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September 12, 2024

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Re: Calpine Corporation and Vistra Corp. Comments on the Proposed Increase to the Minimum Reserve Price for MassDEP's Quarterly Emissions Allowance Auction

To whom it may concern:

On behalf of our clients, Calpine Corporation ("Calpine") and Vistra Corp. ("Vistra"), we would like to thank the Massachusetts Department of Environmental Protection ("MassDEP") for extending the deadline for the submission of public comments on the proposed changes to the minimum reserve price ("MRP") for the quarterly emissions allowance auction as described in the June 2024 Discussion Document entitled *Increasing the Minimum Auction Reserve Price under 310 CMR 7.74: Reducing CO_2 Emissions from Electricity Generating Facilities* ("Discussion Document"). We would also like to thank Commissioner Heiple and the senior MassDEP staff members who met informally with NEPGA leadership and representatives of its members, including Calpine and Vistra, on August 1, 2024 to discuss the proposed increase to the MRP and MassDEP's anticipated timeline for implementing such increase.

As MassDEP is aware, Calpine and Vistra are members of NEPGA. As such, they join in the comments submitted by NEPGA concerning MassDEP's proposal to increase the MRP. We write separately to address certain issues of particular importance to Calpine and Vistra that are not addressed in the NEPGA comments.

I. The Electric Generation Sector Has Already Made Significant Progress in Reducing GHG Emissions

As an initial matter, Calpine and Vistra note that the electric generation sector has already made significant strides, particularly in comparison to other sectors of the economy that are responsible for considerable greenhouse gas ("GHG") emissions. According to MassDEP's own data, as of 2021, the most recent year for which complete data are available,

the electric generation sector has reduced emissions since 1990 by 55.7%, as compared to 20.7% for the building sector and 13.5% for the transportation sector.[1]

Moreover, GHG emissions from the existing thermal generation fleet have largely been reduced as much as is reasonably feasible and these emissions reductions have achieved the targets set forth for the sector in the Global Warming Solutions Act ("GWSA"). Further reductions in GHG emissions from the electric generation sector are only going to occur when sufficient renewable sources are available to displace thermal generation. In the meantime, thermal generation resources are necessary to keep the lights on.

Not only are these thermal resources necessary to keep the lights on, but they are also contractually committed to provide future capacity for the New England electric grid. ISO New England's forward capacity market ("FCM") locks in commitments from generators to be available several years in advance, which commitments provide a measure of stability to the market and the operation of the grid. However, the impact on electricity prices as a result of the proposed increase in the MRP may price certain generators out of the market, making it uneconomic for them to stay in service. Assuming these same generators have capacity commitments to ISO-New England through May 31, 2028 (the last capacity auction held by ISO-New England), these generators will be faced with the difficult choice of incurring material costs to either stay in service at an economic loss or pay another generator to cover their capacity commitments. Such an outcome is unnecessary and should be avoided by, at a minimum, delaying the implementation of the MRP increase until these capacity commitments expire.

II. Increasing the MRP Will Not Effectively Reduce GHG Emissions

In this context, increasing the MRP, particularly by such a large percentage, is likely to have perverse impacts. It will decrease generation capacity in Massachusetts, at a time when the development of renewable energy is lagging, such that the decrease in Massachusetts thermal capacity will not be made up by increases in renewable capacity. Instead, decreases in Massachusetts capacity will be replaced by less efficient and higher polluting thermal capacity in other states, mostly elsewhere in New England, but also in other states even further from Massachusetts.

Calpine engaged PA Consulting Group to model the impacts of the increase in the MRP to $9.00/allowance.[2] PA found that, over the next 20 years, through 2043, the

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[1] *See* MassDEP Emissions Inventories, *Greenhouse Gas Baseline & Inventory, Appendix C: Massachusetts Annual Greenhouse Gas Emissions Inventory: 1990-2021, with partial 2022 & 2023 Data*, available at https://www.mass.gov/lists/massdep-emissions-inventories#greenhouse-gas-baseline-&-inventory-.

[2] PA Consulting Group's findings are summarized in the brief presentation attached as Exhibit A to these comments. Calpine would be pleased to arrange a meeting including PA Consulting Group staff and MassDEP staff to discuss PA Consulting Group's methods and findings if that would be helpful to MassDEP.

increased MRP would reduce CO_2 emissions in Massachusetts by 38.5 MM short tons compared to a baseline case. However, the MRP would also cause CO_2 emissions to increase by 34.6 MM short tons in other ISO-NE states, and would lead to an increase in CO_2 emissions in other states outside ISO-NE of 4.3 MM short tons. Thus, the proposed increase in the MRP would result in a net increase in CO_2 emissions of 0.4 MM short tons across the Eastern Interconnect.

III. The Proposed Increase in the MRP Will Impose Significant Costs to Consumers Without Any Environmental Benefit and May Jeopardize Public Support for Climate Action

All other things being equal, if costs were not part of the equation, MassDEP might be willing to tolerate a result in which an increase in the MRP resulted in a small increase in global CO_2 emissions in order to send a signal to markets and other states that Massachusetts is serious about reducing GHG emissions. However, all other things are not equal. PA Consulting Group also analyzed the impact of the increase in the MRP on electricity prices and found that, over the 20-year period from 2024-2043, the proposed increase in the MRP would cost consumers across the Eastern Interconnect more than $3.3 billion. Of that total, more than $1.5 billion would come from the pockets of Massachusetts consumers.[3]

In short, the proposed MRP would increase Massachusetts consumers' costs by $1.5 Billion, without reducing **total** emissions of GHG. Since GHGs are global pollutants, the impacts of which are measured through the atmospheric concentration of CO_2 and other GHGs, reducing emissions in MA does no good when there are concomitant increases in GHG emissions in other states. In other words, MassDEP should take a global view of this global pollutant – looking only at the impacts within the Commonwealth ignores the way in which GHG emissions lead to climate change. To force consumers, both inside and outside of the Commonwealth to collectively pay $3.3 billion in additional costs for electricity for no net emissions benefit would be arbitrary and capricious.

Moreover, even at a political level, to implement a program with such dramatic cost impacts, at a time when consumers are still very concerned about inflation, runs the risk of undermining public support for climate programs in the Commonwealth. This does not seem like a risk that MassDEP should be looking to take.

Additionally, the increase in the MRP cannot be justified because of the additional revenue that will flow to climate mitigation and resilience programs. PA Consulting Group modelled the additional revenue that would flow to Massachusetts as a result of the MRP increase. It found that, over the twenty-year period, Massachusetts would receive an estimated $497 million in additional revenue for these types of programs. In other words, of the additional $3.3 billion in costs that the MRP increase would cause to consumers, the

[3] Residents of other ISO-NE states would pay approximately $1.8 billion more for electricity from the increased thermal generation necessary to replace the Massachusetts generation lost as a result of the increase in the MRP.

Commonwealth would receive only approximately 15% of the additional consumer expenditures to invest in such programs. When compared to the additional $3.3 billion in costs that the MRP increase would cause to consumers, this discrepancy indicates that the proposal's impact on out-of-state generator revenues outweighs its benefit for Massachusetts program funding. From the perspective of the Massachusetts consumer, that is nothing more than waste.

IV. The Proposed Increase in the MRP Would Constitute an Impermissible Tax

The cost implications of the increase in the MRP lead to yet another flaw in MassDEP's proposal – the increase would be a tax that MassDEP does not have authority to impose under the Massachusetts Constitution.

In addition to the obvious procedural deficiencies in MassDEP' rulemaking, the increase in the MRP proposed by MassDEP would be repugnant to the Massachusetts Constitution. *See Nuclear Metals v. Low-Level Radioactive Waste Mgt. Bd.,* 421 Mass. 196*, 206 (1995)***;** *Emerson Coll. v. Boston*, 391 Mass. 415, 425-26 (1984). Unless authorized by statute, Massachusetts administrative agencies do not have the power to tax. *See* Mass. Const. pt. 1, art. XXIII ("No subsidy, charge, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.")

Administrative agencies only have authority to impose regulatory fees, which are based on the police power to regulate particular businesses or activities.[4] *See Denver St. LLC v. Saugus*, 462 Mass. 651, 652 (2012). Three traits distinguish permissible fees from impermissible taxes: (1) fees are charged for a particularized benefit to the applicant not shared by other members of society; (2) fees are paid by choice (meaning they are voluntary not compulsory); and (3) fees are collected ***not*** to raise revenue, but to compensate the governmental entity providing the services for its expenses. *Emerson Coll.*, 391 Mass. at 425-26. Considering the proposed increase in the MRP in the context of these traits, it is clear that the MassDEP seeks to impose an impermissible tax on the electric generation sector. *See Nuclear Metals, Inc.*, 421 Mass. at 207; *Southview Coop. Hous. Corp. v. Rent Control Bd.*, 396 Mass. 395, 404 (1985).

