

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENERGY RESOURCES

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225 CMR 21.00: CLEAN PEAK ENERGY	:	NOVEMBER 18, 2024
PORTFOLIO STANDARD	:	
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**JOINT COMMENTS OF
RETAIL ENERGY SUPPLY ASSOCIATION
AND NRG RETAIL COMPANIES
RE OCTOBER 2024 EMERGENCY RULEMAKING**

Direct Energy Services, LLC; Direct Energy Business, LLC d/b/a NRG Business; Energy Plus Holdings LLC; Reliant Energy Northeast LLC d/b/a NRG Home; Green Mountain Energy Company; and XOOM Energy Massachusetts, LLC (collectively, the “NRG Retail Companies”) and the Retail Energy Supply Association (“RESA”)¹ hereby jointly submit comments in response to the Department of Energy Resources’ (“Department”) October 11, 2024 Clean Peak Energy Standard (“CPS”) Emergency Rulemaking (“October Rulemaking”).

INTRODUCTION

RESA is a non-profit organization and trade association whose members are active participants in the retail competitive energy markets, including the Massachusetts retail electric market. Several RESA member companies are licensed by the Department of Public Utilities to serve residential, commercial and industrial customers in Massachusetts and are presently providing electricity service to customers in the Commonwealth. As such, RESA has an interest

¹ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

in ensuring that the October Rulemaking does not have an adverse effect on its members, their customers or the continued success of the competitive retail electric market in Massachusetts.

Each of the NRG Retail Companies is a licensed retail electric supplier in Massachusetts. As such, the NRG Retail Companies also have an interest in ensuring that the October Rulemaking does not have an adverse effect on their businesses or customers or the continued success of the competitive retail electric market in Massachusetts.

BACKGROUND

In 2018, the Governor signed a law directing the Department to develop a program requiring retail electricity providers to meet a baseline minimum percentage of sales with qualified clean peak resources that dispatch or discharge electricity to the electric distribution system during seasonal peak periods, or alternatively, reduce load on the system.² The final regulation implementing the CPS became effective in August 2020.

Beginning in 2024, and not less than every four years thereafter, the Department is required to conduct a review of the Clean Peak Energy Certificate Multipliers, Minimum Standard, and Alternative Compliance Payment (“ACP”) Rate (“CPS Review”).³ To inform the 2024 CPS Review, on March 25, 2024, the Department issued Stakeholder Questions regarding potential amendments to the CPS⁴ and accepted public comments on the Stakeholder Questions until May 3, 2024.⁵

² See Chapter 227 of the Acts of 2018.

³ See 225 CMR 21.05(6)(h); 225 CMR 21.07(3)(b)(3); 225 CMR 21.08(3)(a)(5).

⁴ See 2024 Clean Peak Energy Standard Review Stakeholder Questions (Mar. 25, 2024) (“Stakeholder Questions”).

⁵ *Id.*

Despite having sufficient time to do so, after receiving comments on the Stakeholder Questions, the Department did not issue proposed regulations for public input. Instead, more than two months later, the Department issued the first in a series of emergency rulemakings.

On July 12, 2024, the Department issued the initial emergency rulemaking (“July 12 Rulemaking”) decreasing the 2024 Minimum Standard.⁶ One week later, the Department issued another emergency rulemaking (“July 19 Rulemaking”) that retained the changes from the July 12 Rulemaking and:

- Changed the Minimum Standard for 2025 through 2050; and
- Added a Near-Term Resource Multiplier for Qualified Energy Storage Systems that are not co-located with a Qualified Renewable Portfolio Standard Resource or Demand Response Resource and that are interconnected to the Distribution System.⁷

On October 11, 2024, the Department issued yet another emergency rulemaking that: (a) increased the previously established ACP rates for compliance years 2025 through 2050;⁸ (b) reduced the permissible clean peak energy certificate (“CPEC”) banking window from three to two years; (c) modified provisions regarding electric distribution company CPEC procurements; and (d) changed the Summer Peak hours.⁹ RESA and the NRG Retail Companies now hereby jointly submit comments regarding the October Rulemaking.

COMMENTS

RESA and the NRG Retail Companies understand the Department’s desire to encourage the development of clean peak resources. However, the October Rulemaking was not necessary to preserve the public welfare and forgoing the advance public input process was not in the

⁶ See generally, July 12 Rulemaking.

⁷ See generally, July 19 Rulemaking.

⁸ See 225 CMR 21.08(3)(a)2 (increasing the ACP rate from \$43.45 to \$45.00 for compliance year 2025, increasing the ACP rate to \$65.00 for compliance years 2026 through 2032, and increasing the ACP rate to \$45 for years 2033 through 2050).

⁹ See generally, October Rulemaking.

public interest. Moreover, the use of the emergency rulemaking process creates market disruptions and can cause the assessment of unnecessary ratepayer costs. Thus, RESA and the NRG Retail Companies urge the Department to be more judicious in issuing emergency regulations in the future. In addition, to protect existing customer expectations, RESA and the NRG Retail Companies request that the Department exempt contracts executed before October 11, 2024 from the increased ACP rate.

