



**EDISON ELECTRIC
INSTITUTE**

March 20, 2006

Frank Litz, Esq.
Chair of the Regional Greenhouse Gas Initiative
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Dear Mr. Litz:

On December 21, 2005, the governors of seven of the original nine Northeast and Mid-Atlantic states that in 2003 formed the Regional Greenhouse Initiative (RGGI) entered into a Memorandum of Understanding (MOU) to reduce greenhouse gas emissions in the region. In particular, the MOU states that the "Signatory States commit" to implement, as of January 1, 2009, "a regional . . . program that will regulate" the emissions of carbon dioxide from "fossil fuel-fired electricity generating units having a rated capacity equal to or greater than 25 megawatts." The MOU also indicates that 1) the states "are collectively developing a draft Model Rule to serve as a framework for the creation" by the states of "necessary statutory and/or regulatory authority to establish the Program" in the RGGI region and 2) the proposed rule is to be made available for public review.

The Edison Electric Institute (EEI) is the association of U.S. shareholder-owned electric companies, international affiliates and industry associates worldwide. EEI's U.S. member serve nearly 97 percent of all customers served by the shareholder-owned segment of the industry, generate almost 70 percent of all electricity in the country, and serve more than 70 percent of all ultimate customers in the nation.

While we welcome the opportunity to comment on the proposed model rule when it is made available, we are disappointed that RGGI did not provide a similar opportunity in the case of the MOU, as we urged last September, since it is the primary agreement that commits the seven governors and their states to RGGI. Nevertheless, we submit the enclosed EEI comments on the MOU in order to make RGGI and the individual seven signatory states aware of our significant concerns as they work on developing the proposed Model Rule.

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If you have any questions about our comments, please contact me (202-508-5617, bfang@eei.org) or Eric Holdsworth, EEI's Director of Climate Program (202-508-5103, eholdsworth@eei.org).

Sincerely,



William L. Fang
Deputy General Counsel
and Climate Issue Director

Enclosure
cc (w/ enc):

Seven state energy and environmental offices

The Honorable James Connaughton, Esq.
Chairman, Council on Environmental Quality

The Honorable Paula Dobriansky
Under Secretary of State for Democracy and Global Affairs

Dr. Harlan Watson
Senior Climate Negotiator and Special Representative

**EDISON ELECTRIC INSTITUTE COMMENTS
ON THE REGIONAL GREENHOUSE GAS INITIATIVE
MEMORANDUM OF UNDERSTANDING**

March 20, 2006

On December 20, 2005, the governors of seven Northeast and Mid-Atlantic states (Signatory States)¹ signed a Memorandum of Understanding (MOU) in which the Signatory States committed to “propose for legislative and/or regulatory approval” of each signing state “a CO₂ Budget Trading Program” (Program) – which is “aimed” at “stabilizing” and “reducing” carbon dioxide (CO₂) emissions within the Signatory States – and to implement a “regional” CO₂ emissions “Program. . .that will regulate fossil fuel-fired CO₂ emissions from electricity generating units having a rated capacity equal to or greater than 25 megawatts” (emphasis added). We understand that the MOU is merely a joint agreement of the seven governors. It does not have the force of law, although it has the appearance of a mandate on the states. The MOU does not expressly state whether the regulation of such emissions from “electricity generating units” applies to such units located and serving only the seven states or whether its reach is intended to be broader.

The Edison Electric Institute (EEI) submitted comments last September to the RGGI Chair expressing concerns and raising issues with an August 2005 RGGI Staff Working Group draft

¹ The Signatory States are Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York and Vermont. Originally, RGGI was started in 2003 by nine states that included Massachusetts and Rhode Island.

MOU proposal and model results. At that time, we urged that before the governors signed the MOU, stakeholders and the public be given an opportunity to review and comment on the regional MOU. Unfortunately, EEI never received a response from RGGI to this request. Indeed, we first became aware of the final MOU when a press release was issued announcing its signing by the seven Northeast and Mid-Atlantic governors. Nevertheless, we take this opportunity to express our concerns about the proposed Program and about the impact of the MOU and Program on federal international and domestic global climate change policies, and to provide our comments thereon. While our comments are extensive, they do not represent an exhaustive discussion of the MOU and associated problems. We would appreciate the RGGI Chair making the governors of each of the Signatory States aware of these comments.

