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DELAWARE STATE SENATE

146th GENERAL ASSEMBLY

SENATE BILL NO. 124
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 26 OF THE DELAWARE CODE RELATING TO DELAWARE'S RENEWABLE ENERGY PORTFOLIO STANDARDS AND DELAWARE-MANUFACTURED FUEL CELLS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 352, Title 26 of the Delaware Code by redesignating subsections (16) through (24) as subsections (18) through (26) respectively, and inserting new subsections (16) and (17) as follows:

"(16) "Qualified Fuel Cell Provider" means an entity that

a. By no later than the commencement date of commercial operation of the full nameplate capacity of a fuel cell project, manufactures fuel cells in Delaware that are capable of being powered by renewable fuels, and

b. prior to approval of required tariff provisions, is designated by the Director of the Delaware Economic Development Office and the Secretary of DNREC as an economic development opportunity.

(17) "Qualified Fuel Cell Provider Project" means a fuel cell power generation project located in Delaware owned and/or operated by a Qualified Fuel Cell Provider under a tariff approved by the Commission pursuant to § 364 (d) of this title.".

Section 2. Amend § 353, Title 26 of the Delaware Code by inserting new subsections (c) and (d) to read as follows:

"(c) The Commission shall develop rules to transition the REC and SREC procurement responsibility set forth in Section 354 (e) of this subchapter. The purpose of such rules shall be:

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(1) to adequately protect electric suppliers that entered into contracts to provide RECs and SRECs to retail electric customers prior to the transition of REC and SREC procurement responsibility under Section 354(e) of this subchapter,

(2) to adequately protect against overpayment of the cost of RPS obligations for customers of electric suppliers who are parties to supply contracts that were entered into prior to the transition of REC and SREC procurement responsibility under Section 354(e) of this subchapter, and

(3) to adequately protect Commission-regulated electric suppliers and customers thereof from having to incur alternative compliance payments or other costs that would have been avoided but for the failure of an electric supplier to continue retiring RECs or SRECs associated with its retail supply contracts existing at the time of the transition of REC and SREC procurement responsibility under Section 354(e) of this subchapter. To the extent such protection involves a temporary reduction to the RPS obligation or to the price of an alternative compliance payment required of a Commission-regulated electric supplier made necessary by the failure described above, the Commission is authorized to make the necessary temporary reductions notwithstanding the RPS obligations otherwise required by this chapter.

(d) The Commission shall develop procedures for tracking the generation output of Qualified Fuel Cell Provider Projects such that energy produced by such projects shall fulfill the Commission-regulated electric company's State mandated REC and SREC requirements set forth in Section 354 of this subchapter as follows:

(1) fulfillment of the equivalent of 1 REC for each megawatt-hour of energy produced by a Qualified Fuel Cell Provider Project.

a. The Commission-regulated electric company can use energy output produced by a Qualified Fuel Cell Provider Project to fulfill a portion of SREC requirements at a ratio of 6 MWH of RECs per 1 MWH of SRECs. The Commission-regulated electric company may utilize a portion of energy output from a Qualified Fuel Cell Provider Project in any given year to fulfill no more than 30% of the SREC requirements unless:

1. due to lack of SREC availability in the market, the alternative would be to incur Alternative Compliance Payments, or

2. the SREC obligations set forth in Schedule I of Section 354 of this subchapter are increased, and then only to the extent necessary to fulfill the increased SREC obligations.

b. The Secretary of DNREC may, after coordination with the Commission and a Commission-regulated electric company, adjust the requirements of this section including permitting a Commission-regulated electric company participating in a Commission-approved project to exceed the percentages set forth in this section.

c. The right of a Commission-regulated electric company to use energy output produced by a Qualified Fuel Cell Provider Project to fulfill its REC and SREC requirements in accordance with this section shall not expire until actually applied to fulfill such requirements.

(2) The Commission-regulated electric company has the ability to apply the REC and SREC equivalent fulfillment benefits described in this Section for 20 MW in addition to the 30 MW set forth in § 364 of this title for future customer sited applications of Qualified Fuel Cell Provider fuel cells. Separate tariff provisions must first be approved by the Commission for such installations above the original 30 MW."

Section 3. Amend § 354(a), Title 26 of the Delaware Code by striking the word "sold" as it appears in the first sentence in said subsection, and inserting the word "delivered" in its place.

Section 4. Amend § 354(d), Title 26 of the Delaware Code by inserting the phrase "the Commission-regulated electric companies and, where applicable," immediately before "retail electricity suppliers" in the second sentence in said subsection, and inserting the phrase "with existing contractual electric supply obligations" immediately after "retail electricity suppliers" in the second sentence in said subsection.