I. USE OF THE EMERGENCY RULEMAKING PROCESS WAS UNNECESSARY

When adopting regulations, a Massachusetts agency is generally required to provide twenty-one (21) days advance notice of the proposed regulation and an opportunity for public input on the proposed regulation before it is adopted.¹⁰ In limited circumstances, an agency may adopt regulations on an emergency basis without providing such advance notice and opportunity for public input.¹¹

Agencies are, however, only permitted to issue emergency rulemakings when they “find that immediate adoption, amendment or repeal of a regulation is necessary for the preservation of the public health, safety or general welfare, and that observance of the requirements of notice and a public hearing would be contrary to the public interest.”¹² What constitutes the general or public welfare has been “defined with some strictness, so as not to include everything that might be enacted on grounds of mere expediency.”¹³

According to the October Rulemaking:

An emergency regulation is necessary for the preservation of the welfare of the public to (1) avoid market disruption, (2) prevent the assessment of unnecessary ratepayer costs; and (3) advance the construction of the renewable

¹⁰ M.G.L. c. 30A, §§ 2, 3.

¹¹ *Id.*

¹² M.G.L. c. 30A, § 2.

¹³ *Commissioner of Labor and Industries v. Boston Housing Auth.*, 345 Mass. 406, 414 (1963) (citation and internal quotations omitted).

generation/storage facilities necessary to meet . . . greenhouse gas emission reduction requirements. In addition, the delays inherent to the non-emergency promulgation pathway are contrary to the public interest.¹⁴

First and foremost, more than five months passed between the time the Department received public input on the Stakeholder Questions and the issuance of the October Rulemaking. Thus, there was more than enough time for the Department to have issued proposed regulations and sought public input before adopting the changes reflected in the October Rulemaking. Moreover, some of the changes affect future compliance years.¹⁵ As a consequence, it was unnecessary for the Department to adopt those changes without providing an opportunity for public input before the regulation was adopted.

Furthermore, the price that a clean energy generator can receive for CPECs is only one factor that influences how quickly new generation is built. An increase in the ACP rate will not lead to the immediate development of clean energy resources because it takes time to attain required permits and approvals and obtain necessary materials and supplies. Consequently, new clean peak resources cannot be built in the three (3) months in which the emergency regulation is effective. Thus, there was no reason, except mere expediency, for the Department to issue the regulation without providing an opportunity for public input before the regulation was issued. Accordingly, the October Rulemaking was not necessary to preserve the public welfare and compliance with the requirements of advance notice and public hearing would not have been contrary to the public interest.

¹⁴ October Rulemaking.

¹⁵ See, e.g., 225 CMR 21.08(3)(a)2 (increasing the ACP rate for compliance years 2025 through 2050).

II. THE EMERGENCY RULEMAKING PROCESS CREATES MARKET DISRUPTIONS AND CAN CAUSE THE ASSESSMENT OF UNNECESSARY RATEPAYER COSTS

In finding that the October Rulemaking was necessary to “avoid market disruption,” the Department failed to consider the entire electric market. In fact, the October Rulemaking actually created significant market disruption for competitive suppliers and their customers, including residential and commercial customers as well as customers served pursuant to municipal aggregation programs.

Customers enter into agreements with competitive suppliers of varying lengths, including contracts that extend years into the future.¹⁶ Because there are not currently sufficient CPECs available to satisfy the compliance obligations of retail sellers of electricity, when the ACP rate increases, the cost of CPECs increase. The October Rulemaking increased the ACP rate from that which was previously established for compliance years 2025 through 2050.¹⁷ This change resulted in an immediate increase in the cost of CPECs for future compliance years – in direct contravention of the Department’s justification for adopting the changes on an emergency basis.¹⁸

At the time the October Rulemaking was issued, customers had contracts with competitive suppliers that extended years into the future and that were priced based on the requirements previously in effect. Because the October Rulemaking did not exempt existing

¹⁶ Cf. Energy Switch Massachusetts, <https://www.energyswitchma.gov/#/compare/2/1/02108//> (displaying offers in the Eversource service territory that extend up to 36 months into the future) (last visited Nov. 18, 2024).

¹⁷ See 225 CMR 21.08(3)(a)2 (increasing the ACP rate from \$43.45 to \$45.00 for compliance year 2025, increasing the ACP rate to \$65.00 for compliance years 2026 through 2032, and increasing the ACP rate to \$45 for years 2033 through 2050).

¹⁸ See October Rulemaking (“Promulgating the amended regulations as an emergency regulation allows the implementation of the program to occur as quickly as possible, which will provide market certainty and **significant ratepayer cost reductions.**”) (emphasis added); see also July 12 Emergency Rulemaking (making immediate modifications to “shelter ratepayers from the impacts of high Alternative Compliance Payment (ACP) collection during anticipated CPEC market undersupply conditions.”).

contracts from its requirements,¹⁹ it resulted in an immediate market disruption as competitive suppliers and customers were forced to address the implications of the October Rulemaking on their current agreements, including the financial effect on customers that may now be subject to new and unanticipated charges for CPS compliance. Moreover, customers had no advance notice of these impacts so they had no opportunity to prepare for the effects of the changes.