I. The Impacts Of Contraction

In adopting the Framework Convention on Climate Change (FCCC) in 1992, the United Nations acknowledged that climate change² is “global” in nature and called for the “widest possible

² In defining the term “climate change,” FCCC Article 1 refers to the alteration of the “composition of the global atmosphere.” Yet it is difficult to see what, if any, impact the RGGI scheme will have on preventing such alteration. Indeed, the Energy Information Administration’s (EIA) December 2005 report of “Emissions of Greenhouse Gases in the United States 2004” estimates “that U.S. energy-related carbon dioxide emissions in 2002 totaled 5,746 million metric tons (MMT).” The report then states:

To put U.S. emissions in a global perspective, total energy-related carbon dioxide emissions for the world in 2002 are estimated at 24,405 MMT, making U.S. emissions about 24 percent of the world total. Emissions for the mature market economies (North America, Western Europe, Japan, and Australia/New Zealand) in 2002 are estimated at 11,872 MMT, or about 49 percent of the world total. In 2002, the remaining 51 percent of worldwide energy-related carbon dioxide emissions came from emerging economies (9,408 MMT) and the transitional economies of the former Soviet Union and Eastern Europe (3,124 MMT). By 2025, however, the U.S. share of total

cooperation by all countries. . .in an effective and appropriate international response” In contrast, in adopting the MOU RGGI has chosen to initiate a regulatory scheme in a geographic region of one Party to the FCCC, namely, the U.S., and to apply its regulatory Program only to CO₂, GHGs despite the ubiquitous nature of such gases, including CO₂. In establishing this regulatory scheme, RGGI has chosen to single out only one economic sector in the region, namely, the electric utility sector, for CO₂ emission regulation despite the fact that it is only one of several economic sectors in the U.S. and globally that use fossil fuels for energy purposes.³

As recently as last September, a RGGI draft MOU included a region of nine states and the apportionment of an emissions budget for all nine states. In addition, in explaining the RGGI process RGGI Web documents until very recently emphasized the “positive responses” received from nine Northeastern and Mid-Atlantic governors in support of the RGGI “Action Plan” and its “Principles for Program Design,” which, among things, indicated a flexibility to encourage and permit “other states to seamlessly join the initiative.” Ironically, the contraction of the RGGI program from nine to seven states has occurred even though there is a provision titled

world emissions is projected to fall to 20 percent (7,587 MMT out of a global total of 38,396 MMT). The reason for the expected decline in the U.S. share is that U.S. energy-related carbon dioxide emissions are projected to increase at an annual rate of 1.2 percent, while emissions from the emerging and transitional economies are projected to grow at annual rates of 3.2 and 1.5 percent, respectively.”

P. 3 (footnote and table reference omitted).

³ Since 1994, the U.S. Environmental Protection Agency (EPA) has annually provided a report of estimates of U.S. anthropogenic greenhouse gas emissions and sinks in furtherance of FCCC Article 4.1(a). The report recognizes and reports on all six “economic sectors”: residential, commercial, industry, transportation, electricity generation and agriculture, to which EPA allocates emissions. See U.S. EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2003 (Apr. 2005).

“EXPANSION” in the final MOU, which states that it is “a goal” of the Signatory States “to expand the geographic reach of the Program.” The contraction of the RGGI states from nine to seven certainly makes RGGI far less coherent from any standpoint and calls into further question the workability and value of this regulatory approach, particularly as it applies to the one industry affected by it. In addition, the contraction gives further evidence that the RGGI impact on global climate change will be minimal.

Even more importantly, as stakeholders participating in the RGGI process, we understand that the basis for decisions made on the design of the RGGI Program relied on modeling that assumed as late as last October a region of nine, not seven, states.⁴ The two states carved out of RGGI represent a very significant percentage of the New England “electric power system,” which is a “fully integrated” interstate system.⁵ Clearly, the absence of Massachusetts and

⁴ See RGGI “Electricity Sector Modeling Results” of October 26, 2005, ICF Consulting.

⁵ The Independent System Operator New England (ISO-NE) Regional System Plan 2005 (RSP05) of October 20, 2005, approved by the ISO and submitted in compliance with Federal Energy Regulatory Commission (FERC) approval tariffs (Electric Tariff No. 3, ISO New England, Inc.) explains how the six-state region is integrated as follows:

The six-state New England electric power system serves 14 million people living in a 68,000 square-mile area. The system is fully integrated, using all regional generating resources across state boundaries. Over 350 generating units produce electricity, representing approximately 31,000 MW of generating capacity, connected to approximately 8,000 miles of high-voltage transmission lines. Most of these lines are fairly short and networked as a grid, resulting in close interrelationships of electrical performance in all corners of the system. Twelve transmission ties interconnect New England with neighboring electricity systems in the United States and Canada, including New York, New Brunswick, and Quebec; these lines carry power into or out of New England depending on system needs.

* * * *

The largest concentrations of load are in the region’s urban centers, Greater Boston, Southwest Connecticut, and the mid-Connecticut River Valley. Small load centers

Rhode Island not only creates a void in the Program, but also removes a very significant and integral part of the generating capacity of the “six-state New England electric power system” from the Program.⁶ In fact, plants in these two states go from being part of the generation constrained by RGGI to being a new source of leakage.⁷

New modeling is needed to determine the impacts of the Program without the participation of Massachusetts and Rhode Island. Further, state-by-state economic modeling must be done to

appear near smaller cities throughout New England, such as Providence, Rhode Island; Burlington, Vermont; and Portland, Maine.

* * * *

The New England transmission system includes nearly all of the networked electric power systems in New England. It serves a diverse region that contains rural to dense urban areas and integrates a widely dispersed and diverse set of generating resources to serve customer loads. The geographic distribution of New England’s peak load in summer and winter is approximately 20% in the north (Maine, New Hampshire, and Vermont) and 80% in the south (Massachusetts, Connecticut, and Rhode Island). Although the northern area is larger geographically than the southern area, the larger southern load reflects greater development and the concentration of population in urban areas.

