather than produce evidence supporting their standing contentions, rest on their argument that increased costs in CO_2 allowances automatically result in increased electrical bills.

Below, I explore in more detail the parties' submissions on the issue of whether plaintiffs have suffered any injury; in particular, whether plaintiffs' electric bills have increased directly as a result of the increased allowance costs. Defendants' submissions establish that plaintiffs' argument is too simplistic and does not take into account the complexities of purchasing electricity as well as ratemaking. Defendants have presented two items which throw doubt on

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[37]*Stevenson v. DNREC*, *supra* at * 3.

[38]The applicable provision, 29 *Del. C.* § 10141, requires a person seeking review of regulations to be "aggrieved".

[39]The Court will not entertain a constitutional objection made by a person whose rights the act does not affect. *Mills v. Trans Caribbean Airways, Inc.,* 272 A.2d 702, 703 (Del. 1971); *Garden Court Apartments, Inc. v. Hartnett*, 65 A.2d 231, 233 (Del. Super. 1949); *Conard v. State,* 16 A.2d 121, 126 (Del. Super. 1940).

plaintiffs' contentions that the increase in allowance costs translates into increased electric bills for consumers.

The first item is a letter from Todd L. Goodman, Esquire, Associate General Counsel to Delmarva Power. This letter, dated April 28, 2015, is to Jason R. Smith, Public Utilities Analyst to the Delaware Public Service Commission ("PSC") in response to plaintiff David Stevenson's request, on behalf of the Caesar Rodney Institute (CRI), to open Phase II workshops in regards to a PSC Docket concerning bill transparency of Delmarva's bills. The purpose of Mr. Goodman's letter was to correct inaccuracies CRI made in its request. The inaccuracies address the issue at hand. The essence of this letter is that although costs for RGGI apparently are passed on, even Delmarva Power is unable to determine what amount those costs are. Thus, it does not appear that plaintiffs will be able to present evidence of a direct link between increased costs in CO_2 allowances and increased electricity costs.

The other item defendants have presented is Tierney's affidavit. This is offered as an expert's affidavit. There are requirements for accepting expert testimony.[40] First, the person must establish he or she is an expert in the field. Then, the expert must identify the facts and data upon which he or she bases his or her opinion and the reasons for that opinion. Finally, the expert has to back up his or her opinion with specific facts in the context of the summary judgment motion.

Tierney is a Senior Advisor at Analysis Group Inc., where she provides "policy, economic and strategy consulting in the energy industry."[41] The company for which she works is an

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[40] *Lynch v. Athey Products Corp.*, 505 A.2d 42 (Del. Super. Dec. 30, 1985); *Crookshank v. Bayer Healthcare Pharmaceuticals*, 2009 WL 1622828, * 3 (Del. Super. May 22, 2009).

[41] Affidavit of Susan F. Tierney, Ph.D. at p. 1, paragraph 1 (hereinafter, "Tierney at p. __, ¶ ___").

economic, financial, and business strategy consulting firm. She is the lead consultant on many of their projects. She has had a 30 year career "as a regulator, policymaker, university professor, consultant, and expert witness."[42] She has been involved directly in issues relevant to the matter at hand. She is qualified as an expert to speak to the issues relevant to this case, those issues being "the impacts of the State of Delaware's participation in the Regional Greenhouse Gas Initiative ("RGGI") and the impacts of such participation on the rates of electricity customers in Delaware and on the Delaware economy."[43] Her affidavit contains the following information.

First, the price of electricity has increased as a result of the RGGI.[44] On the other hand, an effect of the RGGI program has been that demand for electricity has decreased, thereby resulting in lower electric rates.[45] Tierney's affidavit explains why the price of electricity is directly related to the demand of electricity.[46] Tierney also explains that the CO_2 allowance proceeds on energy efficiency programs led to lower electricity use and lower electricity prices. This is because the overall electric system avoided having to run some of the more expensive power plants; thus, there were lower wholesale prices with RGGI in place than had RGGI not been implemented.[47]

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[42]Tierney at p. 2, ¶ 2.

