

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

NO. SJC-12477

NEW ENGLAND POWER GENERATORS ASSOCIATION AND
GENON ENERGY, INC.,

Plaintiff-Appellants,

FOOTPRINT POWER SALEM HARBOR DEVELOPMENT L.P. AND
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Intervenor-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EXECUTIVE
OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS,

Defendant-Appellees.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF AMICUS CURIAE
CONSERVATION LAW FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Conservation Law Foundation states that it is a nonprofit Massachusetts corporation which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. The corporation has no parent companies and it has not issued any stock, so there is no publicly held corporation that owns 10% of its stock.

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^{viii} Available at: <http://www.mass.gov/ago/news-and-updates/press-releases/2011/power-plant-settles-over-excessive-emissions.html> (last accessed Apr. 12, 2018).

Conservation Law Foundation ("CLF") respectfully submits this brief as amicus curiae in support of Defendant-Appellees Department of Environmental Protection ("DEP") and Executive Office of Energy and Environmental Affairs ("EEA") (together, the "Agencies") pursuant to the Court's February 13, 2018 order in SJ-2016-0509. (RA (vol. 6) at 3494.)¹

QUESTION PRESENTED

Should the Court substitute its judgement -- or that of the Appellants -- for the judgement of the Commonwealth's environmental Agencies regarding which combination of policies and regulations is required to ensure the state achieves the 2020 greenhouse gas ("GHG") emissions reductions required by the Global Warming Solutions Act ("GWSA")?

INTEREST OF AMICUS CURIAE AND INTRODUCTION

CLF has a unique and substantial interest in the legal viability of the rules at issue in this case. Founded in 1966, CLF is a nonprofit, member-supported organization that uses law, economics, and science to

¹ "RA (vol. [X])" refers to the Record Appendix compiled by the Agencies and filed with the Court on February 16, 2018, with volume reference for the Court's convenience.

design and implement strategies to conserve natural resources, protect public health, and promote livable communities in the Commonwealth and throughout New England. For over two decades, CLF has been dedicated to helping the Commonwealth address the climate change emergency we face by equitably and cost-effectively reducing carbon pollution while we transition to a thriving and healthy clean energy economy.

In the late-1990s and early-2000s, CLF played a key role in the creation of the Regional Greenhouse Gas Initiative ("RGGI") -- the first mandatory, market-based carbon dioxide reduction program in the nation. Shortly thereafter, CLF initiated a series of successful Clean Air Act enforcement actions which helped to clean-up, and ultimately close, several Massachusetts coal-fired power plants.² In the same time-frame, CLF joined the Attorney General in bringing the landmark case *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), in which the U.S. Supreme Court acknowledged that "man-made

² See, e.g., CLF, *Notice of Intent to Sue Mt. Tom Generating Co.* (Feb. 8, 2011), available at: https://www.clf.org/wp-content/uploads/2011/02/NOI_Mt_Tom_2_8_11_FINAL.pdf (last accessed Apr. 12, 2018); Office of the Attorney General Press Release, *Holyoke Power Plant Settles With AG, MassDEP, Over Allegations of Excessive Emissions* (Jun. 30, 2011), available at: <http://www.mass.gov/ago/news-and-updates/press-releases/2011/power-plant-settles-over-excessive-emissions.html> (last accessed Apr. 12, 2018).

climate change" poses a real "risk of catastrophic harm" to the Commonwealth,³ such that the regulation of carbon-dioxide as an air pollutant is required to protect the public's health and welfare.⁴

CLF was then instrumental in drafting and developing widespread public support throughout the Commonwealth for the passage ten years ago of the GWSA, state's landmark climate law.⁵ In order to prevent irreversible, man-made climate change and the grave harms associated with it, the GWSA requires the Agencies to regulate the Commonwealth's statewide GHG emissions, including specifically from electric power plants,⁶ to achieve reductions of at least 80% of 1990 levels by 2050.⁷ As a founding member of the GWSA Implementation Advisory Committee,⁸ CLF advised the Secretary of Energy and Environmental Affairs in setting the GWSA's 2020

³ 549 U.S. at 525-26.

⁴ *Id.* at 532-35.

⁵ An Act Relative to Global Warming Solutions, St. 2008, c. 298 (adding, *inter alia*, Chapter 21N, *Climate Protection and Green Economy Act*, to the General Laws).

⁶ G.L. c. 21N, § 3(c), (d).

⁷ *Id.* at § 2(a) ("[DEP] shall . . . regulate emissions of greenhouse gases with the goal of reducing those emissions."); *id.* at § 3(b) (requiring the establishment of 2020, 2030, and 2040 limits that "maximize the commonwealth's ability to meet . . . a 2050 statewide emissions limit that is at least 80 per cent below the 1990 level.").