Pp. ES-2, 5 & 12 (footnotes omitted and emphasis added).

⁶ The MOU expressly recognizes the “contributions of Massachusetts and Rhode Island to the design and development of the Program and the negotiation of this MOU.”

⁷ Ironically, section 6 of the MOU states that the Signatory States “recognize the potential” that the MOU Program “may lead to increased imports [of electricity] and associated emissions leakage,” and agrees to establish a “multi-task working group” to “consider potential options for addressing leakage” and issue “findings and conclusions by December 2007” (emphasis added). The states have also agreed to “consider. . . what actions should be taken to address potential leakage prior to the launch of the program in January 2009,” determine after the Program is launched if “a significant increase in emissions from outside the Signatory States” has resulted, “implement appropriate measures to mitigate such emissions” and “pursue” so-called “technically sound” but unspecified and vague “measures to prevent leakage from undermining the integrity of the Program” (emphasis added). With the deletion of two states, leakage is no longer merely a “potential.” It is real, and RGGI should recognize that reality now. A study will not improve on that knowledge.

determine fully each state's economic impact on the utilities remaining subject to the RGGI Program, because as we noted last September, "such non-participation" by some states, "even temporarily, could exacerbate competitiveness impacts on generators" in the RGGI states, as well as those outside RGGI that are nevertheless interconnected with generators within the RGGI region.

It is true that the MOU expressly provides that Massachusetts and Rhode Island still have the option of becoming "signatories to this MOU at any time prior to January 1, 2008." It even includes "CO₂ emissions budgets" for these states and provides that should they exercise that option, the entire "regional base annual CO₂ emissions budget" will be "increased" to accommodate the "allowance budgets" of these two states. However, this open-ended option only creates even more planning uncertainty between now and 2008 for RGGI, the electric utilities that are not now affected by the RGGI Program and those utilities currently subject to the Program. Added to that uncertainty is the fact that presumably the Model Rule for the Program is to be "collectively" developed only by the Signatory States; thus, according to the MOU, it will not and cannot include a role for Massachusetts and Rhode Island in its development (other than in the public review process), which also could be a significant problem for both states and for the electric utilities serving those states. Moreover, depending on whether Massachusetts and Rhode Island choose to exercise the option, they will necessarily have an abbreviated period to adopt the model rule legislatively or by regulation (or both), which

undoubtedly could also affect their utilities adversely.⁸ In short, the MOU and the Program that it fosters lacks a sound modeling basis and creates severe uncertainty for the affected electric utilities and their customers.

In addition, despite numerous requests throughout the development of the RGGI program and modeling, to our knowledge stakeholders have not been provided with sulfur dioxide (SO₂), nitrogen oxide (NO_x) and mercury (Hg) emissions data outside of the RGGI region with which to assess the implications of RGGI on emissions leakage. Until this information is provided, there is no basis for determining whether emissions leakage resulting from RGGI will have a detrimental environmental impact on the RGGI states. Increased generation by plants upwind of the RGGI states that result from generation leakage caused by the RGGI program could cause significant increases in SO₂, NO_x and Hg emissions drifting into the region. The data needed to evaluate this issue reportedly was part of the modeling output, and as far we know it has not been provided to stakeholders for critical review. We again request it.

II. The MOU's Model Rule Provisions Are Vague And Uncertain.

Section 3.A of the MOU explains that the seven states, not nine, “are collectively developing a draft Model Rule,” which is to “serve as the framework for the creation of necessary statutory and/or regulatory authority” to establish the Program (emphasis added). Section 3.B provides that each state “commits to seek to establish in statute and/or regulation the Program and have

⁸ Massachusetts currently has a CO₂ regulatory program and is preparing a GHG offsets program. It is unclear how and to what extent such a Massachusetts program could be meshed with the RGGI program of regulation and offsets.

that state's component of the regional Program effective" no later than "December 31, 2008" (emphasis added).

First, it is unclear from the MOU which course, whether by statute or by regulation (or both), each of the seven states must or will pursue to approve, create or establish the MOU-described regulatory Program that the MOU indicates is a commitment of each such state. For example, it is unclear whether some or all of these states require a new or amended statute or whether regulations alone will suffice. This is important information that should, at a minimum, be provided when the Model Rule is made available for public review.