[43]*Id.* at p. 4, ¶ 7.

[44]She notes that could change in the future, depending "upon whether the inclusion of CO_2 allowance prices in offer prices induces new and lower-carbon-emitting generating units to enter the market (and thus lowers the cost of power production), and whether demand for electricity changes (e.g., goes down) as a result of the RGGI program." *Id.* at p. 7, ¶ 11.

[45]*Id.* at p. 7, ¶ 12.

[46]*Id.* at pp. 5-7, ¶ 11.

[47]*Id.* at p. 7, ¶ 12.

Tierney maintains that the decreased demands have resulted from the States using the proceeds from the allowance monies to provide energy efficiency measures to electricity consumers. She references a study she co-authored in 2011.[48] The study found that while CO_2 allowances tended to increase electricity prices in the near term, over time, the RGGI Program

> resulted in lower consumer payments for electricity. Because the overall electric system avoided having to run some of the more expensive power plants, there were lower wholesale prices with RGGI in place than had RGGI not be [sic] implemented. All consumers benefitted from this effect, while those consumers who actually implemented energy-efficiency measures funded by RGGI proceeds had even lower electricity bills as their electricity consumption went down.[49]

The study led to the conclusion that in Delaware, the first three years of the RGGI Program resulted in Delaware consumers saving millions of dollars in electricity costs that they otherwise would not have saved without the RGGI program. The authors of the study predicted that the reduced cap will result in continued economic benefits from the RGGI program. She concludes "that contrary to Plaintiff's [sic] allegations, Delaware's participation in the RGGI program has provided positive net economic benefits not only to electricity consumers in Delaware but also to the economy of the state of Delaware."[50]

Plaintiffs' response to defendants' positions appears in the affidavit of David T. Stevenson, submitted in connection with the motion for a stay. Stevenson's qualifications are set forth as follows:

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[48]This study appears as an attachment to Tierney's Affidavit, located as Exhibit 5 in the Appendix to Defendants' Answering Brief in Opposition to Plaintiffs' Motion for Summary Judgment.

[49]Tierney at p. 9, ¶ 14.

[50]*Id.* at p. 4, ¶ 8.

> 1. I have served as the Director for Energy Competitiveness for the Caesar Rodney Institute for the last five years. I have published hundreds of articles, given dozens of speeches, and served as a source for a number of print, radio, and TV journalists on energy issues.
> 2. I have also intervened in numerous Delaware Public Service Commission Dockets and served as a paid consultant for the Delaware Public Advocate, who is charged with protecting ratepayers who are customers of regulated utilities such as Delmarva Power. In my consultant capacity, I have offered sworn expert testimony in numerous PSC electricity Dockets. No party to the Dockets has ever challenged my credentials as an expert witness.

Stevenson's affidavit does not contain Stevenson's educational background, nor does it develop his expertise in the area in question. Furthermore, it is clear that Stevenson does not have access to the information necessary in order for him to reach an informed conclusion on whether the increased allowance costs result in increased consumer electric bills. This affidavit does not establish Stevenson to be an expert in the field of electricity and costs.[51]

Tierney is extremely qualified to answer the question at hand and to provide an explanation that shows the plaintiffs were not harmed and will not be harmed as a result of the amended regulations. Tierney has identified the facts and data upon which she bases her opinion and the reasons for her opinion. However, Tierney should be subject to cross-examination, and the Court must evaluate her opinion testimony and make credibility determinations.[52] It would be inappropriate to grant summary judgment against plaintiffs on the standing issue based solely on Tierney's affidavit,[53] and in fact, defendants do not seek that relief.

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[51]This conclusion does not mean that Stevenson cannot be deemed an expert at a hearing or at trial. He may well be an expert but he has to establish that; the Court will not assume it to be the case.

[52]*Lynch v. Athey Products Corporation*, *supra.*

[53]*Lynch v. Athey Products Corporation, supra.*

Thus, in this case, summary judgment is denied because plaintiffs have failed to meet their burden of showing standing.