⁸ See G.L. c. 21N, § 8.

emissions reduction mandate,⁹ and helped to design the Commonwealth's initial policies and plans to achieve it.¹⁰

In late-2014, after state action had stalled, CLF and the Mass Energy Consumers Alliance filed suit on behalf of a group of high school students in order to enforce the GWSA. In *Kain v. Department of Environmental Protection*, 474 Mass. 278 (2016) (hereinafter "*Kain*"), the Court unanimously ruled in favor of CLF on all issues raised. (RA (vol. 1) at 356-71.) In doing so, it held that the GWSA's emissions limits were legally enforceable volumetric limits,¹¹ and that the state was required by the GWSA to promulgate enforceable regulations sufficient to "ensure that [the GWSA's] legally mandated reductions are realized by the 2020 deadline."¹² In response to the Court's order in *Kain*, the Governor issued Executive Order 569 requiring the development and issuance of the regulations at issue in this appeal.¹³

Throughout the pendency of *Kain*, CLF also intervened

⁹ See *id.* at § 4(a). On Dec. 28, 2010, the Secretary established a statewide GHG emissions limit for the Commonwealth of "25 percent below statewide 1990 GHG emissions levels by the year 2020." EEA, *Determination of Greenhouse Gas Limits for 2020* (Dec. 28, 2010). (RA (vol. 1) at 408.)

¹⁰ See EEA, *Massachusetts Clean Energy and Climate Plan for 2020* (2010) (the "CECP"). (RA (vol. 1) at 414-549.)

¹¹ *Kain*, 474 Mass. at 287-90. (RA (vol. 1) at 364-65.)

¹² *Id.* at 300. (RA (vol. 1) at 371.)

¹³ Executive Order 569 (RA (vol. 1) at 351-55).

in a series of permitting dockets at the Energy Facility Siting Board ("EFSB") regarding the construction and operation of new fossil-fuel electric power plants in Massachusetts. Before the EFSB, CLF argued that in the absence of a regulation like 310 C.M.R. § 7.74 ("Section 7.74"), the GWSA nevertheless required the mitigation of long-term GHG emissions from such power plants.¹⁴ Following the Court's decision in *Kain*, the EFSB and DEP adopted CLF's position, instituting a practice of imposing (in advance of Section 7.74 becoming operative) declining annual emissions caps on each new fossil-fueled electric power plant as a condition of its initial approval by the state.¹⁵

Based on this extensive, unique, and dedicated experience working to reduce GHG emissions in the Commonwealth -- particularly those from electric power plants -- and to enforce the GWSA, CLF is confident that Appellants' challenge fails. As is explained in more detail below, the Agencies' August 2017 Rulemaking

¹⁴ *Conservation Law Found. v. Energy Facility Siting Bd.*, No. SJC-2016-509, Pet. at 5-10; *Conservation Law Found. v. Energy Facility Siting Bd.*, No. SJC-2017-290, Pet. at 5-9.

¹⁵ Three appeals by CLF challenging the adequacy of the facility-specific caps imposed by the EFSB and DEP in the absence of regulations like Section 7.74 have been consolidated and stayed pending the outcome of this appeal. (See RA (vol. 6) 3486-89, 3491-94.)

fulfills the requirements of *Kain* and complies fully with the GWSA.

ARGUMENT

I. The Agencies' August 2017 Rulemaking Fulfills the Requirements of *Kain* and Fully Complies with the GWSA.

As introduced above, the Court in *Kain* held that the GWSA required the Agencies to promulgate one or more enforceable regulations that would "ensure that [the GWSA's] legally mandated reductions are realized by the 2020 deadline."¹⁶ In response, the Agencies noticed in late-2016, accepted public comment on, and issued in August 2017, a suite of new and amended regulations (the "August 2017 Rulemaking" or the "Rulemaking"),¹⁷ the viability of which Appellants now challenge. But contrary to their assertion otherwise, the August 2017 Rulemaking fully meets the requirements of both *Kain* and the GWSA. Where Appellants wrongly attempt to reduce the Rulemaking to a single regulation analyzed in artificially sterile isolation, the Agencies adequately and appropriately based the Rulemaking on an analysis of

¹⁶ *Kain*, 474 Mass. at 300. (RA (vol. 1) at 371.)