Section 5. Amend § 354, Title 26 of the Delaware Code by inserting a new subsection (e) to read as follows:

"(e) Beginning with compliance year 2012, Commission-regulated electric companies shall be responsible for procuring RECs, SRECs and any other attributes needed to comply with subsection (a) of this section with respect to all energy delivered to such companies' end use customers.".

Section 6. Amend § 354(f), Title 26 of the Delaware Code by inserting the phrase "Commission-regulated electric company" immediately before "retail electricity supplier" in the first sentence in said subsection, and inserting the phrase "with existing contractual electric supply obligation" immediately after "retail electricity supplier" in the first sentence in said subsection.

Section 7. Amend § 364, Title 26 of the Delaware Code by deleting the words "customers of" in the Section Title.

Section 8. Amend § 364, Title 26 of the Delaware Code by designating the existing paragraph as subsection (a) and inserting new subsections (b) through (i) as follows:

"(b) All funds disbursed to a Qualified Fuel Cell Provider Project by a Commission-regulated electric company, including incremental site preparation costs incurred by Qualified Fuel Cell Provider Project, shall be collected from the entire Delaware customer base of such company through adjustable non-bypassable charges which shall be established by the Commission. A Commission-regulated electric company participating in a Qualified Fuel Cell Provider Project shall collect and disburse funds solely as the agent for the collection and disbursement of funds for the project and shall have no liability except to comply with the tariff provisions to be established as set forth in subsection (d) of this section.

(c) All miscellaneous costs arising out of Qualified Fuel Cell Provider Projects incurred by a Commission-regulated electric company, including, but not limited to, filing costs, administrative costs and incremental site preparation costs, shall be distributed among the entire Delaware customer base of such company through adjustable non-bypassable charges which shall be established by the Commission. Such costs shall be recovered unless, after Commission review, any such costs are determined by the Commission to have been incurred in bad faith, are the product of waste or out of an abuse of discretion, or in violation of law.

(d) Before a Commission regulated electric company may collect any charges on behalf of a Qualified Fuel Cell Provider Project that would entitle the Commission-regulated electric company to reduce its REC and SREC requirements as provided for in § 353 (d) of this title, the Commission must adopt tariff provisions applicable to such project.

(1) Tariff provisions enabling and obligating Commission-regulated electric companies, acting in the role of an agent for collection and disbursement, to collect charges on behalf of a Qualified Fuel Cell Provider Project shall be proposed jointly by the electric company and the Qualified Fuel Cell Provider and shall, at a minimum, provide for the following.

a. A project of 30 MW nominal nameplate, and future potential additions of up to an additional 20 MW nominal nameplate, not to exceed a total of 50 MW nominal nameplate or 1,152 Megawatt Hours per day averaged on an annual basis. The total allowable 50MW of nominal nameplate shall be reduced by any customer sited installations referred to in § 353 (d)(2) of this title or additional installations of Qualified Fuel Cell Provider fuel cells. Any additional MW beyond the 30MW project made pursuant to this Section and§ 353 (d)(2) of this title must be reviewed and approved by the Commission.

b. a term of service of at least 20 years from commercial operation of the completed Qualified Fuel Cell Provider Project.

c. the cost to customers of the Commission-regulated electric company for each MWH of output produced by the project which, on a levelized basis at the time of Commission approval, does not exceed the highest cost source for combined energy, capacity and environmental attributes approved by the Commission for inclusion in the renewable portfolio of the Commission-regulated electric company as of January 1, 2011.

d. adjustments to funds to be collected from customers and distributed to the Qualified Fuel Cell Provider Project that will also compensate the Qualified Fuel Cell Provider Project for its costs of fuel to produce such output and that will reduce compensation to the Qualified Fuel Cell Provider Project for any revenues received by the Qualified Fuel Cell Provider Project for such output sold in the PJM or any successor market.

e. the requirement that the Qualified Fuel Cell Provider Project must sell all energy, capacity, and ancillary services, produced by the project and any other output available or that becomes reasonably available to the Qualified Fuel Cell Provider Project during the term of the project into the PJM or any PJM successor market. To the extent any additional output produced by the project, including but not limited to any product or environmental attribute from the project becomes available for sale in the PJM Market, PJM successor market, or a market other than PJM or a PJM successor market, the Qualified Fuel Cell Provider Project and Commission-regulated electric company shall jointly propose additional provisions to the tariff designed to reduce the cost of the Qualified Fuel Cell Provider Project to customers of the Commission-regulated electric company.