Section 3 of the RGGI "Action Plan" required that "[e]ach state's environmental representative" report to the RGGI Staff Working Group by September 29, 2003, "any issues associated with state mechanisms for action." To our knowledge, those reports have not been made available to stakeholders, so we do not know what, if any, "issues" exist that would affect which course the Signatory States must take to meet their commitments. In fact, it is unclear whether RGGI has ever attempted to ascertain which course each state will have to undertake in order to approve the regulatory Program prescribed in the MOU.⁹

Second, MOU words like "substantially" and "framework" in the context of a "rule" could be viewed as vague and uncertain. They raise questions about the extent to which the seven states

⁹ In footnote 3 of our earlier comments to RGGI of September 20, 2005, we noted that a New York legislator asked about the role of the legislature in this endeavor. To our knowledge, RGGI has not responded to the legislator.

will adopt a rule that deviates from the MOU Program, and thus is not uniform and consistent within the region. These words suggest that even though the MOU calls for the implementation of the Program regionally, the seven states have individual flexibility in the development and approval of the Model Rule in a way that will not necessarily ensure such uniformity and consistency. Such flexibility is contrary to the very nature of the regional concept; would not appear to “reflect the commitments and understandings” of the Signatory States; and most importantly would not bode well for the affected utilities, creating reliability, economic and other concerns for them, their customers and the region. We seek clarification.

III. Offsets Provisions

EEI welcomes the inclusion in the MOU of the opportunity for affected electric utility “units” to obtain for compliance purposes offsets allowances for projects. However, the offsets provisions of the MOU raise a number of serious concerns.

First, section 2.F of the MOU provides for the “award” of offsets allowances to “sponsors of approved CO₂ (or CO₂-equivalent) emissions offsets projects for reductions that are realized on or after the date of this MOU,” which is December 20, 2005 (emphasis added). The MOU states that the Signatory States “agree,” in developing “offset categories and types,” that they will be “added to the Program upon approval” of such states. However, the MOU does not establish uniform and transparent procedures or mechanisms for making such awards or, most importantly, approving such projects. As discussed below, section 4.A provides for the creation of a Regional Organization (RO) and lists some of its “functions,” including the provision of

“technical support to the States for the development of new offset standards to be added to state rules”; “technical assistance to the States in reviewing and assessing applications for offset projects,” which “may include the development of model guidance documents for use by the States for potential sponsors of offset projects; and assistance in the “review of any application for the award of offset credits” (emphasis added).¹⁰

These “functions” appear to leave the awarding and approval requirements to the states to carry out in a manner that may not be, as noted above, consistent, uniform and transparent for the entire region. Moreover, section 3 of the MOU is silent on the content of the Model Rule regarding offsets and thus does not give any indication as to whether it will include the procedures and mechanisms or other means for making such awards and granting such approvals.

Second, section 2.F of the MOU on offsets states that “[a]mong the key features of the Program are” several provisions titled “General Requirements,” “Initial Offsets Geography and Limits,” etc. (emphasis added). However, the word “among” suggests that there are other so-called “key features” that are not mentioned or covered by the MOU, but which will affect the offsets

¹⁰ It is unclear what is contemplated by the reference to “new offset standards” and the “development of model guidance documents.” With respect to standards, the word “new” suggests that some already exist, which, to our knowledge, is not the case. In addition, it is unclear how and when such standards and guidance documents will be prepared, if ever. The MOU does not appear to require them. Further, in section 2.F, the phrases “award of offset allowances” and “award of offset credits” are used. We assume that they have the same meaning, although that may not be the case. We seek clarification.

program. We urge the Signatory States to explain what those other key features are, how they will affect offsets, and how and when they will apply.

Third, section 2.F(1)(b) provides a list of “initial offset project types that may be approved by a Signatory State” and states that “measurement and verification protocols and certification processes will be consistent across” the states “and incorporated in each state’s program.”¹¹

Section 2.F(1)(c) indicates agreement by the states “to continue to cooperate on the development of additional offset categories and types” to be “added to the Program upon approval of the Signatory States.” However, there is nothing to ensure that this effort by the states will be a priority, timely and transparent.

Fourth, we question the geographic limitation and the restriction on the number of offsets allowances. In the case of the geographic limitation, section 2.F(2)(a) of the MOU initially provides that offsets projects may be derived from anywhere “inside the United States,” which presumably includes all 50 states, but not U.S. territories or Puerto Rico. However, it then penalizes projects in the awarding of allowances that are located “outside the Signatory States[’]” boundaries – which now apparently includes projects located in the non-Signatory States of Massachusetts and Rhode Island – by requiring “two CO₂ equivalent tons of certified

¹¹ While that statement appears to be helpful, it does not explain how or when such protocols and processes are to be developed, who develops them, whether they will involve stakeholders, how they are to be “incorporated into each State’s program and whether they are considered to be rules or guides.” We seek an explanation.

reduction” per allowance instead of one. We see no environmental – or indeed, logical – reason for such a penalty in the case of projects located anywhere in the U.S., including Massachusetts and Rhode Island. We urge its abandonment.

IV. Allocations And Set-asides

Allowance determinations will not be made on a regional basis, but on an individual state basis. Apparently the MOU’s Model Rule will not, at a minimum, propose uniform “rules for allocation,” but instead will leave it up to the individual states to do so in some unspecified timeframe and with no apparent assurance of public input. Not only does the MOU fail to require such rules, but it also does not require that such rules be in place in “advance” of the 2009 launch date. Rather, it merely indicates that the states realize that the completion of the rules “should” be the norm. Of course, if the states delay, there is no penalty. However, the affected utilities will, in effect, be penalized by such delay. In addition, the lack of an express schedule in the MOU for their proposal and promulgation seems inconsistent with the other provisions of the MOU relating to the Model Rule and the launching of the Program.