¹⁷ See RA (vol. 4) at 2131-97 (*Background Document on Proposed New and Amended Regulations: 310 C.M.R. §§ 7.00 and 310 C.M.R. §§ 60.00, Air Pollution Control for Stationary and Mobile Sources* (Dec. 16, 2016)).

emissions across various economic sectors in the Commonwealth, in the context of real-world policies, programs and trends, and with close attention to the operation of the state's GHG Inventory¹⁸ -- the only vehicle by which GWSA compliance can, and will, properly be assessed and determined.¹⁹

A. Valid Determination of GWSA Compliance Requires an Assessment of Impact on the GHG Inventory.

Because "the purpose of G.L. c. 21N is to attain actual, measurable, and permanent emissions reductions in the Commonwealth,"²⁰ ensuring the state's "legally mandated reductions are realized by the 2020 deadline"²¹ requires attention to, and an assessment of, the Commonwealth's GHG Inventory. Indeed, in order to design or evaluate the adequacy of regulations required by the GWSA, both current levels of aggregate and individual

¹⁸ RA (vol. 3) at 1579 - 1797.

¹⁹ The GWSA defines "statewide greenhouse gas emissions" (G.L. c. 21N, § 1) and requires the Agencies to maintain an inventory (*id.* at § 2(a), (c)) for purposes of assessing compliance with the GWSA's mandate to "attain actual, measurable, and permanent emissions reductions in the Commonwealth." *Kain*, 474 Mass. at 300 (RA (vol. 1) at 371); *accord id.* at 292 ("[B]y the design of the act, the department is well equipped to say what actual reductions in emissions sources and source categories can be achieved because it has already inventoried emissions from every source and source category of emissions in the Commonwealth pursuant to G.L. c. 21N, § 2") (RA (vol. 1) at 367).

²⁰ *Kain*, 474 Mass. at 300 (RA (vol. 1) at 371).

²¹ *Id.*

sector emissions, as well as future expected levels regarding the same, must be carefully considered.²²

Given the GWSA's plain mandate to achieve actual levels of real-world emissions reductions, first by the year 2020 and ultimately by 2050, the likely real-world performance of all relevant policies and regulations must be weighed and considered.²³ Moreover, as the Agencies highlighted just months before the *Kain* decision, in addition to the programs and regulations they control, GWSA planning requires consideration of a range of well-known, often-exogenous factors that may be reasonably expected to materially influence the Commonwealth's actual future emissions profile.²⁴ Those include, but are not limited to: "the weather, implementation of federal

²² RA (vol. 5) at 2726-29 (Final CLF Comments on the August 2017 Rulemaking).

²³ *Id.* at 2726-27 ("In order to ensure that the Commonwealth's statewide GHG emissions are no more than 70.8 [million metric tons carbon dioxide equivalent, or "MMTCO₂e"] in 2020, the Rulemaking must directly address—and successfully mitigate—the "significant risk" identified by [the Agencies] just months before the *Kain* decision . . . that statewide emissions in 2020 may be as high as 76 MMTCO₂e, or about 5% above the GWSA's required volumetric limit, even with all then-existing programs and policies fully enforced . . . as a result of a range of well-known factors that are either beyond the Commonwealth's control, or which lie outside of the existing regulatory structure.").

²⁴ EEA, *Massachusetts Clean Energy and Climate Plan for 2020: 2015 Update* (Dec. 31, 2015) at pp. 11-15 (RA (vol. 2) at 1253-57).

vehicle emissions standards, individual driving habits, national and regional fuel prices, the availability and timing of potential future low-emissions electricity imports, inadequate development of regional electricity transmission infrastructure, non-compliance with the state's Renewable Portfolio Standard ("RPS") program, and regional gas-system constraints."²⁵

B. In Issuing the August 2017 Rulemaking, the Agencies Properly Considered and Assessed the GHG Inventory; Appellants' Challenge Does Not.

Although CLF initially voiced strong inventory-based concerns,²⁶ after reviewing the additional analysis and information provided by the Agencies in their *Response to Comment*,²⁷ it ultimately concluded that the August 2017 Rulemaking fully complies with the requirements of the GWSA and the Court's *Kain* decision. Together, the Rulemaking's initial *Background Document on Proposed New and Amended Regulations* (RA (vol. 4) at 2131-97) and its *Response to Comment* demonstrate that the Agencies adequately engaged in the quantitative, GHG Inventory-based analysis the GWSA demands, while including in the Rulemaking regulatory design features designed to account

²⁵ *Id.* at 2727-28 (citing the *2015 Update to the CECP*).

²⁶ *Id.* at 2729-35.

