COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

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 COMPLAINT FOR REVIEW OF FINAL REGULATIONS OF THE
MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND THE EXECUTIVE OFFICE OF
ENERGY AND ENVIRONMENTAL AFFAIRS

REPLY BRIEF OF PLAINTIFF-APPELLANTS NEW ENGLAND POWER GENERATORS ASSOCIATION AND GENON ENERGY, INC.

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INTRODUCTION

The Agencies labor to articulate a rational basis for the 7.74 Rules and reconcile the rules with the plain language of the GWSA. However, they can only do so by ignoring two fundamental points. First, the nature of the electricity market in the ISO-NE region means that limiting generation at fossil facilities in Massachusetts will necessarily increase fossil generation at less efficient plants outside Massachusetts. The result will be an increase in statewide greenhouse gas emissions. Second, the only modeling that looked separately at the impact of the 7.74 Rules confirmed that result.

The Agencies trumpet the impact that the Clean Energy Standard ("CES") at 310 Code Mass. Regs. § 7.75 will have in reducing GHG emissions and repeatedly argue that the 7.74 Rules are only a "backstop." See, e.g., Agencies Br. 27, 36, 55. However, a backstop that will increase statewide greenhouse gas emissions is no backstop at all.

The Plaintiff-Appellants understand that, in the first instance, the Agencies have a limited task in justifying the 7.74 Rules. However, the comments provided to the Agencies in response to the draft

regulations demonstrated that the 7.74 Rules would increase statewide greenhouse gas emissions.

Given that background, it is fair for this Court to ask the Agencies a simple question. What were they afraid of? Why did the Agencies not first model the impact of the CES, and then do a second model, examining the impact of the 7.74 Rules "backstop" on top of the CES. After all, that would have allowed the Agencies to determine if the "backstop" actually backstopped anything. However, the Agencies failed to determine the actual impact of the 7.74 Rules. Instead, they hope to persuade this Court to allow the 7.74 Rules to bask in the reflected glow of the CES. But, this case is not about the CES. It is about the 7.74 Rules. The Agencies' conscious refusal even to try to demonstrate that the 7.74 Rules will actually provide the purported "backstop" allows only one inference at this point. The Agencies did not model the impact of the 7.74 Rules on top of the CES, because they knew what the result would be; it would show that the backstop failed. The 7.74 Rules will result in an increase in statewide greenhouse gas emissions.

ARGUMENT

I. The 7.74 Rules Undermine the Fundamental Purpose of the GWSA.

A. If the 7.74 Rules Have an Impact, They Will Cause Leakage and Increase Statewide Greenhouse Gas Emissions.

The overriding purpose of the GWSA is to reduce "statewide greenhouse gas emissions." G.L. c. 21N, § 3. Accordingly, any regulation promulgated pursuant to the GWSA must advance, and not hinder, that purpose. White Dove, Inc. v. Director of Div. of Marine Fisheries, 380 Mass. 471, 477 (1980) (must be rational relation between regulation and empowering statute); Grocery Mfrs. of Am., Inc. v. Dep't of Pub. Health, 379 Mass. 70, 80 (1979) (arbitrary and capricious regulations are invalid).

The Agencies have not pointed to anything in the Record to contradict or disprove the Record evidence demonstrating that, if the 7.74 Rules have any impact at all, they will increase statewide greenhouse gas emissions. The 7.74 Rules do not "complement" the CES, Agencies Br. 4, or "work in tandem" with the CES, id. at 22. Rather, they create an unnecessary risk that any emissions reductions achieved by the CES could be undone. RA 2390-91.

The Synapse Analysis commissioned by the Agencies does show that the 7.74 Rules are not expected to bind the market because of the emissions reductions achieved by the CES. RA 3214-15; Agencies Br. 27, 53. In this scenario, the CES does all of the work and the 7.74 Rules contribute nothing. RA 3214-15. But, if the 7.74 Rules do bind, then the 7.74 Rules will increase statewide greenhouse gas emissions. RA 2368, 2379, 2390-91; Agencies Br. 56, 59-60.

In that sense, the 7.74 Rules are not, as the Agencies suggest, an enforceable "backstop." They are a back door that causes the escape of greenhouse gas emissions to surrounding states. The 7.74 Rules may ensure that "anticipated emissions reductions… will actually occur in Massachusetts", Agencies Br. 26, but they also ensure that backsliding will occur in elsewhere in the region. RA 2368, 2379, 2390-91; Agencies Br. 56, 59-60. In promulgating the 7.74 Rules, the Agencies protected the Commonwealth to the detriment of surrounding states and the region. See RA 2368, 2379, 2390-91. The GWSA expressly prohibits the Agencies from regulating so parochially.