More importantly, the MOU’s requirement that a quarter of the state’s budgeted allowances be allocated or set-aside for open-ended “consumer benefit or strategic energy purpose[s]” guarantees that all units are likely to be in an allowance-short position and that, coupled with the limits on offsets, will make compliance even more problematic. As to what constitutes “a consumer benefit or strategic energy purpose,” we note that with the word “include,” the list in section 2.G(1) of the MOU is merely a set of open-ended examples of what could be selected by

the states for use of the 25 percent of the allowance. The states apparently are not bound to adopt one or more of them.

As to those examples on the list, there are no criteria for a state to use in selecting one or more, nor is there any indication of how and to what extent a state would administer and implement a selected item. Again, the states are given a free hand to use allowances that are provided regionally. Yet there is no oversight by the region or the RO.

We note further that the list adds at the end “and/or to fund administration of this Program.” This addition is particularly troubling because section 4.B provides that the states “agree” to fund the RO, “at least in part, through payments from the Signatory States in proportion to the State’s annual base CO₂ Emissions Budget,” which appears to mean that the electric utilities and their customers are, in essence, going to be taxed, at least indirectly, by each of the RGGI states in the form of the 25 percent set-aside in order to comply with this MOU mandate on the states. We question the legal basis for this tax under each state’s laws. Obviously, the MOU does not provide that basis.

An additional concern that does not appear to be addressed in the MOU or in this 25 percent set-aside is how new units or plants are planned for and built if only 75 percent of the allowances are allocated to electric utilities in the RGGI region on a state-by-state basis, together with the 3.3-percent limit on offsets-based allowances. For example, there appears to be nothing built into the allowance system for each state that would enable the addition of, for example, a 300- or

500-megaWatt power plant. In the case of New England, RSP05¹² discusses demand and growth needs and “issues of fuel diversity” for that region that are expected and that need to be met. For example, we question how the RGGI Program allows for needed baseload generation growth in the region, which is likely to utilize either coal or nuclear (or both) rather than costly natural gas. We seek RGGI’s response.

E. Regional Organization

The MOU also specifies that the seven Signatory States have agreed to “create and maintain” an RO that is to be a “non-profit entity incorporated in New York,” will “operate pursuant to by-laws agreed upon” by the seven states, and have its primary office in New York City. It may employ staff and “acquire and dispose of assets in order to perform its function” and be run by an Executive Board of “two representatives from each Signatory State.” There is no indication as to how each representative is selected, what term each would serve or what the compensation (if any) would be.

The Board will determine and approve the RO’s budget. As noted earlier, partial funding is to come from the seven states in proportion to each state’s “annual base CO₂ Emissions Budget.” However, the MOU is silent on the source of the RO’s remaining funding. Apparently, it could come from the 25 percent set-aside, as it could be viewed as funding for “administration,” as noted above.

¹² See p. 4, *supra* note 5.

There apparently is no deadline for the RO's establishment. Further, there is no apparent provision for involvement of stakeholders and the public in the development and review of the RO's bylaws before their adoption. The lack of both a deadline and public participation are significant issues that should be addressed.

The MOU also provides in section 5.C for the removal of a Signatory State, which is to be "handled" in the RO's bylaws. It is unclear what is encompassed or intended by the term "handled."¹³

Section 4.A of the MOU states that overall, the RO will facilitate "administration of the Program." The MOU specifies a list of five functions of the RO, the last of which, titled "Limitation on Powers," states that the RO is to be "a technical assistance organization only" and that it "shall have no regulatory or enforcement authority with respect to the Program," adding that "such authority is reserved to each Signatory State for the implementation of its rule" (emphasis added). On the other hand, the first function, titled "Deliberative Forum," states that the RO will "[a]ct as the forum for collective deliberation and action among the Signatory States in implementing the Program" and that its bylaws "shall specify the process for deliberation and arriving at agreement to take collective action" (emphasis added). These deliberative and action

¹³ The MOU provides in section 5.A that any "Non-Signatory State" in the U.S. may "by agreement of the Signatory States, as reflected in an amendment to this MOU," become a "Signatory State." The MOU also provides for withdrawal of a "Signatory State" agreement to the MOU after 30 days notice to "become a non-Signatory State." In such event, the remaining states will adjust "allowance usage."

functions, together with the removal function, indicate that the RO is more than a “technical assistance organization.”