The third trait by itself demands the conclusion that the proposed increase in the MRP is a tax and not a regulatory fee. *See Nuclear Metals, Inc.*, 421 Mass. at 207; *Southview Coop. Hous. Corp.*, 396 Mass. at 404. Administrative agencies do have some latitude in

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[4] Case law distinguishes between two types of administrative agency fees: "user fees" which are imposed based on the rights of the agency/department as the proprietor of instrumentalities used and "regulatory fees" which are based on the police power to regulate particular businesses or activities. *Denver St. LLC,* 462 Mass. at 652. Here, the allowance auction is not a "user fee" because it is not exacting charges from electricity generating facilities incident to their use of any DEP or EEA "instrumentalities." *See id*. Therefore, the allowance auction, in order to be valid, must be justified by MassDEP as a "regulatory fee." *See id*.

fixing charges to cover their anticipated expenses in connection with the services they render. *Southview Coop. Hous. Corp.*, 396 Mass. at 402-04; *see also Opinion of the Justices*, 250 Mass. 591, 602 (1924) ("A license fee may be exacted as part of or incidental to regulations established in the exercise of the police power. Such a fee is commensurate with the reasonable expenses incident to the licensing and all that can rationally thought to be connected therewith.") Nevertheless, a regulatory fee must bear ***some connection*** to the costs of the agency's activity or service. *See Nuclear Metals, Inc.*, 421 Mass. at 207; *Southview Coop. Hous. Corp.*, 396 Mass. at 404.

Here, MassDEP did not and could not articulate any connection whatsoever between the revenues it would derive from the increase in the MRP and its costs to administer the auctions or implement the GHG emissions cap program. First, MassDEP has not in fact attempted to identify the cost to administer either the allowance auctions or the overall regulations at 310 CMR 7.74 (the "7.74 Rules").

MassDEP's brief, two-page Discussion Document[5] does not even mention the cost to operate the allowance auction and does not even begin to suggest that the increase in the MRP is necessary to generate revenue to operate the auction.[6] Indeed, the Discussion Document demonstrates that the opposite is true. In fact, the Discussion Document makes clear that a significant purpose behind the increase in the MRP is to raise revenue for climate programs, not to fund administration of the allowance auctions itself. The Discussion Document states in part that:

> In October 2023, the Massachusetts Climate Chief issued recommendations to Massachusetts agencies, including to: "***consider policy options***, including potentially additional market-based mechanisms, that both reduce emissions and also ***produce a revenue stream that can be used to fund further decarbonization***." Increasing the MRP under 310 CMR 7.74 would be generally consistent with this recommendation.

Discussion Document, p. 2 (emphasis added and footnote omitted).

Given that the third prong of the test to distinguish a permissible fee from an impermissible tax is that "fees are collected not to raise revenue but to compensate the governmental entity providing the services for its expenses," *Emerson Coll.*, 391 Mass. at 425-26, the explicit statement in the Discussion Document that one purpose of the increase in

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[5] https://www.mass.gov/doc/minimum-reserve-price-discussion-document/download. Last accessed August 30, 2024.

[6] It should go without saying, but in fact it is necessary to point out that MassDEP's failure to follow the requirements of notice and comment rulemaking, as discussed in NEPGA's comments, has deprived Calpine, Vistra, and other commenters of an administrative record to support the increase in the MRP. The Discussion Document is pretty much the entirety of what might be considered an administrative record here, and is certainly the only document that even mentions how the revenue from the MRP may be utilized.

the MRP is precisely to raise revenue constitutes an admission that the MRP increase would constitute a tax.[7] Calpine and Vistra do not dispute that funding "further decarbonization" is a worthy objective. However, it is not in any way related to MassDEP's administration of the quarterly emissions allowance auctions. *See Emerson Coll.*, 391 Mass. at 425-26. Therefore, the additional auction revenue from the increase in the MRP cannot be considered simply to be regulatory fees. *See Nuclear Metals, Inc.*, 421 Mass. at 207; *Southview Coop. Hous. Corp.*, 396 Mass. at 404. It follows that the proposed dramatic increase in the MRP must be a tax. *See Nuclear Metals, Inc.*, 421 Mass. at 207; *Southview Coop. Hous. Corp.*, 396 Mass. at 404.

Although noted above, it is worth emphasizing that the increase in the MRP would constitute a very inefficient tax. It would cost Massachusetts taxpayers more than $1.5 Billion but would yield only from $67 million to $565 million in revenue. It would be much more successful in generating revenue for out-of-state generators than it would for Massachusetts climate programs.

V. The Administratively Determined Procurement Quantity Caps do not Consider the Economics of the Real-Time Energy Market

Although not directly relevant to the consequences or legality of the proposed increase to the MRP, Calpine and Vistra wish to emphasize three concerns with the administratively determined emissions allowance caps under the 7.74 Rules:

Firstly, there is a conflict between the quantity procurement caps enforced by the 7.74 Rules and the Real-time Energy Market's ("RTEM") capability to dispatch the most efficient, low-cost resources, as anticipated by the region. These administrative quantity limitations unnecessarily restrict the output from some of the state's most efficient, low-cost production resources, substituting it with output that has less favorable operational characteristics (i.e., higher costs and increased emission output).

Generally, when resources cannot purchase sufficient quantities of allowances in the auction, the owners of frequently dispatched, efficient resources in the RTEM must limit their output in line with the available allowances and raise their bid prices to compensate for the lower facility output. This is an unfortunate, but necessary, outcome to cover facility costs; when the output in the RTEM is reduced by the limited allowances offered, these fixed costs are spread over a smaller megawatt ("MW") quantity at the facility, resulting in a higher cost per MW for Massachusetts ratepayers.

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[7] It is also worth noting here that the size of the increase in the MRP is further evidence that the proposed new MRP of $9.00 per allowance constitutes a tax. It was plausible for MassDEP to argue that an MRP of $0.50 per allowance bears a reasonable connection to the cost of operating the auction; it is not plausible to argue that an increase in the MRP from $0.50 per allowance to $9.00 per allowance is necessary to operate the auction.

Second, for resources that are unable to procure sufficient quantities of allowances due to the administratively determined caps, such resources are left to procure allowances from other allowance holders in the secondary market. However, because allowances do not expire, previously procured allowances can be held by individual companies in perpetuity, further limiting the availability of allowances for efficient resources with high RTEM production. This compounds the problem described above. Under both of these circumstances, efficient resources concede market share to less efficient resources until they are forced to prematurely retire. The quantity caps associated with the 7.74 Rules inefficiently and unnecessarily expedite the retirement of the State's most efficient resources and create outcomes counter to the objectives of the 7.74 Rules.

Lastly, Calpine and Vistra believe that competitive markets should incentivize less efficient facilities to (re)invest and become more efficient, and in turn gain market share. This goal should be supported by MassDEP. However, given the concerns outlined above, any financial benefits resulting from the (re)investment in a facility may be unable to be recovered through the markets, because the investment (making the facility more efficient) is counteracted by unnecessary output limitations in the RTEM.

The most logical outcome of the 7.74 Rules is to have the region's most efficient resources generate the most MWs, providing the region with the most dispatchable power with the least emissions. Also, by focusing on the most efficient resources, the State can achieve its emission reduction targets in a more cost-effective manner. This approach ensures that the resources with the lowest production costs and highest efficiency are utilized to their full potential, thereby minimizing the overall environmental impact while maximizing economic benefits. It is essential to reconsider the current emissions allowance program to align with these objectives and support the long-term sustainability of the Commonwealth's energy market.

VI. Conclusions

The proposed increase in the MRP is both bad policy and impermissible under Massachusetts law. It is bad policy because it will not reduce net emissions of GHG. It would instead merely drive generation to less efficient facilities in other states, particularly in ISO-NE. It is also an extremely expensive policy. It will increase electric generation costs by more than $3.3 billion across the Eastern Interconnect over the next twenty years, with more than $1.5 billion of those costs being borne by Massachusetts consumers. Incurring additional costs of more than $3 billion, for no net reduction in GHG emissions, would unambiguously be arbitrary and capricious.

Finally, the increase in the MRP cannot be justified by the need to raise revenue to fund climate programs. First, of the more than $3.3 billion in additional costs that would result from the increase in the MRP, only 15%, or $497 million would flow to the Commonwealth’s coffers; instead, the vast majority of the costs resulting from the increase in the MRP would simply flow to out-of-state generators. Second, the revenue-raising purpose

of the increase, which was explicitly stated by MassDEP in the Discussion Document, makes clear that the increase would constitute an impermissible tax under Massachusetts law.

For all these reasons, as well as those stated in the NEPGA comment letter, MassDEP should withdraw the proposal to increase the MRP.

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Thank you for your consideration of these comments. Please do not hesitate to reach out to me or to Sarah Novosel of Calpine or Andrew Weinstein and J. Arnold Quinn of Vistra with any questions.

Sincerely,

DocuSigned by:
Seth Jaffe
63AEDAE2726446B...