f. the Commission-regulated electric company shall, on behalf of a Qualified Fuel Cell Provider Project, collect from its customers, through a non-bypassable charge provided for in subsections (b) and (c) of this section, any positive difference between the sum of (i) the price for each MWH of output produced by the project plus (ii) the cost of fuel to produce such output plus (iii) any costs incurred by the Commission-regulated electric company arising out of the Qualified Fuel Cell Provider Project minus the amount received by the Qualified Fuel Cell Provider Project for the market sale of its output, and shall distribute such amount to the Qualified Fuel Cell Provider Project.

g. that the Commission-regulated electric company shall, on behalf of a Qualified Fuel Cell Provider Project, distribute to its customers from the Qualified Fuel Cell Provider Project, through a distribution mechanism to be established in a tariff, any positive difference between the amount received by the Qualified Fuel Cell Provider Project for the market sale of its output minus the sum of (i) the price established for each MWH of output from the project plus (ii) the cost of fuel to produce such output plus (iii) any costs incurred by the Commission-regulated electric company arising out of the Qualified Fuel Cell Provider Project.

h. an average efficiency level that the fuel cells in a project must maintain.

i. a definition of the role of the Commission-regulated electric company solely as the agent of a Qualified Fuel Cell Provider Project, for the collection of funds and disbursement of such collected funds to Qualified Fuel Cell Provider Project and to its customers.

j. the mechanism through which the Commission-regulated electric company, on behalf of a Qualified Fuel Cell Provider Project, shall collect from its customers, through a non-bypassable charge provided for in subsections (b) and (c) of this section, any difference between the sum of (i) the price for each MWH of output produced by the project plus (ii) the cost of fuel to produce such output plus (iii) any costs incurred by the Commission-regulated electric company arising out of the Qualified Fuel Cell Provider Project minus the amount received by the Qualified Fuel Cell Provider Project for the market sale of its output.

k. the mechanism through which the Commission-regulated electric company, on behalf of a Qualified Fuel Cell Provider Project, shall distribute to its customers, through bill credits, any positive difference between the amount received by the Qualified Fuel Cell Provider Project for the market sale of its output minus the sum of (i) the price established for each MWH of output from the project plus (ii) the cost of fuel to produce such output plus (iii) any costs incurred by the Commission-regulated electric company arising out of the Qualified Fuel Cell Provider Project.

l. a provision that protects a Qualified Fuel Cell Provider Project from any future changes to this subchapter that would prevent a Qualified Fuel Cell Provider Project that provides service under approved tariff provisions from recovering all amounts approved in such tariff. Such provision shall also include the obligation of the Commission-regulated electric company, in the event of any such change to this subchapter, to collect from its customers amounts necessary to disburse, and to disburse to the Qualified Fuel Cell Provider Project the full amount approved by the Commission in such pre-existing tariff for each MWH of output produced by the Qualified Fuel Cell Provider Project.

m. In the event of an event of force majeure that prevents the Qualified Fuel Cell Provider Project from supplying output from at least 80% of the capacity of the Qualified Fuel Cell Provider Project, or an interruption in fuel supply, in whole or in part, to the project, a mechanism through which,

1. during the event of force majeure, the Commission-regulated electric company shall, on behalf of a Qualified Fuel Cell Provider Project, collect from its customers and transfer to the Qualified Fuel Cell Provider Project, a maximum of 70% of the price per MWH of output affected by the event of force majeure, and during an interruption in fuel supply, the Commission-regulated electric company shall, on behalf of a Qualified Fuel Cell

Provider Project, collect from its customers and transfer to the Qualified Fuel Cell Provider Project 100% of the price per MWH of output affected by the interruption.

2. during the event of force majeure or interruption in fuel supply, the Commission-regulated electric company will continue to receive the full reduction in renewable portfolio standards that would have been provided by the output but for the event of force majeure or interruption in fuel supply.

(2) All tariff filings must be approved or denied by the Commission in whole, as proposed, without alteration or the imposition of any condition or conditions with respect thereto by the Commission. In determining whether to approve or deny the Tariff, the Commission shall first ensure that the provisions of Section 364 (d) (1) a.-m. of this Title have been satisfied. In addition, the Commission shall consider the incremental cost of the Qualified Fuel Cell Provider Project to customers, applying at least the following factors:

a. Whether the Qualified Fuel Cell Provider Project utilizes innovative baseload technologies,

b. Whether the Qualified Fuel Cell Provider Project offers environmental benefits to the state relative to conventional baseload generation technologies,

c. Whether the Qualified Fuel Cell Provider Project promotes economic development in the State, and

d. Whether the Tariff as filed promotes price stability over the project term.

(3) A Commission-regulated electric company and Qualified Fuel Cell Provider Project may jointly modify proposed tariff provisions prior to any final ruling by the Commission.