V. Ineffectiveness Of State And Regional Approaches

As noted above, the MOU has significant problems that will create uncertainties for, and affect the reliability of, electric generating units within the seven-state RGGI region and beyond.¹⁴

RGGI’s focus on our industry is misguided, and represents a piecemeal or patchwork approach that will have little, if any, beneficial impact globally, nationally or even regionally. Indeed, because of the limited scope of the region and its focus only on electric utilities, the assertions in the MOU that “a carbon constraint on fossil fuel-fired electricity generation and the development of a CO₂ allowance trading mechanism. . . will lead to less dependence on the import of fossil fuels” (emphasis added) are not well-founded, particularly since electric utilities in New England at least have an “ever increasing reliance on natural gas,” not oil, whether imported or domestic (see RSP05, p. ES-6). The MOU also states that “the Signatory States wish to establish themselves. . . as world leaders in the creation, development, and deployment of CO₂ emission control technologies, energy-efficient technologies, and other measures aimed at reducing CO₂

¹⁴ We appreciate that the MOU provides in section 6. that the “Signatory States recognize the paramount importance of maintaining a reliable electrical system in the region, and that they are committed to monitoring. . . to ensure that the Program will not result in electricity supply interruptions” (emphasis supplied). However, while the section also “recognizes the potential that the Program may lead to increased electricity imports and associated emissions leakage” and that they “agree to pursue technically sound measures to prevent leakage from undermining the integrity of the Program,” the MOU is silent on what timely actions it can and will take if the monitoring demonstrates reliability-related problems that may or may not actually result in “supply interruptions,” but nevertheless may have a serious adverse impact on reliability, the normal operations of one or more utilities, or costs and rates. Even in the case of leakage, the MOU is vague on what “measures” RGGI would take and silent on what authority RGGI would have to do so. These are all serious concerns.

emissions,” and that “to address climate change. . .the Signatory States find it imperative to act together to control emissions of greenhouse gases, particularly carbon dioxide, into the Earth’s atmosphere from within their region” in the U.S. (emphasis added). We question whether such a regional “imperative” exists and submit that there are less intrusive ways for these states to achieve world leadership than regional regulation.

Indeed, it appears that the Signatory States merely want to expand their sphere of regulation and influence in the U.S. In furtherance of those aims, the MOU expressly encourages non-Signatory States, in addition to Massachusetts and Rhode Island, to become “a Signatory State” and, in fact, welcomes “expressions of interest from non-Signatory States with a goal to expand the geographic reach of the Program.”¹⁵ We reiterate that such a patchwork is not in the best interests of either the nation or our economic sector, and, as discussed below, 1) conflicts with continuing foreign and domestic policies long established by the Executive and Legislative Branches and 2) raises constitutional concerns.

VI. Constitutional Concerns

A. Federal Government Climate Actions

The U.S. federal government has a history of taking action to address climate change. The U.S., along with more than 150 other countries, signed the Framework Convention on Climate Change

¹⁵ Section 6 of the MOU even suggests that should some “federal program” be proposed that is “determined” – presumably by RGGI – “to be comparable to this Program,” RGGI will deign to “transition into the federal program,” all of which assumes that it would have a choice substantively, legally and politically. No mention is made in the section of what is best for the U.S. from both a GHG and an economic standpoint.

(FCCC) in June 1992. The Senate subsequently provided its advice and consent and the FCCC entered into force on March 21, 1994. Subsequently, the U.S. entered into negotiations on the Kyoto Protocol, which were completed in December 1997. However, prior to that the Senate unanimously passed a resolution (S. Res. 98) providing that the President should not sign “any protocol to, or any other agreement regarding”¹⁶ the FCCC that would “mandate new commitments” to reduce GHGs for developed countries unless such mandates also applied to developing countries, or “which would result in serious harm” to the U.S. economy (emphasis added). While the Protocol was signed by the U.S. in 1998, two Presidents never submitted the Kyoto Protocol to the Senate for advice and consent to ratification.

Nevertheless, the Executive Branch has continued to pursue actions addressing climate change since that time. In 2002, the President announced a new voluntary, intensity-based climate program aimed at reducing U.S. GHG intensity 18 percent by 2012. More recently, in January 2006, the U.S. joined five other nations in the “Asia-Pacific Partnership on Clean Development and Climate” (AP6). In announcing the AP6, the President noted that “the greatest progress will be assured by a cooperative effort that combines our strategies with the best strategies of other nations to improve economic and energy security, reduce harmful air pollution, and reduce greenhouse gas emissions.”

¹⁶ The phrase “any other agreement” is open-ended and applies to any future protocol or other instrument adopted by the FCCC Parties that may also fail to meet the above conditions of S. Res. 98. Thus, the resolution is as relevant today as it was in 1997.

Since adoption of the FCCC, Congress has appropriated many billions of dollars for, among other things, the support of research on climate change, the development and deployment of relevant technologies, and the implementation of the FCCC. Further, Congress, in enacting the Energy Policy Act of 1992 included a title XVI, “Global Climate Change” (42 U.S.C. § 13381 *et seq.*), which initiated several non-regulatory actions, including the creation of a voluntary reporting program. More recently, Congress enacted a second Energy Policy Act in August 2005 (EPAct 2005), Pub. L. No. 109-58, which contained a number of titles and other provisions directly or indirectly addressing GHG emissions.