Seth D. Jaffe

cc: Sarah Novosel, Calpine
Andrew Weinstein, Vistra
J. Arnold Quinn, Vistra

EXHIBIT A

Impact of CO2 Floor Price in Massachusetts

August 2024

Bringing Ingenuity to Life.
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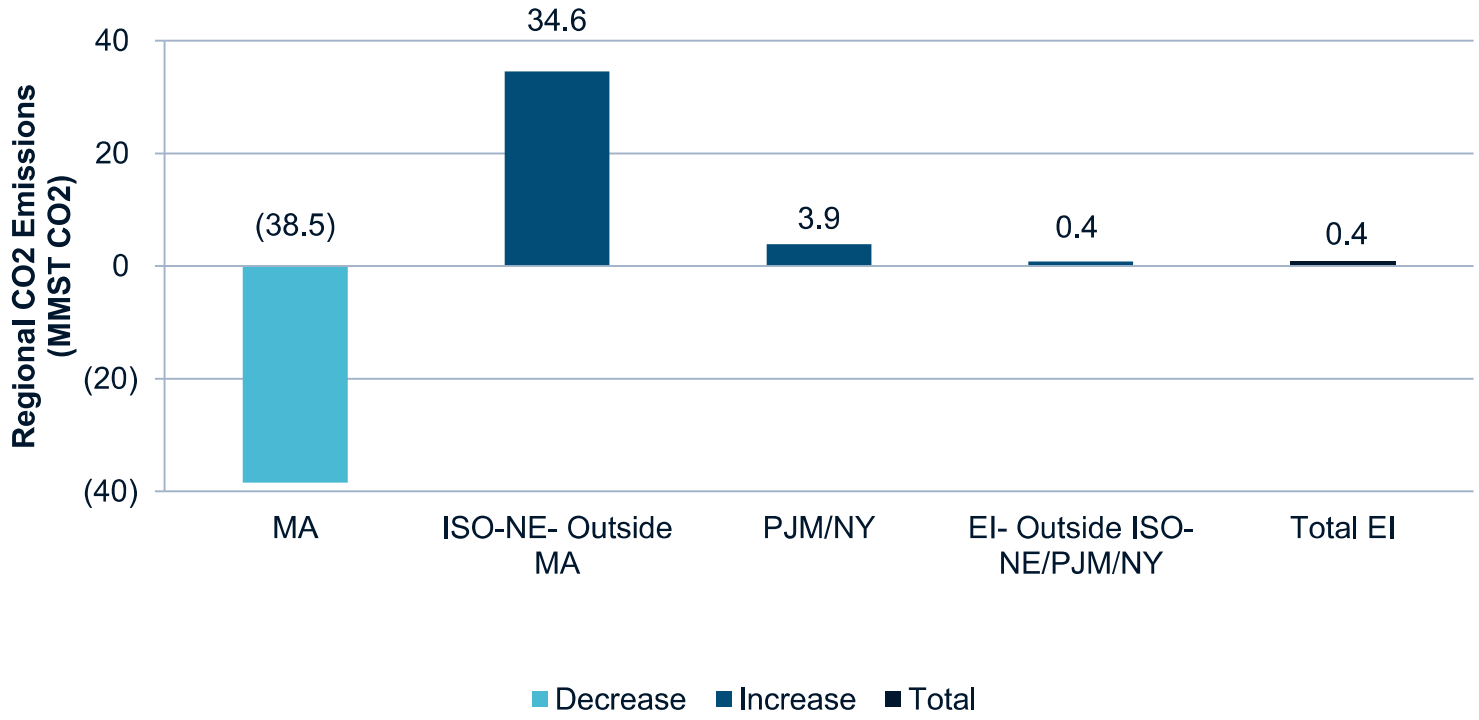
Impact of $9 Floor Price to Total Eastern Interconnect CO_2 Emissions

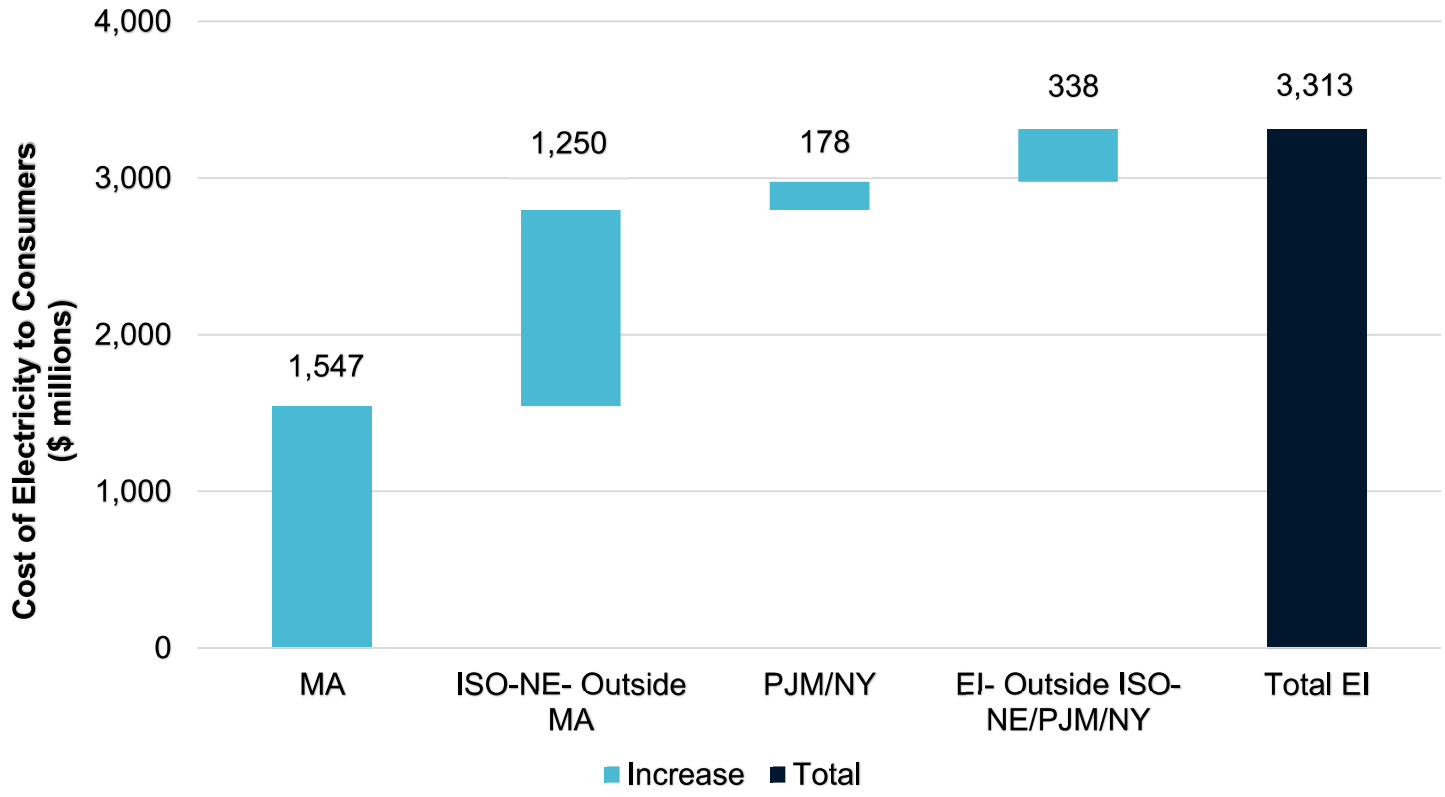
Higher floor price decreases *Massachusetts* CO_2 emissions by 35%, but 90% of this is offset by higher emissions elsewhere in ISO-NE.



Note: PA's analysis covers the period from 2024 to 2043.

Impact of $9 Floor Price on Cost to Consumers

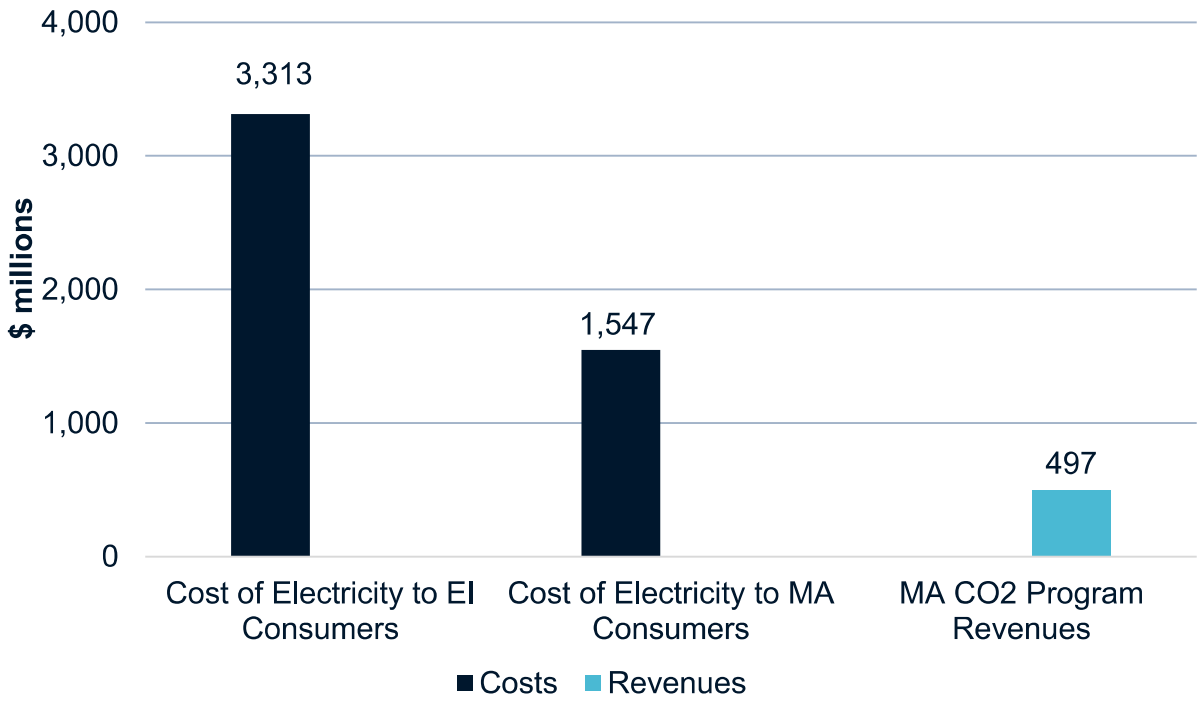
The higher CO_2 compliance costs increases electricity costs for Massachusetts ratepayers by $1.5 billion.