With regard to their standing to seek a stay, plaintiffs argue the Court must view plaintiffs' standing at the time they filed the complaint and, because the Court ruled in its decision on the motion to dismiss that plaintiffs had standing at that time, then this Court must rule they have standing to seek the stay.

Plaintiffs chose to seek the stay after discovery and briefing took place. At this point, it is clear that plaintiffs have significant hurdles to overcome to establish standing. It would be unjust to grant plaintiffs the requested stay knowing that plaintiffs' ability to establish standing is questionable. The Court, accordingly, denies the motion seeking a stay on the ground that plaintiffs have not established they have standing to pursue such a request.

Defendants advanced some assertions on standing which they did not appropriately support. While the Court did not consider those assertions in reaching its decision here, the Court could have denied summary judgment in order for these assertions to be further developed.[54] I examine these assertions below.

The first assertions concern the individual plaintiffs' standing.

Plaintiffs Stevenson and Peterman are customers of Delaware Electric Cooperative, Inc. ("Delaware Co-op"). Defendants maintain that Delaware Co-op purchases its electricity from Old Dominion. Defendants assert:

> Old Dominion's website shows that it generates power only in Maryland and Virginia. Virginia is not a RGGI state, and Maryland's program is independent of Delaware's, so no nexus would exist between the Delaware RGGI Amendment

[54] *Ebersole v. Lowengrub*, 180 A.2d at 470.

and power from Old Dominion.[55]

If it turns out that Delaware Co-op does purchase its electricity from Old Dominion and if Old Dominion generates power only in Maryland and Virginia, then Stevenson and Peterman will be deemed to have no standing to pursue this action.

Plaintiff Hudson alleges in the complaint he is a customer of Delmarva Power,[56] as does plaintiff Moore. Defendants maintain that Delmarva Power purchases power off the PJM Interconnection LLC ("PJM") grid. Defendants assert the following with regards to Delmarva Power and PJM.

> PJM Interconnection LLC is a regional transmission organization serving all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM is the world's largest competitive wholesale electricity market. More than 900 companies are PJM members, which serves 61 million customers and has 183.6 gigawatts of generating capacity. With 1,376 generation sources, 62,556 miles (100,670 km) of transmission lines and 6,038 transmission substations, PJM delivered 791 terawatt-hours of electricity in 2013. [Citing to a Wikipedia article].[57]

Defendants explain that plaintiffs have not shown that the amended regulations raise PJM's electricity prices. They assert:

> [V]ery little of the power generated in the PJM area is subject to RGGI requirements because Delaware and Maryland FN 3 are the only PJM states that participate in RGGI. Electricity generated in Delaware could be purchased anywhere within PJM's grid, so a rise in generation costs in Delaware does not translate into a rise in costs of energy purchased in Delaware. Plaintiffs have failed to make any showing of how increased costs to Delaware generators who generate a small fraction of electricity sold to PJM – that is dispatched by lowest

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[55]Defendants' Response to Motion to Stay at 2.

[56]His affidavit muddies that assertion.

[57]*Id.* at 2 n. 2.

pricing – actually impact PJM and ultimately, Delmarva's prices.

> FN3 Maryland's RGGI requirements exist independent of Delaware's RGGI Amendment, so any impact in prices from Maryland's program is not before this court.[58]

This information is not supported appropriately. However, if defendants ultimately support it adequately, then it would underscore the invalidity of plaintiffs' contention that increased allowance costs directly result in increased electric costs.

At this stage of the litigation, defendants have rendered suspect plaintiffs' contentions that they will be financially harmed, and plaintiffs have not in any way produced solid evidence that they will pay increased electricity prices as a result of the amended regulations. The standing issue must be resolved at trial.

For the foregoing reasons, both plaintiffs' motion for summary judgment and their motion for a stay are denied.

IT IS SO ORDERED.

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[58] *Id.* at 2-3.