²⁷ RA (vol. 5) at 3142-3269.

for a range of reasonably foreseeable, exogenous emissions impact risks.²⁸

The Agencies' resolution of an important cross-sector quantitative issue between the transportation and electric power sectors is illustrative. In analysis published shortly before the *Kain* decision, the Agencies indicated that there was a substantial risk that statewide emissions in 2020 may be as high as 5% above the GWSA's required volumetric limit, even with all then-existing programs and policies fully enforced.²⁹ The Agencies at the time (late-2015) attributed most of that risk to two factors: uncertainty regarding potential growth in transportation sector emissions³⁰ and to uncertainty regarding the timing of additional state

²⁸ See, e.g., RA (vol. 4) at 2137-42 (Background Document) (all relevant emissions sectors); *id.* at 2165-66 (electricity sector); RA (vol. 5) at 3153-57 (Response to Comment) (analyzing Section 7.74 and 310 C.M.R. § 7.75 ("Section 7.75") in the necessary context of "achieving [GWSA-required] GHG emissions reductions for the Commonwealth as a whole," for their contributions to the "protect[ion] of public health . . . including in those communities already adversely impacted by air pollution," and in light of updated multi-sector emissions reduction estimates).

²⁹ RA (vol. 2) at 1253-57 (2015 Update to the CECP).

³⁰ Due to a steady observed increase in "vehicle miles traveled" (people driving more) sufficient to more than offset federally mandated improvements in vehicle fuel efficiency (annually increasing fleet "MPG" performance).

clean energy procurements.³¹ As a result, CLF argued that absent new information or analysis regarding those risk factors, Section 7.74's enforceable aggregate emissions-cap on in-state power plants must be lower than initially set in the draft regulation in order to ensure the Commonwealth met, rather than exceeded, the 2020 emissions levels required by the GWSA.³²

However, in its *Response to Comment*, the Agencies presented new data and analysis regarding the likely upper-bound of potential 2020 transportation emissions.³³ And that analysis changed the equation. According to the their updated transportation forecast numbers (in mid-2017 rather than mid-2015), the Agencies assessed that the upper-bound of likely 2020 transportation sector GHG emissions was more than a million tons lower than previously reported, such that that a higher aggregate 2020 emissions limit for in-state electric power plants (at levels proposed for, and ultimately adopted in, the Section 7.74 regulation) was justified.³⁴ CLF agreed.

The Agencies' comprehensive assessment and treatment

³¹ See RA (vol. 5) at 2727-28 (Final CLF Comments on the August 2017 Rulemaking) (citing the *2015 Update to the CECP*, pp. 11-15 (RA (vol. 2) at 1253-57)).

³² *Id.* at 2733-35.

³³ RA (vol. 5) at 3182-84 (Response to Comment).

³⁴ *Id.*

of emissions within the electric power sector similarly demonstrates their careful attention to the GHG Inventory and to mitigating both cost and real-world risks while regulating to ensure the GWSA's 2020 limit is met. In compliance with Section 3(c) of the GWSA,³⁵ in establishing "[e]missions levels and limits associated with the electric sector" via Section 7.74 and 310 C.M.R. § 7.75 ("Section 7.75" also known as the "Clean Energy Standard" or "CES"), the Agencies properly considered current and future "[electricity] consumption,"³⁶ emissions related to "purchases of electricity from the regional electric grid,"³⁷ as well as the operation of both "[RGGI] and the [RPS]."³⁸ The Agencies also ensured

³⁵ G.L. c. 21N, § 3(c) ("Emissions levels and limits associated with the electric sector shall be established . . . based on consumption and purchases of electricity from the regional electric grid, taking into account the regional greenhouse gas initiative and the renewable portfolio standard.").

³⁶ See, e.g., RA (vol. 4) at 2165 (Background Document) (Table 1: "Change in Generation or Load, 2013-2020") (accounting for, *inter alia*, significant reductions in emissions and in demand for electricity as a result of the existing Renewable Portfolio Standard, the new CES, continuing energy efficiency programs, appliance efficiency standards, and anticipated future load increases from electric vehicles).

³⁷ See, e.g., RA (vol. 5) at 3171-79 (Response to Comment) (extensively considering program design and interaction with the operation of the ISO-NE "regional electric grid").

³⁸ See, e.g., RA (vol.4) at 2154-55 (Background Document) (addressing compatibility with RGGI and RPS), 2160 (compatibility with RGGI), 2164 (need pursuant to *Kain* for enforceable programs in addition to RGGI), 2170 (Section

that both Section 7.74 and Section 7.75 were designed to specifically achieve measureable reductions in the Commonwealth's GHG Inventory as *Kain* and the GWSA require.³⁹

In stark contrast, and as discussed in more detail below, Appellants' analysis is fatally narrow in focus. With self-serving blinders in place, Appellants offer no analysis of relevant cross-sector interactions, carelessly and repeatedly substitute and interchange claims regarding regional electricity emissions for those regarding the Commonwealth's all-sector "statewide GHG emissions,"⁴⁰ and openly (but without justification)

7.74 compliance designed for compatibility with RGGI); RA (vol. 5) at 3170 (Response to Comment) (addressing comments to ensure Section 7.74 "can be implemented without any impact to RGGI").