Note: PA's analysis covers the period from 2024 to 2043.

Cumulative Economic Impact of $9 Floor Price

The higher MA CO_2 floor price increases the cost of electricity across the Eastern Interconnect by $3.3 billion, increases the cost of electricity to MA consumers by $1.5 billion, and increases revenues to the MA CO_2 program by $0.5 billion.



Note: PA's analysis covers the period from 2024 to 2043.

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About PA.

We believe in the power of ingenuity to build a positive human future.

As strategies, technologies, and innovation collide, we create opportunity from complexity.

Our diverse teams of experts combine innovative thinking and breakthrough technologies to progress further, faster. Our clients adapt and transform, and together we achieve enduring results.

We are over 4,000 strategists, innovators, designers, consultants, digital experts, scientists, engineers, and technologists. And we have deep expertise in consumer and manufacturing, defence and security, energy and utilities, financial services, government and public services, health and life sciences, and transport.

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September 12, 2024

VIA ELECTRONIC MAIL ONLY

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Department of Environmental Protection
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Subject: Joint Comments from Climate Advocacy Organizations Regarding MassDEP's Proposal to Increase the Minimum Auction Reserve Price under 310 CMR 7.74: Reducing CO2 Emissions from Electricity Generating Facilities

Dear Climate Strategies Division Staff:

The undersigned climate advocacy organizations appreciate the opportunity to submit comments in support of the Massachusetts Department of Environmental Protection's (MassDEP or the Department) proposal to increase the minimum auction reserve price for the electricity sector carbon allowance market. We commend the Department's efforts to strengthen this program as a tool for achieving Massachusetts' greenhouse gas emissions reduction mandate

The undersigned strongly support the adoption of an increased minimum reserve auction price. A higher price floor sends a clear market signal that prioritizes emissions reductions and ensures that Massachusetts continues to lead in promoting clean energy solutions. Beyond this critical adjustment, we urge MassDEP to consider additional program improvements that will further enhance environmental and public health outcomes:

1. **Clear and Transparent Reporting on the Use of Auction Proceeds:**

   It is critical that there be transparency and accountability regarding how the proceeds from the carbon allowance market are spent and are planned to be spent. We recommend that MassDEP implement strict reporting requirements to ensure that proceeds are directed toward both initiatives that reduce greenhouse gas emissions, and support Environmental Justice (EJ) communities, including investments in clean energy, energy efficiency, and public health programs. We also recommend that MassDEP publish a report on projected revenue and a plan for spending at the start of the year.

2. **Expansion of the Program to Include Criteria Pollutants:**

   While targeting CO_2 emissions is an important aspect of reducing the environmental impact of power generation, it is important to recognize that other pollutants, such as nitrogen oxides (NOx), sulfur dioxide (SO_2), and particulate matter (PM & $PM_{2.5}$), also contribute significantly to poor air quality and health risks, particularly in EJ communities. Expanding the program to include these criteria pollutants in the auctions would ensure a more comprehensive approach to addressing the environmental and health impacts of electricity generation. The additional revenue from the criteria pollutants could be directed towards those communities.

3. **Establishing a Different Emission Cap for Power Plants Located Near EJ Communities:**

   Power plants located in or near EJ Environmental Justice communities pose higher health and environmental risks to these populations. To address these disproportionate impacts, we propose that MassDEP considers implementing a differentiated cap on emissions specifically for these facilities. This

approach would involve setting a cap that is stricter and prioritizes emission reductions for the facilities located in EJ areas.

4. **Consistency with Massachusetts Overall Decarbonization Goals:**

   MassDEP's market monitor noted that "if allowance prices observed prior to September 2023 are consistent with MassDEP policy goals for 310 CMR 7.74, then MassDEP could consider increasing the auction reserve price to a level more consistent with these prices."[1] The undersigned agree that using an ambitious threshold that would facilitate achievement of Massachusetts' mandate to achieve net-zero greenhouse gas emissions by 2050 under the Commonwealth's 2021 Climate Roadmap Law[2] is a necessary action. To the extent that this target can be made even more ambitious in pursuit of Massachusetts' decarbonization efforts, the undersigned encourage MassDEP to set a minimum reserve price with swift reduction of greenhouse gas emissions in mind.

In conclusion, increasing the minimum reserve price is a positive step, but expanding the program's scope to address criteria pollutants and focusing on EJ communities will maximize its effectiveness. Additionally, ensuring transparency in proceeds spending will build public trust and ensure that these funds are used to achieve the greatest environmental and health benefits.

Thank you for your leadership on this important issue. We welcome any additional dialogue on this matter.

Sincerely,

Paola Tamayo, Policy Analyst, Acadia Center

Priya Gandbhir, Senior Attorney, Conservation Law Foundation

Larry Chretien, Executive Director, Green Energy Consumers Alliance

Amy Boyd Rabin, Vice President of Policy, Environmental League Of Massachusetts

[1] Potomac Economics "Market monitor comments on raising the auction reserve price level" (Dec. 2023) available at: https://www.mass.gov/doc/market-monitor-memorandum-on-minimum-reserve-price/download.

[2] Mass. Acts 2021, ch. 8.

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September 12, 2024

Comments via email: climate.strategies@mass.gov

Re: Dartmouth Power's Comments on the Proposed Increase to the Minimum Reserve Price for MassDEP's Quarterly Emissions Allowance Auction

To whom it may concern,

Dartmouth Power Associates, L.P. (Dartmouth Power), a subsidiary of Talen Energy, owns and operates a power plant in Dartmouth, Massachusetts. The plant has two gas turbine generators: one 77 MW combined cycle unit (Unit 1) and the other a 24.7 MW simple cycle unit (Unit 2). Both burn natural gas as the primary fuel and have No. 2 fuel oil as a backup fuel. Unit 1 is subject to the Massachusetts CO2 cap and trade program, while Unit 2 is too small to be subject to the rule. Dartmouth has been complying with the CO2 cap and trade regulation, surrendering the necessary allowances at the end of each year, and participating in some of the quarterly auctions for obtaining allowances (Talen Energy Marketing is the entity that participates). Dartmouth understands that Massachusetts Department of Environmental Protection (MassDEP) is proposing to increase the minimum reserve price (MRP) for the CO2 allowances from $0.50/metric ton (tonne) to $9.00/tonne starting in December 2024. Dartmouth is very concerned with the proposal as it, arguably, would have significant economic impact to the State's power generators and citizens with little to no improvements to CO2 emissions. Therefore, Dartmouth would like to provide the comments herein on the proposed changes to the MRP for the quarterly emissions allowance auction as described in the June 2024 Discussion Document entitled *Increasing the Minimum Auction Reserve Price under 310 CMR 7.74: Reducing CO_2 Emissions from Electricity Generating Facilities* ("Discussion Document").

Dartmouth is not a member of the New England Power Generators Association (NEPGA) but has reviewed the group's comments on MassDEP's proposed rule changes and agrees with them. Below are the key points Dartmouth would like to emphasize, including those from NEPGA, with supporting information following:

- The Electric Generation Sector Has Already Made Significant Progress in Reducing GHG Emissions, including through the Regional Greenhouse Gas Initiative (RGGI) which imposes additional costs on Commonwealth thermal generators for CO_2 emissions
- Increasing the MRP Will Not Effectively Reduce GHG Emissions
- The Proposed Increase in the MRP Will Impose Significant Costs to Consumers Without Any Environmental Benefit
- MassDEP's proposed action is a rulemaking that must comply with Chapter 30A and its failure to do so makes the action legally questionable.

Massachusetts Power Plants Have Already Made Significant Progress in Reducing GHG Emissions

Dartmouth notes that the electric generation sector has already made significant strides, particularly in comparison to other sectors of the economy that are responsible for considerable greenhouse gas ("GHG") emissions. According to MassDEP's own data, as of 2021, the most recent year for which complete data is available, the electric generation sector has reduced emissions since 1990 by 55.7%, as compared to 20.7% for the building sector and 13.5% for the transportation sector. (Appendix C under GHG reports on: https://www.mass.gov/lists/massdep-emissions-inventories#greenhouse-gas-baseline-&-inventory-).