(4) Notwithstanding Section 306 of Title 26 or any other provision of the Delaware Code to the contrary, any changes in rates or charges necessary to collect funds for disbursements or costs addressed in subsection 364 (a)-(c) of this section through adjustable non-bypassable charges shall become effective thirty (30) days after filing, absent a determination of manifest error by the Public Service Commission. The Commission may allow changes in rates or charges related to such adjustable non-bypassable charges to become effective less than thirty (30) days after filing under such conditions as it may prescribe.

(5) Once approved by the Commission, such tariff provisions cannot be altered, nor may approval be repealed or modified, without the agreement of both the Commission-regulated electric company and the Qualified Fuel Cell Provider Project except that revisions to tariffs may be proposed by the Commission-regulated electric company alone where:

a. Such revisions have no adverse effect on the Qualified Fuel Cell Provider Project, and

b. Such revisions are for the purpose of complying with subsection (c) of this section.

(e) For purposes of this Subchapter, all fuel cell units of a Qualified Fuel Cell Provider Project under tariff with a Commission-regulated electric company shall be considered to have been manufactured in Delaware as long as:

(1) By no later than the second anniversary of commercial operation of the full nameplate capacity of a fuel cell project, or December 31, 2016, whichever is earlier, either (i) at least 80% of the installed nameplate capacity shall have been sourced from fuel cell units manufactured in a permanent manufacturing facility located in the State or (ii) no more than ten megawatts of nameplate capacity from a fuel cell project shall be manufactured outside of the State, and

(2) Fuel cell manufacturer has executed an agreement with the Delaware Economic Development Office that a termination payment shall be made by the fuel cell manufacturer in the event that it ceases manufacturing operations in the State.

(f) Notwithstanding any other provision of the Delaware Code to the contrary, amounts due to the Qualified Fuel Cell Provider Project and amounts collected by the Commission-regulated electric company on behalf a Qualified Fuel Cell Provider Project as a result of a Qualified Fuel Cell Provider Project, and any other costs incurred by a Commission-regulated electric company addressed in Sections 364 (a) through (c) of this title shall constitute revenue property when, and to the extent that, a tariff authorizing the revenue charges have become effective in accordance with this section, and the revenue property shall thereafter continuously exist as property for all purposes with all of the rights and privileges of this section for the period and to the extent provided in the tariff, but in any event until the end of the term of service of the Qualified Fuel Cell Provider Project.

(g) Notwithstanding any other provision of the Delaware Code to the contrary, any requirement under this section or a tariff under this section requiring that the Commission take action with respect to the subject matter of a project under this section shall be binding upon the Commission, as it may be constituted from time to time, and any successor agency exercising functions similar to the Commission and the Commission shall have no authority to rescind, alter, or amend that requirement in a subsequent order except as provided in this chapter.

(h) Notwithstanding any other provision of the Delaware Code to the contrary except as otherwise provided in this chapter, with respect to revenue property, the tariffs with respect to disbursements and costs arising out of the Qualified Fuel Cell Provider Project and recovery of costs addressed in Sections 364(a) through (c) of this title shall be irrevocable and the Commission shall not have authority either by rescinding, altering, or amending the tariff provisions or otherwise, to revalue or revise for ratemaking purposes the disbursements and costs arising out of the

Qualified Fuel Cell Provider Project, or the costs of recovering such costs, determine that the disbursements and costs of the Qualified Fuel Cell Provider Project are unjust or unreasonable, or in any way reduce or impair the value of revenue property either directly or indirectly by taking project revenue amounts, disbursements or costs arising out of the Qualified Fuel Cell Provider Project into account when setting other rates for the Commission-regulated electric company; nor shall the disbursements, amount of revenues or costs arising with respect thereto be subject to reduction, impairment, postponement, or termination. Except as otherwise provided in this section, the State of Delaware does hereby pledge and agree with the owners of revenue property and the Commission-regulated electric company as the agent for collecting and disbursement on behalf of a Qualified Fuel Cell Provider Project and in collecting costs incurred by the electric company addressed in Sections 364(a) through (c) of this title that the State shall neither limit nor alter the revenue property and all rights thereunder until the obligations, are fully met and discharged, provided nothing contained in this section shall preclude the limitation or alteration if and when adequate provision shall be made by law for the full recovery by the Qualified Fuel Cell Provider Project and the Commission regulated electric company.

(i) Notwithstanding Section 201 of Title 26 or any other provision of the Delaware Code to the contrary, the courts of this State shall have exclusive original jurisdiction over any dispute between a Qualified Fuel Cell Provider Project and a Commission-regulated electric company involving the interpretation of the obligations between them as contained in Commission approved tariffs required by Section 364 (d) of this subchapter.".

Section 9. This Act shall be effective as of the date of its enactment.

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