This disruption was exacerbated by the back-to-back emergency rulemakings.²⁰ Customers, like clean resource developers,²¹ want market certainty. Because of the constant changes to the various renewable, alternative and clean energy standards that the Commonwealth has adopted²² and continues to adopt,²³ there is already significant market uncertainty. The issuance of three emergency rulemakings in a four-month period only exacerbates that uncertainty because it makes it nearly impossible for customers to know what changes will happen next or how quickly or significantly those changes will impact them.

Furthermore, an emergency regulation may only “remain in effect for . . . three months unless, during that time, the agency gives notice and affords interested persons an opportunity” for public input.²⁴ This after-the-fact public input process can result in changes to an emergency regulation before it is adopted as final.²⁵ The possibility for additional changes generates further market uncertainty and the potential that ratepayers will be assessed unnecessary costs. For

¹⁹ See generally, October Rulemaking.

²⁰ See July 12 Rulemaking; July 19 Rulemaking; October Rulemaking.

²¹ See October Rulemaking (“The proposed amendments are necessary to continue the Commonwealth's support of the deployment of energy storage systems and renewable generation facilities, facilitate a stable and equitable market, and protect ratepayer interests.”).

²² See 225 CMR 14.00; 225 CMR 15.00; 225 CMR 16.00; 225 CMR 21.00; 310 CMR 7.75.

²³ See, e.g., Massachusetts Department of Environmental Protection Discussion Document, Strengthening the Clean Energy Standard (Dec. 2023) (setting forth options for potential changes to the Clean Energy Standard).

²⁴ M.G.L. c. 30A, §§ 2, 3.

²⁵ See *Biogen IDEC MA, Inc. v. Treasurer and Receiver General*, 454 Mass. 174, 179-80 (2009) (noting that the final regulations were “nearly identical” to the emergency regulations).

example, retail electricity suppliers may have invoked available contractual and legal means to address the financial implications of the increased ACP rate in the October Rulemaking. If the ACP rate is changed in the final regulations, this may result in further adjustments to customer prices. Moreover, to the extent the ACP rate decreases in the final regulations, it could result in ratepayers having paid unnecessary costs during the period the emergency regulation was in effect in direct contravention of the Department's stated purpose for invoking the emergency rulemaking process.²⁶

Given the significant disruption and uncertainty that the emergency rulemaking process creates, RESA and the NRG Retail Companies urge the Department to engage in longer term and coordinated planning that allows for advance input on potential changes and avoids piecemeal changes in rapid succession. In this way, the Department can reduce the number of market disruptions and the likelihood that customers will incur unnecessary costs.

III. TO REDUCE MARKET DISRUPTIONS, EXISTING EXPECTATIONS SHOULD BE PROTECTED

Equally important as regulatory certainty is the need to protect existing customer expectations. The October Rulemaking increased the previously established ACP rates for compliance years 2025 through 2050.²⁷ This increase will materially increase the cost of CPS compliance and impact existing customer contracts that were priced based on the prior ACP rates and may have a term of service that extends over multiple years.

²⁶ Cf. October Rulemaking ("An emergency regulation is necessary for the preservation of the welfare of the public to (1) avoid market disruption, (2) ***prevent the assessment of unnecessary ratepayer costs***; and (3) advance the construction of the renewable generation/storage facilities necessary to meet . . . greenhouse gas emission reduction requirements.") (emphasis added).

²⁷ See 225 CMR 21.08(3)(a)2 (increasing the ACP rate from \$43.45 to \$45.00 for compliance year 2025, increasing the ACP rate to \$65.00 for compliance years 2026 through 2032, and increasing the ACP rate to \$45 for years 2033 through 2050).

When there is not sufficient supply to satisfy the demand for CPECs, the market price gravitates toward the ACP. As a consequence, a \$20 increase in the ACP equates to a \$20 upward movement in the market. For example, when the ACP is \$45, the market will trade around \$44. Similarly, when the ACP rate is \$65, the market will trade around \$64 until the market sees the supply/demand equation start to balance.

Retail electricity suppliers may have contractual and legal means to address increased costs resulting from change of law circumstances like the increased ACP rates in the October Rulemaking. However, these mechanisms will have a direct and immediate financial impact on customers that will now be subject to new and unanticipated charges that are not within their budgets. These unexpected charges place customers in an untenable position as they may be required to pay these added costs per the terms of their contractual agreements. The impact of those additional costs is particularly difficult for customers with limited budgetary flexibility.

Moreover, this approach undermines the customers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products customers desire and have contracted to meet their energy needs. Accordingly, in order to avoid disrupting these existing agreements, RESA and the NRG Retail Companies request that the Department recognize an exemption from the increased ACP rate for contracts executed prior to October 11, 2024.

CONCLUSION

For all of the foregoing reasons, RESA and NRG Retail Companies request that the Department reduce the frequency with which it adopts regulations on an emergency basis and exempt customer contracts executed before October 11, 2024 from the increased ACP rates.

Respectfully submitted,
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