Moreover, GHG emissions from the existing thermal generation fleet have largely been reduced as much as is reasonably feasible and these emissions reductions have achieved the targets set forth for the sector in the Global Warming Solutions Act ("GWSA"). Further reductions in GHG emissions from the electric generation sector are only going to occur when sufficient renewable sources are available to displace thermal generation. In the meantime, thermal generation resources are necessary to keep the lights on.

In addition, thermal generators in Massachusetts participate in RGGI which is designed to drive CO_2 emission reductions and imposes CO_2 compliance costs above and beyond the Massachusetts CO_2 allowance program. Through program evolutions, RGGI has and by all accounts will continue to drive CO_2 emission reductions and impose increasing compliance costs on Commonwealth generators. Any analysis of CO_2 emission reductions and proceeds to support Massachusetts clean energy programs should recognize the significant progress and proceeds made available through the RGGI program.

Increasing the MRP May Not Reduce Overall GHG Emissions

Increasing the MRP, particularly by such a large percentage and so quickly, will drive up the cost of every MWhr generated in the Commonwealth from the existing fossil plants, which are relied upon for a stable and reliable grid in Massachusetts. As costs go up from certain sources in a deregulated market, the electricity demand still must be met, so other cheaper out-of-state sources will take the place of Massachusetts fossil generation, like that from Dartmouth. Renewable energy development is lagging and will not quickly take its place, so fossil generation from other states in New England and beyond will be needed. Fossil generation outside Massachusetts will likely emit the same or more CO_2 than the units in-state, essentially swapping CO_2 sources and without generating any revenue for the out-of-state CO_2. This would take place in the short-term as the demand is being met on a daily basis, but the shift may also be become permanent, if in-state generators such as Dartmouth, are too expensive to meet demand and must retire.

The Proposed Increase in the MRP Will Impose Significant Costs to Consumers Without Any Environmental Benefit

Dartmouth understands that no single change to a market will cause a single, discreet change, i.e., not all in-state demand will be met by out-of-state generation after the increase in MRP. But, adding a cost to the generation in-state will drive the price of power up for the in-state users, as the market will settle at a price that covers the costs. And that cost will be borne by the citizens of Massachusetts.

That may be acceptable to some citizens, if there was a corresponding decrease in CO_2 emissions; however, the proposed increase in the MRP would not reduce **total** emissions of GHG. Since GHG is a global pollutant, the impacts of which are measured through the

atmospheric concentration of CO_2 and other GHGs, reducing emissions in Massachusetts does no good when there are increases in GHG emissions in other states that would be caused by the shifting (leakage) of generation to out-of-state fossil generation. To force consumers and business alike, both inside and outside of the Commonwealth to pay electricity bills for no net emissions benefit would be arbitrary and capricious.

MassDEP's Proposed Action Is a Rulemaking That Must Comply With Chapter 30A and Its Failure To Do So Makes the Action Legally Questionable.

Dartmouth supports the comment made by NEPGA that this proposed action by MassDEP to increase the MRP should be considered a regulatory change that warrants the full public notice process under Chapter 30A. The proposed change to the MRP, potentially an 18-times increase in one of our business's costs, is a significant change and will affect businesses like Dartmouth throughout the Commonwealth. Furthermore, since, to some degree, that increased cost will get passed on to the residences and other businesses of Massachusetts, the public at large should be provided their full rights for reviewing and commenting on regulatory changes. This deficiency is made more glaring by the fact that Massachusetts treats changes to the original CO_2 cap and trade program, RGGI, as a regulatory change with extensive public outreach, notice and comment. If MassDEP intends to increase the MRP, it must reissue the substance of the Discussion Document as a formal notice of proposed rulemaking and set in motion the rigorous public participation process prescribed by Chapter 30A.

Conclusions

The proposed increase in the MRP is both bad policy and it is being done without the required public involvement. It is bad policy because it will not reduce net emissions of GHG. It would instead merely shift generation to less efficient facilities in other states, particularly in ISO-NE. It is also an extremely expensive policy by increasing costs to the in-state generators and the residences and businesses of Massachusetts. Incurring additional costs, for no net reduction in GHG emissions, would be arbitrary and capricious.

Additionally, given the size and scope of the change being proposed, MassDEP has not followed the correct Chapter 30A procedures for public involvement. The public is not fully informed of what is actually a rulemaking and this makes MassDEP's efforts legally questionable.

Dartmouth and its parent company Talen Energy appreciate the opportunity to provide comments on MassDEP's MRP increase proposal. If you have any questions or need further information, please reach out to me (contact info in letter heading).

Sincerely,

Thomas Weissinger
Sr. Director, Environment

cc: Wesley Greig, Dartmouth Power
Dale Lebsack, Talen Energy

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July 5, 2024

climate.strategies@mass.gov.

Re: Request for Extension of Time to File Public Comments on MassDEP Discussion Document

To whom it may concern:

On behalf of our client New England Power Generators Association ("NEPGA")[1] and its members, we submit this request for additional time to file public comments on the recently published Massachusetts Department of Environmental Protection ("MassDEP") Discussion Document entitled *Increasing the Minimum Auction Reserve Price under 310 CMR 7.74: Reducing CO_2 Emissions from Electricity Generating Facilities* ("Discussion Document"). The Discussion Document proposes to institute a new minimum reserve price that would be eighteen times the current minimum reserve price for MassDEP's quarterly emissions allowance auction, with the increase in the minimum reserve price to take effect in advance of the September 2024 auction. As a threshold matter, this seismic increase in the minimum reserve price will cause substantial adverse impacts on NEPGA's members, though the breadth and depth of these impacts are not yet fully understood. That is because NEPGA's members have had barely two weeks to analyze the potential impacts of an artificially inflated minimum reserve price on their respective economic models and generation forecasts.

For the reasons set forth below, **MassDEP should extend the deadline for public comments on the Discussion Document from July 12, 2024 to September 12, 2024**. This extension of time will permit NEPGA's members to actually analyze and evaluate the expected impacts of the inflated minimum reserve price. In turn, it will afford them time to develop and submit valuable data and analyses to MassDEP, which will contribute to a more robust record for the proposed change.

First, providing less than one month for regulated entities to evaluate and respond to a market-altering change to the minimum reserve price is objectively unreasonable. The current $0.50 auction reserve price for emissions allowances has been in place since 2018.

[1] The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular NEPGA member.

Prior to MassDEP's publication of the Discussion Document on June 18, 2024, NEPGA's members had no reason to anticipate such a dramatic change to the auction format. Before that date, NEPGA's members were not apprised of MassDEP's intention to modify the minimum reserve price. MassDEP convened no industry roundtables nor engaged in any informal discussions with regulated entities to solicit feedback or signal that a change might be forthcoming. As a consequence, NEPGA's members were blindsided by the Discussion Document and left with less than a month to consider its impacts and draft cogent public comments.

This abbreviated public comment period – comprising only 16 working days because of the Juneteenth and July 4th state holidays – is woefully inadequate and inequitable given the lack of prior transparency and collaboration. This is especially true given the total absence of justification in the Discussion Document for the abbreviated public comment timeline. Although MassDEP cites the Massachusetts' Climate Chief's October 2023 recommendation to "consider policy options … that both reduce emissions and also produce a revenue stream that can be used to fund further decarbonization," that citation alone does not justify such a truncated public process.

It bears emphasis that the limited public process articulated in the Discussion Document stands in stark contrast to the robust stakeholder participation process for modifying the emissions cap for the Regional Greenhouse Gas Initiative ("RGGI"), which MassDEP has frequently identified as a model for the 7.74 Rules. Changes to the RGGI cap required months of consideration, substantial public comments and approval by individual states, which collectively ensured that impacts from proposed changes are well understood and considered by both the regulators and the regulated. To operate a similar cap and trade program without the same collaboration and stakeholder input would be to ignore the recognition in RGGI that energy generation markets are complex and that changes to the market for allowances should not be made without thorough vetting and an opportunity for those subject to the rules to analyze them and provide meaningful comment.

Second, although couched as a "Discussion Document" rather than a notice of proposed rulemaking, the change to the minimum reserve price proposed in the Discussion Document would be, in substance, every bit a "standard or other requirement of general application and future effect"[2] for the relevant regulated entities (*i.e.*, electricity generating facilities). The $9.00 minimum reserve price will operate prospectively and apply to all bidders in all future emissions allowance auctions until MassDEP sets a new reserve price. Because the change in the minimum reserve price has all the attributes of a regulation, MassDEP should have complied with the Commonwealth's formal notice and comment rulemaking process set forth in G.L. c. 30A. Although the Discussion Document does not propose changes to the text of the 7.74 Rules, it does propose prospective, generally applicable changes to the rights and obligations of electricity generating facilities in the

[2] As "regulation" is defined under Mass. General Laws chapter 30A.

Commonwealth and dictates how the auction established by the 7.74 Rules will function with respect to those entities. Because MassDEP's cursory opportunity for notice and comment has deprived those subject to the 7.74 Rules of a meaningful opportunity to review and comment on the very significant change MassDEP has proposed, MassDEP should pause, step back, and provide such a meaningful opportunity to comment.