³⁹ See, e.g., RA (vol. 5) at 3158-59 (Response to Comment) (regarding emissions accounting to ensure "the combined stringency of 310 CMR 7.74 and 310 CMR 7.75 is sufficient to ensure compliance with the GWSA 2020 limit"); *id.* at 3164 (regarding use of Section 7.75 alternative compliance payments in 2020), 3165 (regarding the use of banked Section 7.75 credits in 2020).

⁴⁰ See, e.g., Br. of Appellant New England Power Generators Assoc. ("NEPGA Br.") at 37-38 (improperly equating the potential under certain circumstances for "[a]n increase in New England emissions under a Massachusetts cap" with an "increase . . . [in Massachusetts'] statewide GHG emissions"), 45 (same); Br. of Appellant-Intervenor Mass. Muni. Wholesale Elect. Co. ("MMWEC Br.") at 14 (incorrectly equating ISO-NE analysis of regional emissions with Massachusetts' "statewide GHG" emissions); Br. of Appellant-Intervenor Footprint Power Salem Harbor Development LP ("Footprint Power Br.") at 13-16 (incorrectly suggesting analysis in ISO-NE, Dynegy, NRG,

ignore a range of important policies, regulations, and trends that the Agencies properly concluded will materially impact future, real-world electric power sector emissions.⁴¹

II. Appellants' Challenge Ignores Policies, Regulations, and Real-World Trends that Materially Affect the Electric Power Sector and Its Emissions.

Appellants' repeated assertion that this appeal must be resolved in their favor as a matter of "simple logic" necessarily flowing from a "basic understanding" of New England's electricity markets⁴² is not only incorrect, it

and Tabors studies regarding potential variation in total regional emissions necessarily equates to an "increase in [Massachusetts'] statewide GHG emissions"). As the Court correctly recognized in *Kain*, the general increase or decrease in regional New England emissions is not determinative of compliance with the GWSA, the "central purpose" of which is "reducing emissions in the Commonwealth." *Kain*, 474 Mass. at 298 n.25 (original emphasis) (RA (vol. 1) at 370).

⁴¹ See, e.g., *Footprint Power Br.* at 18 (admitting that Appellants' modelling excludes, but the Agencies considered, "critical assumptions" regarding the impact that "Section 7.75 and other Massachusetts energy policy programs" will have on future "amounts of renewable resources" and "demand for electricity" in the Commonwealth).

⁴² See *NEPGA Br.* at 11 ("basic understanding"), 12 ("simple logic"); *id.* at 20-21 (suggesting regional market mechanics determinative), 35-36 (suggesting higher emissions "inevitabl[e]" due to dispatch system); 39 (suggesting "[l]ogic compels the conclusion . . . that net statewide emissions will increase"); *Footprint Br.* at 11 (alleged flaw "obvious" once "the logic of the ISO-NE dispatch is established"), 16 ("The intrinsic logic of the ISO-NE least-cost dispatch process affords no other conclusion."); *id.* at 16 (suggesting Appellants' studies

is a bright red flag marking a fundamental and fatal weakness of their challenge. Indeed, real-world policies and trends explode the so-called "logical necessity" of Appellants' claims regarding emissions displacement. While there is always a theoretical risk of "leakage"⁴³ with any sub-national emissions control scheme (private power generators made the same claim in an attempt to stop RGGI twenty years ago), it can and should here be dramatically reduced -- if not eliminated completely -- by complementary policies incentivizing energy efficiency and clean, renewable generation.

A. New and Existing Massachusetts Energy Programs Are Driving Yearly Gains in Energy Efficiency and Renewable Generation Causing Yearly Declines in Electricity Consumption and Emissions.

Appellants' core challenge regarding "emissions displacement" -- their repeated claim that as a matter of logic alone Section 7.74 will, in all cases and in all future years, necessarily cause an increase in GHG emissions as out-of-state generators make-up for a regulation-driven decrease in in-state generation - might

confirm "compelling logic" of challenge), 22 ("The logic of the ISO-NE Dispatch affords no other conclusion.")