There is no scenario, either borne out in the Record or hypothesized by the Agencies, in which the

7.74 Rules will actually reduce statewide greenhouse gas emissions.[1] See RA 3142-3264. The 7.74 Rules not only undermine the chief purpose of the GWSA; they undermine the gains expected to be achieved by the CES. See RA 2368, 2379, 2390-91. For these reasons, they are irrational and unenforceable. Borden, Inc. v. Comm'r of Pub. Health, 388 Mass. 707, 736 (1983); Grocery Mfrs. of Am., Inc., 379 Mass. at 80.

B. The Record Unambiguously Demonstrates that 7.74 Rules Will Cause More Than "Minimal Leakage."

The Agencies' consistent refrain is that some leakage is an acceptable consequence of the 7.74 Rules. Agencies Br. 42 ("without causing excessive leakage"); 56 ("minimal increased emissions from out-of-state power plants"); 59 ("interim leakage"). This theory finds no support in the GWSA. See G.L. c. 21N.

First, the Agencies infer from the GWSA's single use of the word "leakage" that the Legislature considered it inconsequential. Agencies Br. 59. In

[1] Likewise, CLF's Amicus Brief exalts the combined impacts of the CES and the 7.74 Rules, but provides no basis on which to conclude that that these beneficial impacts are in spite of, rather than because of, the 7.74 Rules.

reality, the GWSA reflects acute awareness of and concern about leakage. The GWSA defines "statewide greenhouse gas emissions" to include leakage, even though the definition does not utilize that specific term. G.L. c. 21N, § 1. The GWSA also specifically defines "leakage". Id. The more sensible reading of the GWSA is that the Legislature intended for the Agencies to regulate the electric sector without causing leakage. See G.L. c. 21N, § 3.

Second, even if the Court were to countenance the Agencies' suggestion that the GWSA tolerates "minimal" leakage, the predicted leakage is not, in fact, "minimal." "Minimize" means to "reduce to the smallest possible number, degree, or extent." WEBSTER'S THIRD NEW INT'L DICTIONARY 1438 (2002). Here, the expected leakage cannot be the "smallest possible" degree because it is entirely unnecessary. RA 2368, 2379, 2390-91, 3214-15. The Synapse Analysis shows that the CES alone will drive the necessary reductions in greenhouse gas emissions, without causing any leakage. RA 3214-15. The 7.74 Rules, if they have any effect at all, will cause leakage. RA 2368, 2379, 2390-91. Said differently, if the Agencies had stopped at the CES, the "possibility" of leakage would be zero.

Third, if the GWSA does in fact tolerate some level of leakage, the Agencies' failure to define how much leakage would be too much is telling. If any leakage is acceptable, it clearly has to meet one obvious criterion: ***the amount of leakage has to be less than the amount of the in-state reductions***. If the amount of leakage is greater than the amount of in-state reductions, then the regulations will cause an increase in "statewide greenhouse gas emissions," in contravention of the statutory mandate. And that is what the Agencies have done here. If the 7.74 Rules have any impact at all, the leakage will not be "minimal." It will be greater than the amount of in-state reductions, and net statewide greenhouse gas emissions will increase.

II. Section 3 of the GWSA Requires the Agencies to Treat the Electric Sector Differently than All Other Sectors of the Economy.

The Agencies ignored a specific directive from the Legislature. The Legislature drafted the GWSA with an understanding of the regional character of electricity markets and a sober perspective on the limitations of patchwork, state-by-state, electric sector emissions regulations. See G.L. c. 21N, §§ 1,

3. The Agencies concede this point. See Agencies Br. 2 ("Massachusetts cannot solve climate change on its own…"). Accordingly, the Legislature called for special treatment of the electric sector. G.L. c. 21N, § 3. The Agencies ignored this instruction, and grouped the electric sector with every other sector of the economy in imposing "declining annual aggregate emissions limits." See G.L. c. 21N, § 3(d).

In struggling to find support for this action, the Agencies engage in a hyper-technical parsing of § 3(c) into procedural and substantive requirements and considerations. See Agencies Br. 38-45. This granular reading misses the forest for the trees and ignores the most salient aspect of § 3. Section 3 requires DEP to: 1) regulate electricity generators in one fashion (§ 3(c)); and 2) regulate everyone else in a different fashion (§ 3(d)). The GWSA commands the Agencies to regulate the electric sector differently. They failed to do so.