Third, and finally, such an abbreviated public notice/comment period would deprive MassDEP of more detailed and thoughtful public comments that may inform its final decision regarding the appropriate minimum reserve price. Given the stated purposes of the Global Warming Solutions Act, G.L. c. 21N, and the 7.74 Rules to reduce aggregate CO_2 emissions from the electricity generating sector, it is critical that electricity generating facilities and other industry stakeholders be able to evaluate the impacts of the proposed change to the minimum reserve price and provide comments concerning whether it may, in fact, undermine those stated purposes.

Because of the regional system in which NEPGA's members operate, increasing the marginal cost of generation inside the Commonwealth could simply push demand outside of the Commonwealth to other generators in the ISO-NE region. NEPGA's members should be afforded sufficient time to either review these potential implications and how or whether MassDEP has considered issues such as these. It is noteworthy that MassDEP has never previously held an auction in which the minimum reserve price could so substantially interfere with market prices.

NEPGA's members are actively engaged in gathering data and performing certain analyses concerning the likely impacts of MassDEP's proposal. These activities necessarily require additional time beyond the 16 working days afforded to stakeholders in the Discussion Document. In order to solicit meaningful and informed stakeholder input on the proposed change to the minimum reserve price, MassDEP should extend the public comment period until September 12, 2024 and allow NEPGA's members to complete their inchoate analyses.

Thank you for your consideration of this request. Please do not hesitate to reach out to me with any questions.

Sincerely,

DocuSigned by:
Seth Jaffe
63AEDAE2726446B...
Seth Jaffe

Cc: Secretary Rebecca Tepper
Climate Chief Melissa Hoffer
Commissioner Bonnie Heiple

Comments of VITOL INC.

To the Massachusetts Department of Environmental Protection

Discussion Document on Increasing the Minimum Action Reserve Price under 310 CMR 7.74: Reducing CO2 Emissions from Electricity Generating Facilities

September 12,2024

Seth Cochran
Head of Strategic Market Policy
Vitol Inc.
sco@vitol.com

Vitol Inc. (Vitol) appreciates the opportunity to provide input to the Massachusetts Department of Environmental Protection's (MassDEP) proposed decision to increase the minimum auction reserve price from $0.50 to $9.00 per allowance starting with the September 2024 auction. We support MassDEP's efforts to maintain a viable allowance program and the need to align the minimum reserve price with its policy goals. While we support the proposal, we are concerned the implementation time period does not provide sufficient advanced notice to stakeholders. We submit that once the proposal is finalized there should be an implementation period that spans a sufficient time period for the market to adjust to the change. This will protect the market from sudden policy changes that introduce a material risk in the energy and emissions markets. Specifically, we propose that rule changes impacting price formation should have a 180-day implementation phase that starts once there is an order issued. This would prevent market distortions that can occur from imposing administrative and unnecessary risks. For example, consider an electric generation owner who sold forward for an upcoming season and thereafter an increase to the minimum reserve price is announced and quickly implemented. If the supplier did not incorporate this risk into its offer, then its awarded price may not cover the increased cost of emission allowances. Going forward, with the understanding of the risk of a sudden rule change, the generator would reflect this cost in its offer at all times. This poses an ongoing and unnecessary cost to buyers that could be avoided by setting an implementation time period that provides time for the market to adjust. In addition, the absence of this risk would make it easier for willing buyers and sellers to assess the fair value of emission allowances. This would lead to a more robust market place with narrower bid-ask spreads, which in turn increases market liquidity and forward price discovery.

We appreciate MassDEP's consideration of our comments and are hopeful the revision process can be modified to include a more defined timeline for implementing policy changes.

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September 12, 2024

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Re: NEPGA's Comments on the Proposed Increase to the Minimum Reserve Price for MassDEP's Quarterly Emissions Allowance Auction

To whom it may concern:

On behalf of our client, the New England Power Generators Association ("NEPGA"),[1] and its members, we would like to thank the Massachusetts Department of Environmental Protection ("MassDEP") for extending the deadline for the submission of public comments on the proposed changes to the minimum reserve price ("MRP") for the quarterly emissions allowance auction as described in the June 2024 Discussion Document entitled *Increasing the Minimum Auction Reserve Price under 310 CMR 7.74: Reducing CO_2 Emissions from Electricity Generating Facilities* ("Discussion Document"). We would also like to thank Commissioner Heiple and the senior MassDEP staff members who met informally with NEPGA leadership on August 1, 2024 to discuss the proposed increase to the MRP and MassDEP's anticipated timeline for implementing such increase.

Although NEPGA appreciates MassDEP's willingness to engage on this topic, NEPGA and its members remain deeply concerned about the inadequate public process involved in MassDEP's unilateral decision to increase the MRP to an amount that is 18 times its historical level. MassDEP's decision to eschew formal notice and public comment rulemaking for such a significant programmatic change that will substantially alter the rights and responsibilities of numerous electricity generating facilities in the Commonwealth deprived those regulated entities of the opportunity to participate in the agency's decision-making process. This opportunity should have been afforded to them and to the public at large under the Massachusetts Administrative Procedures Act, G.L. c. 30A ("Chapter 30A"). In short, extending the period of time for the public to submit comments on the Discussion Document and engaging in informal meetings with certain stakeholders does not cure the agency's procedural failure to comply with Chapter 30A.

[1] The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular NEPGA member.

Even if MassDEP cures this procedural error and reintroduces its proposal through formal notice and comment rulemaking, NEPGA and its members also remain concerned about the substantive impact of such a significant and unprecedented programmatic change. An abrupt, 18-fold increase in the MRP has the potential to upset the current functioning of the emissions allowance auction and introduce uncertainty into a program that has operated with stable rules and procedures since the first auction was held almost six years ago. In order to achieve one of the purposes identified by MassDEP as the justification for the proposed increase in the MRP – *i.e.*, fostering stability and predictability in the quarterly emissions allowance auction[2] – MassDEP should adopt a phased approach to increasing the MRP. On that score, NEPGA recommends that MassDEP raise the MRP ratably from $2.45 to $9.00 over the period of 3 years (*i.e.*, 12 auctions). This phased implementation would allow auction participants to carefully recalibrate their bidding behavior and avoid the potentially destabilizing impacts of a sudden spike in the MRP.

NEPGA's specific concerns regarding the inadequate process that led to the publication of the Discussion Document and recommendations for a phased implementation for the proposed increase in the MRP are addressed more fully in the sections that follow.

1. MassDEP must comply with Chapter 30A to increase the MRP and its failure to do so renders any increase legally infirm and vulnerable to challenge.

In issuing the Discussion Document, MassDEP did not comply with the procedures set forth in Chapter 30A. As a result, MassDEP ignored its statutory duty to provide broad notice of the proposed increase to the MRP, which precluded informed and engaged public participation in the rulemaking. *See Colby v. Comm'r of Pub. Welfare*, 18 Mass. App. Ct. 767, 779-80 (1984).

To be clear, MassDEP is unambiguously engaging in rulemaking. Although couched as a "Discussion Document" rather than a notice of proposed rulemaking, the change to the MRP proposed in the Discussion Document would be every bit a "standard or other requirement of general application and future effect"[3] for the relevant regulated entities (*i.e.*,

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[2] These purposes were set forth in the Discussion Document and the December 19, 2023 memorandum drafted by Potomac Economic ("Market Monitor") and entitled *Market monitor comments on raising the auction reserve price level ("Market Monitor Comments")*, and confirmed in MassDEP's Response to Questions, available at: https://www.mass.gov/doc/questions-and-answers-on-minimum-reserve-price/download.

[3] As "regulation" is defined under Chapter 30A. *See* G.L. 30A, § 1(5) ("'Regulation' includes ***the whole or any part of every rule, regulation, standard or other requirement of general application and future effect***, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (d) regulations relating to the use of the public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings.") (Emphasis added).

electricity generating facilities). The Discussion Document proposes prospective, generally applicable changes to the rights and obligations of electricity generating facilities in the Commonwealth and dictates how the auction established by the 310 CMR 7.74 (the "7.74 Rules")[4] will function with respect to those entities. Said differently, the new $9.00 MRP will operate prospectively and apply to ***all bidders*** in ***all future emissions allowance auctions*** until MassDEP sets a new MRP.

Because an increase in the MRP has all the attributes of a regulation, MassDEP is required to comply with the Commonwealth's formal notice and comment rulemaking process set forth in Chapter 30A. *See, e.g.*, *Fairhaven Hous. Authority v. Commonwealth*, 493 Mass. 27, 33 n.14 (2023); *DeCosmo v. Blue Tarp Redev., LLC*, 487 Mass. 690, 695 (2021) ("In fact, the blackjack rules, although not true regulations, largely match the statutory definition of a regulation in the administrative procedure statute. Therefore, we read the regulations and the blackjack rules together, as we would different sections of regulations and we interpret both in the same manner as a statute, and according to traditional rules of construction.") (Internal citations and quotations omitted.)