B. Interference with Federal Policies

Thus, the Executive Branch’s global climate change policy, established by several Presidents, has been to negotiate and ratify the FCCC and commit to implement it because it imposes commitments on all Parties, while opposing treaties and other measures that require only developed country Parties to reduce GHG emissions with no similar commitments for developing country Parties, such as China and India. In addition, the Executive Branch has pursued, among other things, policies of research, development, demonstration and deployment of climate technologies and voluntary reporting of GHG emissions and reductions.

In the case of the Legislative Branch, Congress has given advice and consent to the FCCC, funded its implementation, and authorized and funded research, studies, technology development, reporting and other non-regulatory programs aimed at addressing GHGs globally,

including measures on adaptation.¹⁷ In addition, Congress has, on several occasions, resisted legislative proposals for regulatory controls on domestic GHGs, including CO₂ emissions.¹⁸

While we recognize that RGGI is still at an early stage regarding its proposed Program (to which the governors of the Signatory States have signaled their commitment by signing the MOU), because a Model Rule still needs to be adopted and the states need to approve it by statute or regulation (or both), it is not premature to note that the regulatory means chosen by the Signatory

¹⁷ In fact, the only direct regulation of GHGs that Congress has agreed to affecting electric utilities occurred in 1990 with the enactment of section 821 of Pub. L. No. 101-549 (42 U.S.C. § 7651k note). It requires EPA to issue a rule requiring electric utilities subject to title IV of the Clean Air Act to monitor their CO₂ emissions and to report the data to EPA, which is to compute annually the aggregate annual total CO₂ emissions. In 2003, EPA decided that it lacked authority under the Clean Air Act to regulate CO₂ emissions for global climate change purposes. 68 Fed.Reg. 52925 (2003). That decision was upheld by the U.S. Court of Appeals for the D.C. Circuit in Massachusetts v. EPA, Nos. 03-1361-03-1368 (D.C. Cir. July 15, 2005), *pet. for reh'g denied* (D.C. Cir. 2005), *pet. for cert. pending* (U.S. 2006).

¹⁸ For example, Congress considered and rejected the imposition of mandatory caps on CO₂ emissions proposed by Senators McCain and Lieberman as Amendment No. 826, known as the “Climate Stewardship and Innovation Act.” 151 Cong. Rec. S6892, S6894 (daily ed. June 21, 2005). Earlier the Senate considered in 2003 a similar Amendment No. 2028, the “Climate Stewardship Act,” by these senators. 149 Cong. Rec. S13598 (daily ed. Oct. 30, 2003). That 2003 amendment actually received a more favorable vote, 43–55, than the more recent 2005 version, which failed by a vote of 38-60. In addition, during the consideration in the Senate of EPAct 2005, Sen. Bingaman offered a “Sense of the Senate” resolution that “Congress should enact a comprehensive and effective national program of mandatory, market-based limits and incentives on emissions of greenhouse gas. . .that —
(1) will not significantly harm the United States economy; and
(2) will encourage comparable action by other nations that are . . .key contributions to global emissions.” 151 Cong. Rec. S7033-S7037 (daily ed. June 22, 2005) (emphasis added). In offering this resolution, Sen. Bingaman expressed “hope that a majority of the House of Representatives” would “agree with it.” *Id.* at S7034. While it passed the Senate by voice vote (*id.* at S7037), it was not agreed to by the House and thus was not a part of the final version of EPAct 2005. See H. Conf. Rep. No. 190, 109th Cong., 1st Sess. (2005).

States to address GHGs would appear to conflict with the long-standing, federal foreign and domestic global climate change policy discussed above. As the Supreme Court said in American Insurance Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (internal citations omitted):

There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place," and the "exercise of the federal executive authority means that state law must give way, where. . .there is evidence of clear conflict between the policies adopted by the two."

See also Hines v. Davidowitz, 312 U.S. 52 (1941). In Garamendi, the court also said that "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'Executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)." *Id.* at 414. The court added that the "exercise of the federal executive authority means that State law must give way where. . .there is evidence of clear conflict between the policies adopted by the two." *Id.* at 421.

Clearly, the President, as discussed above, has established a foreign policy for the U.S. on global climate change, which is to work with other nations multilaterally and bilaterally under the FCCC and in partnerships aimed at a joint and coordinated response to global climate change. Moreover, the President has stated a federal policy of addressing GHGs through non-mandatory

measures because climate change is inherently global and the means to address it must be a concern of all FCCC Parties, not just developed country Parties.

To the extent the Signatory States may disagree with federal policy choices on global climate change, the states do not have the option of adopting differing policies. Their “dissatisfaction should be addressed to the President or, perhaps, Congress.” Garamendi, *supra*, at 427. Because the MOU Program agreed to by Signatory States would be, if ultimately adopted by the states as proposed by the MOU, contrary to the national government’s foreign policy, it would appear to be preempted by federal law. See also Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000).