Contrary to the Agencies' assertion, § 3(d) of the GWSA precludes imposition of a declining emissions cap on the electric sector. See Agencies Br. 39. The "broad" authority cited by the Agencies, Agencies Br. 3, cannot undermine specific directives from the

Legislature, particularly where the Agencies invoked that broad authority to contravene a specific GWSA provision. The only fair reading of the GWSA is that the Legislature created the separate provisions for the electric generation sector in § 3(c) and the rest of the economy in § 3(d) for one specific purpose – to prevent the Agencies from doing precisely what they did here, i.e., impose regulations that cause in-state emissions reductions, but increases in statewide greenhouse gas emissions. See RA 2368, 2379, 2390-91 (if 7.74 Rules have any impact, they will increase statewide greenhouse gas emissions). See also Boston Police Patrolmen's Ass'n v. Police Dep't of Boston, 446 Mass. 46, 50 (2006) (statute must be construed so that effect is given to all of its provisions, so that no part is inoperative or superfluous).

Admittedly, § 3(c) does require the Agencies to impose "levels and limits" on the electric sector. But that does not mean the GWSA required the Agencies to promulgate the 7.74 Rules.[2] The Agencies satisfied

[2] The Agencies mischaracterize Appellants' brief in stating that Appellants suggested that that RGGI itself can supply the "limits" contemplated in 3(c). Agencies Br. 35. Appellants did not suggest that they did. Notably, the Agencies did not provide a citation

their obligation under § 3(c) in promulgating the CES which "establishes an increasing level of clean, non-emitting electricity that sellers of electricity to Massachusetts consumers must purchase annually." See 310 Code Mass. Regs. § 7.75; Agencies Br. 4. By increasing proportionally the amount of renewable energy that Massachusetts electricity distribution companies ("EDCs") must purchase, the CES necessarily establishes "levels and limits" on the amount of fossil-fuel generated electricity that Massachusetts EDCs may purchase. See 310 Code Mass. Regs 7.75; Agencies Br. 4. The 7.74 Rules are therefore both arbitrary and unnecessary.

III. If the 7.74 Rules are Valid, then the 2020 Sunset Date Applies.

If the Court upholds the 7.74 Rules, the GWSA regulatory sunset date applies to the rules and invalidates any post-2020 emissions limits. The Agencies appear to willfully misunderstand Appellants' conclusion about the regulatory sunset date in § 16 of

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for Appellants' alleged suggestion. Moreover, this Court in Kain v. Dep't of Envtl. Protection plainly said that the RGGI regulations do not satisfy § 3(c). 474 Mass. 278, 296-297 (2016).

the GWSA. See 2008 Mass. Acts c. 298, § 16; Agencies Br. 45, 46 n.28. The language of § 16 is clear and unambiguous. 2008 Mass. Acts c. 298, § 16 (regulations of the department "pursuant to subsection (d) of said section 3"… "shall expire on December 31, 2020"). Of course the sunset date does not apply to regulations promulgated pursuant to § 3(c). Appellants do not claim that it does.

Rather, Appellants contend that the 7.74 Rules are ultra vires because § 3(c) cannot provide a basis for imposing "declining annual aggregate emissions limits" on the electric sector. But, if the Court concludes that § 3(d) authorizes such regulations, the sunset date must then apply. The Agencies' arguments to the contrary fall flat.

First, the Agencies promulgated what are, in effect, § 3(d) regulations to govern the conduct of the electric sector. The regulations impose mass-based, annually declining, greenhouse gas emission limits on fossil-fueled power plants in Massachusetts. 310 Code Mass. Regs. § 7.74; RA 3348-49. The 7.74 Rules thus track the instruction from the Legislature in § 3(d). See G.L. c. 21N, § 3(d) ("The department shall promulgate regulations establishing a desired

level of declining annual aggregate emissions limits…").

Second, the rulemaking history of the 7.74 Rules demonstrates that the Agencies intended to promulgate the rules pursuant to their authority under § 3(d). The Background Document on Proposed New and Amended Regulations ("Background Document") explicitly stated that DEP was proposing the regulations pursuant to its authority under § 3(d). RA 2137 ("MassDEP is proposing regulations for new programs along with revisions to existing regulations, ***under the authority of Section 3(d)*** to achieve GWSA goals" [emphasis added].); RA 2138 Table 1 (table confirming authority for new electric sector regulations on "Generator Emissions Limits" would be § 3(d)). Only after challenging the Agencies' purported legal basis for the rules, did the Agencies seek shelter under § 3(c). See RA 3190-94. The Agencies cannot waive a wand and transform § 3(d) regulations into § 3(c) regulations.