Specifically, administrative agencies in the Commonwealth, including MassDEP, must provide notice of, and the opportunity to comment, on all proposed regulations. G.L. c. 30A, §§ 2-3. When an administrative agency promulgates regulations without first apprising the public of its intentions, the rulemaking is defective and the regulations are invalid. G.L. c. 30A, §§ 2-3; *see, e.g., Mass. Gen. Hosp. v. Comm'r of Admin.*, 353 Mass. 369, 375 (1967) (regulations not validly issued because of failure to comply with provisions of c. 30A). This required public notice "shall refer to the statutory authority under which the action is proposed; give the time and place of the public hearing; either state the express terms of or describe the substance of the proposed regulation; and include any additional matter required by any law." G.L. c. 30A, § 2 (emphasis added); *see also Colby*, 18 Mass. App. Ct. at 779 (General Laws c. 30A, § 3, as appearing in 1976 Mass. Acts c. 459, § 3, requires that the notice must "either state the express terms or describe the substance of the proposed action.")

[4] The 7.74 Rules permit MassDEP to establish an MRP. However, the 7.74 Rules do not set a specific MRP or establish a specific process for MassDEP to set that number. *See* 310 CMR 7.74(2), (6)(h)1.f and (6)(h)(2). While MassDEP did not comply with Chapter 30A when setting the original $.50 MRP for the quarterly emissions allowance auctions, the fact that MassDEP ignored Chapter 30A during a prior rulemaking does not excuse compliance with Chapter 30A for future rulemakings. Critically, Chapter 30A does not prescribe a deadline for challenging agency regulations. *Contrast* G.L. c. 30A, § 7 (no deadline for judicial review of regulations) *with* § 14 (30-day deadline for appeals from final decisions of agencies in adjudicatory proceedings).

Here, MassDEP did not comply with G.L. c. 30A, § 2, which requires, for the adoption, amendment or repeal of regulations requiring a public hearing,[5] that an agency give notice at least twenty–one days prior to the date of the public hearing by:

(a) publishing notice of such hearing in such manner as is specified by any law, or, if no manner is specified, then in such newspapers, and, where appropriate, in such trade, industry or professional publications as the agency may select;

(b) notifying any person to whom specific notice must be given, such notice to be given by delivering or mailing a copy of the notice to the last known address of the person required to be notified;

(c) notifying any person or group filing a written request for notice of agency rule making hearings such request to be renewed annually in December, such notice to be given by delivering or mailing a copy of the notice to the last known address of the person or group required to be notified; and

(d) filing a copy of such notice with the state secretary.

MassDEP is, of course, familiar with the above-described process, having regularly published formal notices of proposed rulemaking throughout the agency's existence, and most specifically for purposes here, when it first promulgated the 7.74 Rules in 2017 and when it amended those rules.[6] Alternative forms of public notice or modified public participation processes – such as the circumscribed process outlined in the Discussion Document – are not sufficient and do not discharge MassDEP of its clear obligations under Chapter 30A.

And MassDEP's failure to comply with the strictures of G.L. c. 30A is not merely a foot fault. As noted in NEPGA's initial comment letter on the Discussion Document dated July 5, 2024, the limited public process following MassDEP's issuance of the Discussion Document stands in stark contrast to the robust stakeholder participation process for modifying the emissions cap for the Regional Greenhouse Gas Initiative ("RGGI"), which MassDEP has frequently identified as a model for the 7.74 Rules. Whenever RGGI modifies the emissions cap or otherwise proposes programmatic changes that would be akin to new "regulations" under Massachusetts law, it engages in months of consideration, substantial public comments and approval by individual states, which collectively ensure that impacts

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[5] MassDEP has previously determined that promulgation of and amendments to the 7.74 Rules required public hearings.

[6] *See, e.g., Response to Comment on Amendments to: 310 CMR 7.74 Reducing CO2 Emissions from Electricity Generating Facilities* (December 2017), available at https://www.mass.gov/doc/310-cmr-774-response-to-comments/download; Response to Comment on Proposed Amendments to: 310 CMR 7.74 Reducing CO2 Emissions from Electricity Generating Facilities (July 2018), available at https://www.mass.gov/doc/310-cmr-774-response-to-comment-0/download.

from the proposed changes are well understood and considered by both the regulators and the regulated. For example, when RGGI engages in a "Program Review"[7], the RGGI states[8]:

(a) Conduct technical analyses, including electricity sector modeling, to inform decision-making related to core Program Review topics, such as the regional CO_2 emission cap;

(b) Solicit input from communities, affected groups, and the general public on the Program Review process and timeline, core topics and objectives, modeling assumptions and results, and other policy and design considerations; and

(c) Convene independent learning sessions with experts and other interested parties on key design elements.

Indeed, the RGGI Program Review materials make clear that "public participation is a key component of a successful Program Review" and that the RGGI states will "conduct public engagement throughout [a] Program Review, including periodic public meetings and accompanying open comment periods, to share updates and solicit public feedback." And while the MRP change proposed here is not a full "Program Review," RGGI does not make any material market or auction change outside of this process. Therefore, given that MassDEP has repeatedly cited RGGI as a comparable program to the 7.74 auctions, the RGGI Program Review process is an apt comparison for the changes the MassDEP is proposing here.

To operate a similar cap and trade program without the same collaboration and stakeholder input when making a change that meets the definition of a regulation would be to ignore the recognition in RGGI that energy generation markets are complex and that changes to the market for allowances should not be made without thorough vetting and an opportunity for those subject to the rules to analyze them and provide meaningful comment.

At bottom, in attempting to increase the MRP without providing the statutorily-mandated notice of proposed rulemaking and attendant opportunity for the public to understand and comment on its proposal, MassDEP violated Chapter 30A and fundamental principles of administrative agency rulemaking. *See* G.L. c. 30A, §§ 2-3; *Colby*, 18 Mass. App. Ct. at 779-80. In so doing, MassDEP deprived electricity generating facilities and the public of the primary purpose of notice and comment rulemaking. *See Colby*, 18 Mass. App. Ct. at 779-80 ("Such notice is designed to assure fairness and mature consideration of rules").

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[7] Program Review details available at: https://www.rggi.org/program-overview-and-design/program-review.

[8] Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

If MassDEP intends to increase the MRP, it must reissue the substance of the Discussion Document as a formal notice of proposed rulemaking and set in motion the well-trodden public participation process prescribed by Chapter 30A. And, to be clear, MassDEP must in the future engage in this same public process each time it proposes any "rule, regulation, standard or other requirement of general application and future effect" for the emissions allowance auction. *See* G.L. 30A, § 1(5).

2. MassDEP should phase in any increase to the MRP.

Assuming that MassDEP reboots this process and issues a formal notice of proposed rulemaking as required under Chapter 30A, NEPGA recommends that the proposed rulemaking incorporate a phased approach to increasing the MRP. As noted above, NEPGA recommends that MassDEP increase the MRP from $2.45 – *i.e.*, the lower bound of the range recommended by the Market Monitor[9] – to $9.00 over a three-year period to allow the regulated community the time and flexibility to adjust to what would otherwise be a seismic change in the mechanics of the quarterly emissions allowance auction.

Specifically, NEPGA proposes the following implementation schedule for the proposed increase in the MRP:

Auction Date	**MRP[10]**
September 2024	$ .50
December 2024	$ .50
March 2025	$ 2.45
June 2025	$ 3.05
September 2025	$ 3.65
December 2025	$ 4.25
March 2026	$ 4.85
June 2026	$ 5.45

[9] *See* Market Monitor Comments, p. 3.

[10] The commencement date for any increase in the MRP is contingent on the amount time it will take for DEP to complete the notice and comment rulemaking process required by Chapter 30A. In light of the expected timeline for that process, the implementation schedule proposed in this comment letter assumes that the first increase to the MRP could occur no sooner than the auction scheduled for March 2025.

September 2026	$	6.05
December 2026	$	6.65
March 2027	$	7.25
June 2027	$	7.85
September 2027	$	8.45
December 2027	$	9.00

This phased approach would allow auction participants to adjust to the proposed increase in the MRP and, to a certain extent, allow the market to continue functioning competitively. With the exception of certain recent auctions, auction clearing prices have historically been lower than $9.00. This means that auction participants have had flexibility to bid based on market factors including their internal forecasts for electricity demand and facility dispatch, while also being able to leverage the secondary market for allowances to cover for any shortfalls. Certainly, there have been auctions that have cleared above $9.00 and future auctions may clear above that threshold as a result of the competitive forces at play within those auctions. However, future auction clearing prices should be dictated by regulated participants in compliance with the emissions requirements that the auction is designed to drive, not by an externality that constrains the competitive market. By instead increasing the MRP to a level above the historical average auction clearing price, MassDEP would artificially restrict these market forces in a manner that will increase costs of operation for certain electricity generating facilities in the Commonwealth and fundamentally change how emissions allowances are priced and exchanged in the secondary market.