C. Other Constitutional Concerns

The MOU, which is an agreement among seven state governors, purports to commit the Signatory States to organize and approve a regulatory program covering seven Northeastern and mid-Atlantic states to regulate CO₂ emissions from electric utilities for global climate change purposes and to encourage other states to also become Signatory States, apparently regardless of whether they adjoin one or more of the seven RGGI states. Article 1, section 10, clause 3 of the U.S. Constitution “permits the States to enter into ‘agreements’ or ‘compacts,’ so long as Congressional consent is obtained.” U.S. Steel Corp. v. Multi-state Tax Commission, 434 U.S. 452, 460 (1978), *citing* New Hampshire v. Maine, 426 U.S. 363 (1976). To our knowledge, the Signatory States have no plans to seek such consent.

In Virginia v. Tennessee, 148 U.S. 503, 519 (1893), the Supreme Court said:

Looking at the clause in which the terms “compact” or “agreement” appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.

See also New Hampshire v. Maine, *supra*, at 369, in which the Supreme Court said, regarding boundary disputes, that the “proposed consent decree plainly falls without the Compact Clause under this test.” In Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 160 (1985), the Supreme Court applied the same test.

Referring to Northeast Bancorp, the court in Seattle Master Builders Ass’n v. Pacific Northeast Electric Power & Conservation Planning Council, 786 F.2d. 1359, 1363 (9th Cir. 1986) noted that the “Supreme Court recently outlined some of the indicia of compacts,” which “are establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness.” But then the court said:

Even if all these indicia of compacts are present, the only interstate agreements which fall within the scope of the compact clause are those “tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”

Id., citing Cuyler v. Adams, 449 U.S. 433 (1981).

“If the joint activity does not affect the federal sphere, no approval by Congress is needed. If it affects the federal sphere, then Congress must authorize the activity.” Cuyler, *supra*, at 440

(emphasis added). Whether the RGGI Program meets the Cuyler indicia is not controlling.¹⁹

What controls is Cuyler's "federal sphere" test. In short, what is relevant, as stated in U.S. Steel, *supra*, at 471, is the "impact on [the] federal structure." As discussed above, the proposed regulatory approval Program, if ultimately authorized by the states, will undoubtedly "affect the federal sphere," and thus "approval by Congress" appears to be "needed."

Another matter of concern is the impact of the seven state RGGI control program on commerce.

As observed by Justice Blackman, "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility." Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 757 (1982). He added that "[i]ndeed, the utilities involved in this very case...sell their retail customers power that is generated in part beyond Mississippi's borders, and offer reciprocal services to utilities in other States." *Id.* Similarly, as noted on p. 4, *supra* note 5, the six-state New England region is "fully integrated, using all regional generating resources across state boundaries," and has "[t]welve transmission ties" interconnecting the region "with neighboring electricity systems in the United States and Canada," and these lines "carry power into or out" of the region.

¹⁹ Black's Law Dictionary 787 (8th ed. 1999), defines "indicia" to mean "Evidence" "or signs; indications." Bouvier's Law Dictionary and Concise Encyclopedia, Vol. 1, p. 1542 (8th ed. 1914) defines "indicia" to mean "Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth." Barron's Law Dictionary's 227 definition of this word is: "indications; signs or circumstances which tend to support a belief in a proposition as being probably, but which do not prove to a certainty the truth of the proposition. It is circumstantial evidence. 53 S.E. 2d 122, 125." (2d ed 1984) (emphasis added).

While the Commerce Clause of the Constitution (Art. 1, § 8, cl. 3) empowers the Congress to regulate commerce, in the absence of such regulations there are matters that the Supreme Court in Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) said “are open to control by the States so long as they act within the restraints imposed” by the Commerce Clause. The Court added:

The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court, giving effect to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion for the Court in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-538, 69 S.Ct. 657, 665, 93 L.Ed. 865:

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

Id.

There is cause for concern that as a result of the MOU, the seven Signatory States are planning to operate as such “units.” For example, section 6.A of the MOU raises concern about the Program increasing “electricity imports and associated leakage” and establishes a “working group” to “consider potential options for addressing leakage” and to issue “findings and conclusions.” The section calls for the monitoring of such imports and if “there is a determination that the Program has led to a significant increase in emissions” from “outside” units, “the Signatory States shall . . . implement appropriate measures to mitigate such emissions” (emphasis added). That is a vague and uncertain mandate and certainly a threat to the electric utilities in and outside of the region and to commerce.

The Supreme Court has said that where a law “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In the case of the MOU, the “local public interest” is extremely vague, if it exists at all, while the burden on commerce appears real and “excessive.” We need only look again to the MOU’s “Whereas” clauses to demonstrate that there is little to rely on for a demonstration of “local public interest.” For example, those clauses speak of GHGs “enhancing the natural greenhouse effect resulting in changes in the Earth’s climate”; climate change posing “serious potential risks to human health and terrestrial and aquatic ecosystems globally”; the “carbon constraint on fossil fuel-fired electricity generation” creating a “strong incentive” for “efficient fuel burning technologies,” apparently on a broader scale than just RGGI; such constraints leading to “less dependence,” presumably nationally and regionally, “on the import of fossil fuels”; and the “wish” of the Signatory States to “establish themselves and their industries as world leaders” about such matters as control technologies, renewables and more (emphasis added). In short, it does not appear that the “effects” of the MOU on interstate commerce “are only incidental.”