Third, the Agencies' suggestion that the sunset provision is not actually a sunset provision belies the unambiguous text of § 16. See Biogen IDEC MA, Inc. v. Treas. & Receiver Gen., 454 Mass. 174, 186 (2009) (if "Legislature has spoken with certainty on

the topic in question, and if we conclude that the statute is unambiguous, we give effect to the Legislature's intent"). See also Pepin v. Div. of Fisheries and Wildlife, 467 Mass. 210, 221 (2014) ("Nor may regulations validly be promulgated where they 'are in conflict with statutes or exceed the authority conferred by statutes...'").

The duration of the 7.74 Rules facially conflicts with the express time limitation articulated in the GWSA. Section 16 of the GWSA states that regulations of the department pursuant to § 3(d) "shall expire on December 31, 2020." 2008 Mass. Acts c. 298, § 16. This could not be more clear. To the extent that the 7.74 Rules regulate beyond 2020, they are invalid. See Pepin, 467 Mass. at 221 ("Regulations are invalid when the agency utilizes powers neither expressly nor impliedly granted by statute.").[3]

[3] The Agencies' suggestion that the decision in Kain supports its creative reading of the sunset provision is just wrong. See 474 Mass. at 289 n.14. Kain does not suggest that § 16 of the GWSA is not a sunset provision. To the contrary, n.14, to which the Agencies' brief refers, explicitly describes § 16 as a "sunset provision." Id. Kain merely explains why the sunset provision exists. Id.

Undertaking to read an ambiguity into an otherwise unambiguous statute, the Agencies trumpet the fact that the GWSA does not include sunset dates in 2030, 2040 and 2050 as proof that the Legislature intended for only DEP to "revisit" the regulations at the end of every decade. This reading makes no sense. Because the regulations sunset in 2020, there was no need for the Legislature to include additional sunset dates at future intervals. If the Legislature intended for DEP to "revisit" and repromulgate § 3(d) regulations at 10 years intervals, it would have said so in the GWSA. It did not, and the Court should not defer to the Agencies' attempt to rewrite the statute.

The Agencies' claim that the existence of the sunset provision is a mistake and "vestige of the GWSA's California analogue" is equally empty. See Agencies Br. 50. That may be so. Nonetheless, it is the Legislature's error to fix. See id. See also ENGIE Gas & LNG LLC v. Dep't of Pub. Utils., 475 Mass. 191, 211 (2016) citing Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014) (agency does not have power to rewrite clear statutory terms to "suit its own sense of how the statute should operate"). The sunset date unambiguously applies to any § 3(d)

regulations. 2008 Mass. Acts c. 298, § 16. It follows that the sunset date must apply to the 7.74 Rules if the Court finds authority for the rules in § 3(d). See ENGIE Gas & LNG LLC, 475 Mass. at 211. In short, if the plain language of § 16 is not sufficient to create a sunset provision, what could the Legislature possibly do to establish a sunset provision that the Agencies would find binding?

IV. The Ancillary Benefits of the 7.74 Rules Touted By the Agencies are Illusory and Find No Support in the Record.

The Agencies extol the in-state emissions benefits of the 7.74 Rules and turn a blind eye to the out-of-state emissions costs. So too do the Agencies ignore the out-of-state consequences of the 7.74 Rules in praising the multiple other "rational" bases for the rules. See Agencies Br. 55-63.

A. The Agencies' Suggestion that the 7.74 Rules Will Increase Out-of-State Clean Energy, Rather Than Out-of-State Fossil Fuel Generation Cannot Be Correct.

The Agencies suggest that, if the 7.74 Rules are binding, they would increase clean energy imported into Massachusetts. See Agencies Br. 69 and n.41. However, the Agencies' brief acknowledged how the ISO-

NE stack works. See Agencies Brief 16-19. It acknowledges – and trumpets – that renewable energy sources have no fuel costs, thus have lower marginal costs, and are always lower in the ISO-NE stack than fossil fuel resources. Id. Thus, if the 7.74 Rules are binding – if they actually limit in-state generation – then, by definition, the in-state fossil generation constrained by the 7.74 Rules will be replaced by other, less efficient, fossil fuel generation from outside Massachusetts. The 7.74 Rules incentivize out-of-state fossil generation, not out-of-state renewable energy.