These impacts indisputably are material changes to the way the emissions allowance auction has operated since its inception. If MassDEP truly intends for the proposed increase in the MRP to result in more stability and predictability, then it should acknowledge these impacts and gradually increase the MRP, which would provide auction participants with the time necessary to recalibrate their bidding and market behaviors in response to the new auction regime.[11] In other words, MassDEP should help flatten the learning curve as it did in

[11] We note that, at the August 1 meeting, MassDEP representatives suggested that there would be no point to phasing in an increase in the MRP, because generators would respond to the advance notice of the increase by raising their bids to a level at or just below the future MRP. NEPGA believes that this reasoning is flawed. First, bidders' behavior is affected by a number of factors, not merely by the expected future price. Second, to the extent that bidders do adjust their behavior, and bids do increase, that would merely mean that, by phasing in the increase in the MRP, the Department could still accomplish its objectives while preserving flexibility for those generators whose behavior is not solely driven by knowledge of future MRP increases.

2018-2020 when it phased in the new auction concept and transitioned away from the free allocation of allowances to generators. *See* 310 CMR 7.74(6)(a)(1-3).

Finally, adopting the proposed phased implementation schedule would be an appropriate acknowledgement that the electricity generation sector has already achieved its fair share emissions reductions in the Commonwealth. At every juncture since the Global Warming Solutions Act ("GWSA") took effect, the electricity generation sector has met or exceeded its emissions reduction targets while other sectors addressed by the GWSA have lagged behind. Instead of addressing the laggards, MassDEP has consistently turned the screws on the exemplar. Now, MassDEP is proposing to not only rely on the generation sector to shoulder an increasingly disproportionate share of emissions reductions, but also to fund climate change initiatives through the additional revenue DEP will collect from the increase in the MRP. MassDEP has expressly stated that the third animating purpose behind its proposal to increase the MRP is to "produce a revenue that can be used to fund further decarbonization."[12] While MassDEP's impulse may be to continue to lean solely on the electricity generating sector to achieve its policy goals, including fundraising for unspecified future decarbonization efforts, targeting this sector for additional exactions is both misguided and inequitable. A phased implementation schedule for increases to the MRP would at least lessen the financial impact of funding initiatives that should be borne by a broader base of emitters.

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Thank you for your consideration of these comments. Please do not hesitate to reach out to me or to Dan Dolan or Molly Connors of NEPGA with any questions.

Sincerely,

DocuSigned by:
Seth Jaffe
63AEDAE2726446B...

Seth D. Jaffe

cc: Dan Dolan, NEPGA
Molly Connors, NEPGA

[12] *See* Discussion Document, p. 2.

August 8, 2024

Commissioner Heiple
Massachusetts Department of Environmental Protection
100 Cambridge Street, Suite 900
Boston, MA 02114
Electronic Submission: climate.strategies@mass.gov

RE: Increasing the Minimum Auction Reserve Price under 310 CMR 7.74

Commissioner Heiple,

Please accept the following comments in response to the Massachusetts Department of Environmental Protection ("MassDEP" or the "Department") Discussion Document regarding a proposed increase of the minimum price for allowance auctions conducted pursuant to 310 CMR 7.74. As an energy provider, Vicinity Energy Inc. ("Vicinity") fully supports Governor Healey's vision on building a thriving and sustainable Commonwealth and we are excited to be a partner in the effort to reduce greenhouse gas emissions ("GHG") in the communities we serve. However, as explained herein, Vicinity has serious concerns regarding the proposed increase of the minimum reserve price ("MRP") from $0.50 to $9.00 per allowance and urges you to continue following the original path set forth under the Global Warming Solutions Act ("GWSA") and allow the market to dictate allowance pricing. The 1,700% proposed increase will have adverse impacts on the overall goal of reducing GHG.

To understand the context of our comments, it is important to understand Vicinity, our history and our future. Vicinity is the largest provider of district energy solutions in North America. Here in Massachusetts, with a portfolio of 71 million square feet of space in Boston and Cambridge, Vicinity has been at the forefront of efficient district thermal energy generation and distribution since its origination as part of Boston Edison. Our thermal energy heats buildings, heats and chills water, and supports sterilization and humidification for key downtown hospitals and healthcare facilities, highlighting the critical importance of ensuring a consistent and reliable energy supply as we transition towards a decarbonized future. Most recently, Vicinity began an aggressive effort to decarbonize and electrify its district energy system. We are in the process of installing an industrial-sized electric boiler running on renewable power at times when renewable power is under-utilized. More dramatically, Vicinity is actively designing and constructing the first of its kind in North America heat pump to draw thermal energy from the Charles River. Our next venture will be the installation of thermal energy storage which will also use renewable energy at times when renewable energy is under-utilized. By reducing electricity use during peak demand, Vicinity will take pressure off the electrical grid when power usage is at its highest, while also reducing costs for customers.

Vicinity's plans to further accelerate our decarbonization efforts in Boston and Cambridge will be significantly impacted by the drastic MRP increase from $0.50 to $9.00 per allowance, a 1,700% increase as it diverts a crucial investment resource for our decarbonization efforts. While we understand that the motive for the MRP increase is to create price stability and predictability, this sudden and drastic

increase not only contradicts the original intent of the allowance market, but also disrupts Vicinity's investment plan for the decarbonization our district energy system.

The goal of the GWSA is equal parts simple and ambitious: decrease GHG emissions within the Commonwealth. That goal is pursued through a deft balancing act of reducing emissions limits, and therefore the emission themselves, while simultaneously maintaining critical electricity production within the Commonwealth. As originally contemplated, the Department understood that this balancing was important because the imposition of a sudden and substantial fiscal barrier to electricity production would result in leakage of generation out-of-state and no overall emissions reduction. *See New England Power Generators Association, Inc. v. Department of Environmental Protection, 480 Mass. 398, 409 (2018) (discussing the interplay of the GWSA and the CES Regulation, 310 CMR 7.75, concluding "the agencies predict that the Cap Regulation's limit on greenhouse gases will be met without any decrease in production by Massachusetts fossil fuel generators.")*

With respect to the original intent of the auction program, the 2018 Technical Support Document, under Section IV: Impacts of Proposed Amendments, includes the following language: *"Economic Impacts: The amendments will have minimal economic impacts during 2019 and 2020, if any, and will not have any impact after 2020. If stakeholders are correct regarding the benefits of a transition, then the amendments could reduce any economic impacts of 310 CMR 7.74 by improving the efficiency of the allowance market.* ***However, given projected low allowance prices, possibly equal to zero, significant impacts are not anticipated.***" This language underscores that the program was developed with the expectation of low allowance costs, and MassDEP's proposal appears to fundamentally alter this initial intent. It is not clear from the Discussion Document whether an economic analysis of economic impacts, including impacts to customers and ratepayers, has been conducted.

Over the past 5 years, power generators have seen a significant increase in RGGI prices, with an approximate 300% increase from 2019 to 2024. This substantial rise in costs already represents a considerable financial impact on power generators, as they now face higher expenses for RGGI emissions allowances. While stating that "[i]t may be necessary to tighten the emission caps under 310 CMR 7.74", the Discussion Document does not identify what the emissions targets are that will be supported by the new minimum reserve price. Nor is there any indication in the Discussion Document or the Market Monitor memorandum that emissions targets are not being met. Indeed, given that allowance pricing is set through a market-based compliance mechanism, the fact that auction clearing prices are low proves that emissions themselves are low. That is, if emissions remained in excess of the limits market factors would necessarily drive allowance prices upward.

The Department's selection of $9.00 per allowance is confusing and unwarranted. The Reserve Price under the RGGI program (see 225 CMR 13.00) will be $2.62 in 2025. The Market Monitor memorandum suggests an MRP of $2.45, with the caveat that it could be higher to achieve "the minimum level consistent with MassDEP policy goals for 310 CMR 7.74." Did MassDEP consider other minimum reserve prices between $0.50 and $9.00 per allowance and how those values affect emissions? Vicinity recommends that the Department conduct an additional analysis on differing reserve price scenarios, including the economic impact of differing prices, and share its findings with stakeholders, with additional opportunities to comment, prior to changing the minimum reserve price in such a significant manner.

Vicinity strongly urges MassDEP to reconsider the proposed changes to the MRP until information on the basis for the proposed change and a third-party economic and consumer impact study can be

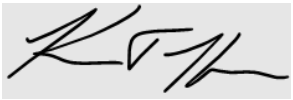
conducted to better understand the full consequences of the increase to utility customers and energy providers.

Finally, MassDEP sets annual emissions allowances for the auction through the formula established in 310 CMR 7.74(5)(a). If the Commonwealth determines that market conditions have changed significantly and seeks to establish new policy goals to address declining auction prices, we respectfully argue that the appropriate, transparent mechanism for doing so would be a rulemaking amendment to 310 CMR 7.74(5)(a).

Vicinity's district energy system is critical to helping the Commonwealth of Massachusetts achieve its GHG emissions reduction goals. While our customer base consists of several vital institutions with mission-critical energy requirements, the environmental benefits extend to all corners of Boston and Cambridge, including the environmental justice neighborhoods that are disproportionately affected by fossil fuel pollution.

Thank you to the MassDEP staff for the opportunity to comment. We share your commitment to addressing climate change and achieving net zero carbon emissions and, as usual, welcome the opportunity to discuss our responses in greater detail.

Sincerely,



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