⁴³ The GWSA defines "leakage" as "the offset of a reduction in emissions of greenhouse gases within the [C]ommonwealth by an increase in emissions of greenhouse gases outside the [C]ommonwealth." G.L. c. 21N, § 1; accord RA (vol. 5) at 3149 (Response to Comment).

merit discussion if Section 7.74 were the Commonwealth's only energy policy and we reasonably expected electricity consumption to remain the same, or grow, in future years. But neither is the case.

As is explained and examined at length in the Rulemaking's *Background Document* and the Agencies' *Response to Comment*, there are several existing programs and enforceable regulations that will continue to directly and materially impact both the generation and consumption of electricity in and for the Commonwealth as well as related GHG emissions.⁴⁴ Two among those, the state's RPS and first-in-nation⁴⁵ energy efficiency programs, work to directly reduce -- increasingly each year -- the need for fossil fuel burning power plants, both in-state and out-of-state, to run in the service of the Commonwealth. Those annual reductions in need for fossil generation will be accelerated starting next year as the state's new Section 7.75 Clean Energy Standard (which Appellants do not challenge) requires even more

⁴⁴ See *supra* Part I.B, notes 36-38 and accompanying text.

⁴⁵ For the seventh year in a row, Massachusetts has been ranked #1 among U.S. states achieving "nation-leading levels" of energy efficiency for electricity of almost 3% per year in saved/avoided electricity consumption. See Amer. Council for an Energy Efficient Economy, *2017 State Energy Efficiency Scorecard: Massachusetts*, available at: <https://aceee.org/sites/default/files/pdf/state-sheet/2017/massachusetts.pdf> (last accessed Apr. 12, 2018).

clean electricity (beyond that required by the RPS) to be sold by all major retail sellers throughout Massachusetts.⁴⁶ Indeed, given the existence and effect of these other statewide energy programs, it would have been plain error for the Agencies to ignore them either in designing the August 2017 Rulemaking or in their supporting emissions analysis. And as Appellants have admitted:⁴⁷ when the Agencies ran effectively "the same type of [ISO-New England, or "ISO-NE"] simulation model" as Appellants -- while including these programs in the model, rather than excluding them as Appellants inexplicably did -- the analysis consistently "showed significant decreases in GHG emissions" as renewable generation replaced fossil fuel burning power plants and as a "lower demand for electricity [resulted in] less need for electric generation."⁴⁸

⁴⁶ See RA (vol. 4) at 2154-56 (Background Document) (describing the Section 7.75 CES).

⁴⁷ See Footprint Br. at 18-19.

⁴⁸ *Id.* Accord RA (vol. 5) at 3210-11 (Response to Comment) (Appx. A: *Analysis of Massachusetts Electricity Sector Regulations: Electricity Bill and CO2 Impacts* (Aug. 2017)) (analysis included, in addition to Section 7.74 and Section 7.75: ISO-NE forecasts of electricity sales, natural gas and other resource prices, known power plant additions and retirements, the RPS in Massachusetts and in other states, on-going Massachusetts clean energy procurements pursuant to the Energy Diversity Act of 2016, additions to the regional electricity transmission system, and future RGGI prices); *id.* at 3202 ("The new regulations are projected to reduce future CO2 emissions in Massachusetts, relative to

Moreover, as a direct result of the Commonwealth's nation-leading energy efficiency standards, which all electric distribution companies (like Eversource and National Grid) are required to meet, electricity consumption in Massachusetts is neither steady nor increasing. To the contrary: according to ISO-NE's most recent estimate, electricity consumption in Massachusetts is -- under all conditions⁴⁹ -- expected to continue to steadily decline by about one-half of one percent, each year for the next ten years.⁵⁰ Appropriately, the Agencies incorporated such forecasts into the Rulemaking's emissions analysis,⁵¹ using ISO-NE's then-most-current 2017 projections. The most recent 2018 forecast (released less than a month ago), however,

both today and a business-as-usual Reference Case. In addition, these regulations result in emissions reductions in the other New England states, and New England as a whole.").

⁴⁹ ISO-NE's annual, 10-year forecast of capacity, energy, loads, and transmission ("CELT") forecasts for each state and for New England as a whole total annual energy, as well as average ("50/50") and worst case ("90/10") peak energy needs for both summer and winter demand periods. See, e.g., ISO-NE (Fred Ninotti) Presentation, *Draft Final 2018 CELT ISO-NE and States Annual Energy and Seasonal Peak Forecasts* (Mar. 28, 2018) (the "2018 CELT"), available at: https://www.iso-ne.com/static-assets/documents/2018/04/2018-03-28_final_forecasts_mtg90.pdf (last accessed Apr. 12, 2018).