In any event, the Agencies failed to articulate this "basis" for the 7.74 Rules in their Response to Comment. Accordingly, the Agencies cannot now rely on it and the Court must not consider it. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981) (courts may not accept counsel's *post hoc* rationalizations for agency

action). Cf. NSTAR Elec. Co. v. Dep't of Pub. Utils., 462 Mass. 381, 387 n.3 (2012).

B. The Agencies Should Not Rely on Neighboring States to Solve the Commonwealth's Emissions Dilemma.

The Agencies' self-congratulatory rhetoric also cannot provide any basis for the 7.74 Rules. See Agencies Br. 61-62. The Agencies suggest that the 7.74 Rules provide a "clear signal" to incentivize development of emissions reduction technologies and, further, that the 7.74 Rules and CES will serve as "models" and "catalysts" for extra-territorial actions. Agencies Br. 28, 61. Nothing in the Record supports the Agencies' unadorned assertions that pushing emissions across state lines will encourage similar regulation in neighboring states.

The Agencies assert that cap-and-trade programs use market forces to encourage development of cleaner resources, meaning that the 7.74 Rules too could encourage development of cleaner resources that will enter at the bottom of the bid stack. Agencies Br. 18, 61. However, the Record documents that the

Agencies cite in support of this suggestion are inapt.[4] See RA 2045, 2372, 2737. They do not speak to potential extra-territorial benefits of a ***state-specific*** cap-and-trade program like the scheme created by the 7.74 Rules. See id. In contrast to the program created by the 7.74 Rules, RGGI is a regional cap-and-trade program covering multiple states and grid networks. RA 2045-46. The Agencies cannot blindly presume that their state-specific program will yield the same ancillary benefits.

C. Any In-State Health Benefits Must Be Counterbalanced By the Out-Of-State Health Consequences.

Finally, the purported public health benefits of the 7.74 Rules cannot justify the 7.74 Rules. The Record demonstrates that the 7.74 Rules will increase net statewide greenhouse gas emissions. The Agencies' argument that a binding constraint on GHG emissions in

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[4] In support of the proclaimed extra-territorial benefits of the 7.74 Rules, the Agencies also rely on Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 Ariz. L. Rev. 681, 700 (2008). Agencies Br. 58, 61. This document is not in the Record and the Court should not give it any weight. See Motor Vehicle Mfrs. Ass'n and Am. Textile Mfrs. Inst., supra at 16-17.

Massachusetts will result in further reductions in traditional pollutants and the public health concerns associated with those pollutants may be true, but it comes with a necessary corollary that we find it difficult to believe that the Agencies would really defend.

For if it is true that binding limits on Massachusetts facilities will also result in decreases in other pollutants, then it is equally true that the increased use of less efficient fossil generation outside Massachusetts will result in increases in emissions of traditional pollutants in those other states. In other words, the 7.74 Rules will not result in a decrease in public health impacts from fossil generation emissions of traditional pollutants. It will simply export those emissions, and the resulting public health problems, to other states in the ISO-NE market. Do the Agencies really want to argue that the 7.74 Rules can be justified by public health benefits in Massachusetts that will be outweighed by public health costs in other states? That is hardly regional environmental cooperation.

CONCLUSION

For the reasons set forth above and in their initial brief, Appellants respectfully request that the Court grant their Motion for Judgment on the Pleadings and declare the 7.74 Rules unlawful, arbitrary and capricious and, therefore, void.

Respectfully submitted,

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Dated: April 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, I served a copy of the above document by hand delivery on Seth Schofield and Turner Smith of the Office of the Attorney General, counsel for Defendant-Appellees, One Ashburton Place, 18th Floor, Boston, MA, 02108 with additional copies to:

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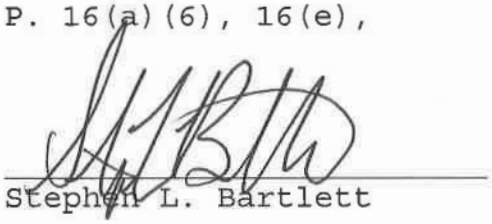
MASS. R. APP. P. 16(K) CERTIFICATION

I, Stephen L. Bartlett, counsel for the Plaintiff-Appellants, hereby certify pursuant to Mass. R. App. P. 16(k) on April 27, 2018 that the reply brief of the Plaintiff-Appellants, submitted in connection with this case, complies with the requirements for appellate briefs set forth in the Massachusetts Rules of Appellate Procedure, including but not limited to the requirements of Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h) and 20.



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