⁵⁰ *Id.* at 8, 13.

⁵¹ RA (vol. 5) at 3240 (Response to Comment, Appx. A) (incorporating ISO-NE's 2017 CELT forecasts).

predicts an even steeper year-on-year decline in the next ten years than was included in the Rulemaking analysis. Directly supporting that analysis, ISO-NE's newest forecasts predict summer and winter peak loads across New England will be between 650 megawatts to 1,538 megawatts less each year than ISO-NE's estimates from just a year ago.⁵² Such reductions are dramatic and directly relevant to the potential for "emissions displacement" as they are large enough to render *entirely obsolete* between two to four large power plants in the region.⁵³

B. Massachusetts is Acting to Increase Renewable Generation, and Decrease Fossil Fuel Emissions in Concert with States Together Representing 80% of New England's Population and Energy Consumption.

The too-narrow scope of Appellants' argument and supporting analysis not only fails to account for a range of relevant Massachusetts policies and programs, it similarly fails to account for similar policies in neighboring states that together will undoubtedly have a

⁵² 2018 CELT, at 31 (regional system summer peak), 56 (regional system winter peak). Similar declines are predicted over last year's forecast for Massachusetts as well, *id.* at 80-81 (estimated annual peaks 352 to 1,058 megawatts lower than in last year's forecast).

⁵³ See RA (vol. 5) at 3253 (indicating the sizes of fifteen representative generating facilities in New England that on average can each provide about 200 megawatts of electricity, the smallest able to provide only about 50 megawatts; the largest some 480 megawatts)).

similarly beneficial, emissions-reducing effect. And again, in a dynamic world where Massachusetts is not acting alone, and Section 7.74 is not the only "policy lever" being pulled, the risk of so-called "emissions displacement" is vanishingly small if not non-existent.

In addition a public commitment to dramatic 2030 emissions reductions by all New England Governors and Eastern Canadian Premiers,⁵⁴ both Connecticut and Rhode Island are committed by law to reducing GHG emissions by 2050 at a similar pace and at the same scale as the GWSA requires for Massachusetts. For example, Connecticut's own Global Warming Solutions Act requires the state to reduce greenhouse gas emissions by 10% from 1990 levels by 2020 and 80% from 2001 levels by 2050. Conn. Gen. Stat. Sec. 22a-200a.⁵⁵ And in its most recent

⁵⁴ NEG-ECP Resolution 39-1, *Resolution Concerning Climate Change* (Aug. 31, 2015) at 2 (adopting a "2030 emissions reduction marker . . . of at least 35% - 45% [] below 1990 levels" and requiring Governors and Premiers to "identify and implement additional strategies, policies and measures at the regional level to facilitate achievement of the region's GHG reduction marker for 2030 and the 2050 target."), available at: <http://www.coneg.org/Data/Sites/1/media/39-1-climate-change.pdf> (last accessed Apr. 12, 2018); accord RA (vol. 2) at 1292 (2015 Update to CECP) (referencing Resolution 39-1 as an "important first step" by the Baker Administration in enforcing the GWSA beyond 2020").

⁵⁵ The Resilient Rhode Island Act of 2014 similarly commits the Ocean State to achieving GHG emissions reductions of 10% below 1990 levels by 2020, 45% below 1990 levels by

Comprehensive Energy Strategy (issued February 8, 2018), the state reaches virtually the same conclusion as Massachusetts has: in order to achieve those reductions, the state must aggressively “[g]row and sustain renewable and zero-carbon generation in the state and [the] region” since a “decarbonize[ed] . . . electric power sector” will be required in order to achieve “widespread electrification of building thermal loads and the transportation sector.”⁵⁶

Consistent with their state climate laws,⁵⁷ Connecticut and Rhode Island are, like Massachusetts, engaged in sustained and meaningful procurements of renewable generation that, as Appellants concede,⁵⁸ will

2035, and 80% below 1990 levels by 2050. R.I. Gen. L. §§ 42-6.2-2(2).

⁵⁶ CT Dep’t of Energy & Env’tl. Prot., *Comprehensive Energy Strategy* (Feb. 8, 2018) at 10 (a deeply decarbonized electricity sector will be “the cornerstone of the state’s carbon-free economy”), available at: http://www.ct.gov/deep/lib/deep/energy/ces/2018_comprehensive_energy_strategy.pdf (last accessed Apr. 12, 2018). *Accord, e.g.*, RA (vol. 5) at 3154 (Response to Comment) (In order “to achieve the 2050 GWSA limit of at least an 80% reduction in statewide GHG emissions . . . the Commonwealth must achieve a significant reduction in GHG emissions from transportation, the heating of buildings, and the electric sector. Since a significant percentage of vehicles and building systems must be electrified as a way to reduce GHG emissions, EEA and MassDEP’s regulations must first focus on achieving GHG reductions from the electric sector.”).

⁵⁷ See Conn. Gen. Stat. Sec. 22a-200a; R.I. Gen. L. §§ 42-6.2-2.

⁵⁸ Footprint Br. at 18.

help to achieve required emissions reductions while minimizing the risk of any program-related leakage. Together with Massachusetts, Connecticut and Rhode Island are in the process of executing power purchase contracts for about 264 megawatts of new, in-region solar generation and 126 megawatts of new, in-region onshore wind generation, all of which is scheduled to achieve commercial operation in or before 2020.⁵⁹ In addition, Connecticut has just issued another, separate request-for-proposals to provide the state with an additional 900,000 megawatt-hours of energy -- more than three percent of the state's total annual electricity supply -- from offshore wind and other low emissions electricity generation facilities.⁶⁰

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⁵⁹ These joint procurements are the result of a joint, "tri-state" renewable energy procurement initiated in June 2015 (in Massachusetts pursuant to St. 2008, c. 169, § 83A). See *In re: Pets. For Approval of Long-Term Contract for Renewable Resources*, D.P.U. 17-117, 17-118, 17-119, 17-120, Joint Direct Testimony of Waltman, DiDomenico, and Glover (Sept. 20, 2017) at 7-8, 14, 19, 43-44, available at: http://170.63.40.34/DPU/FileRoomAPI/api/Attachments/Get/?path=17-117%2fJoint_Initial_Testimony.pdf (last accessed Apr. 12, 2018).

⁶⁰ See CT Dep't of Energy & Env'tl. Prot., *Notice of Request for Proposals from Private Developers for Clean Energy* (Jan. 31, 2018) at 3, n.7, available at: [http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/0fa7e92df14f12248525822600682775/\\$FILE/2018.01.31_FINAL%20RFP.pdf](http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/0fa7e92df14f12248525822600682775/$FILE/2018.01.31_FINAL%20RFP.pdf) (last accessed Apr. 12, 2018).

CONCLUSION

It is not surprising that Appellants hope to invalidate Section 7.74 and with it, the August 2017 Rulemaking. The Commonwealth must dramatically reduce emissions from their fossil-fuel burning electric power plants year-over-year through 2050 in order to achieve the all-economy emissions levels required by the GWSA.⁶¹ There is no other way for the Commonwealth to proceed: "the only viable path" to achieve the GWSA's "80% by 2050" emissions reduction mandate requires that the electric power sector be decarbonized.⁶²

But despite their hope, Appellants' challenge fails. Although they disagree with the Agencies, Appellants have not -- and cannot -- "establish the absence of any conceivable grounds upon which [the Rulemaking] may be upheld." *Mass. Fed'n of Teachers v. Bd. of Educ.*, 436 Mass. 763, 771 (2002). To the contrary, applying "all rational presumptions in favor of the validity of [the Rulemaking]" it cannot be reasonably disputed that

⁶¹ *Accord* RA (vol. 5) at 3153 (Response to Comment) ("[T]he only viable path to deep reductions in GHG emissions . . . can be summarized in three words: reduce, electrify, and decarbonize." As a result, "[t]he importance of the electric sector in achieving GHG emissions reductions for the Commonwealth as a whole cannot be minimized.").

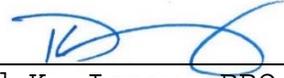
⁶² *Id.*; *accord* CT Dep't of Energy & Env'tl. Prot., *Comprehensive Energy Strategy* at 10.

Section 7.74 and the August 2017 Rulemaking can and should be reasonable construed to be "in harmony with the legislative mandate" of the GWSA,⁶³ which is the attainment of "actual, measurable, and permanent emissions reductions in the Commonwealth." *Kain*, 474 Mass. at 300 (RA (vol. 1) at 371).

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By its attorney,



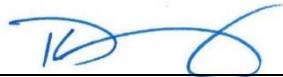
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⁶³ *Mass. Fed. of Teachers*, 436 Mass. at 771; accord *Entergy Nuclear Generation Co. v. Dep't of Env'tl. Prot.*, 459 Mass. 319, 329 (2011).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including without limitation Rules 16(a)(6), 16(e), 16(f), 16(h), 18 and 20, Mass. R. App. P.



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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I served two (2) copies of the foregoing Brief of Amicus Curiae Conservation Law Foundation on all other counsel of record, electronically and by U.S. mail, as follows:

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