

Cape Light Compact Governing Board
Wednesday, March 11, 2015

The Governing Board of the Cape Light Compact convened on Wednesday, March 11, 2015 at 2:00 p.m. in Room 11/12, Superior Court House, 3195 Main Street, Barnstable, MA 02630.

PRESENT WERE:

1. Dr. Joyce Flynn, Chairwoman, Yarmouth – remotely by phone
2. Robert Schofield, Vice-Chair, Bourne
3. Peter Cocolis, Treasurer, Chatham
4. Peter Cabana, Member at Large, Dukes County by phone
5. Barry Worth, Secretary, Harwich
6. David Anthony, Barnstable
7. Deane Keuch, Brewster
8. Timothy Carroll, Chilmark - remotely by phone
9. Brad Crowell, Dennis
10. Frederick Fenlon, Eastham
11. Ronald Zweig, Falmouth
12. Thomas Mayo, Mashpee
13. Richard Toole, Oak Bluffs
14. Raymond Castillo, Orleans
15. Thomas Donegan, Provincetown
16. Everett Horn, Sandwich
17. Richard Elkin, Wellfleet
18. Susan Hruby, W. Tisbury @ 3:05 p.m.

ABSENT WERE:

19. Michael Hebert, Aquinnah
20. Paul Pimentel, Edgartown
21. Peter Fontecchio, Truro
22. Sheila Lyons, Barnstable County

VACANCIES:

23. Tisbury

LEGAL COUNSEL:

Jeffrey Bernstein, Esq., BCK Law, PC
Robert Ritchie, Esq., Outside Counsel

STAFF PRESENT:

Margaret Downey, Administrator
Stephan Wollenburg, Sr. Power Supply Planner
Margaret Song, Residential Program Manager
Lindsay Henderson, Marketing & Data Analyst
Meredith Miller, C&I Program Manager
Philip Moffitt, EM&V Manager
Karen Loura, Administrative Assistant

OTHERS

Seth Rolbein, Mass. Senator Dan Wolf's Office

CALL TO ORDER

V. Chr. Schofield called the meeting to order at 2:02 p.m. The meeting notice/agenda having been posted pursuant to the Open Meeting Law on the Cape Light Compact website.

OPEN SESSION VOTE ON ENTRY INTO EXECUTIVE SESSION

V. Chr. Schofield requested a motion to enter into Executive Session pursuant to MGL Ch. 30A § 21(a)(3) and § 21(a)(10) for the purpose of discussing litigation strategy and related power supply issues related to DPU 14-69. He declared that an open session may have a detrimental effect on Cape Light Compact's litigating position and its ability to conduct business in relation to other entities making, selling or distributing electric power and

energy and a detrimental effect on the litigating position of the public body. The Governing Board will return to Open Session at the conclusion of Executive Session. *B. Worth moved to enter into Executive Session, seconded by P. Cabana and voted by roll call vote as follows:*

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|----------------------------|-----|------------------------------|-----|
| 1. D. Anthony, Barnstable | Yes | 10. B. Worth, Harwich | Yes |
| 2. R. Schofield, Bourne | Yes | 11. T. Mayo, Mashpee | Yes |
| 3. D. Keuch, Brewster | Yes | 12. R. Toole, Oak Bluffs | Yes |
| 4. P. Cocolis, Chatham | Yes | 13. R. Castillo, Orleans | Yes |
| 5. T. Carroll, Chilmark | Yes | 14. T. Donegan, Provincetown | Yes |
| 6. P. Cabana, Dukes County | Yes | 15. E. Horn, Sandwich | Yes |
| 7. B. Crowell, Dennis | Yes | 16. R. Elkin, Wellfleet | Yes |
| 8. F. Fenlon, Eastham | Yes | 17. J. Flynn, Yarmouth | Yes |
| 9. R. Zweig, Falmouth | Yes | | |

DPU 14-69 – UPDATED AGGREGATION PLAN

At the request of M. Downey, Atty. Bernstein prepared a legal analysis on the issue of the mil adder and retained Atty. Robert Ritchie as outside Counsel to review the BCK analysis and to provide his own independent analysis. Atty. Ritchie is a former employee of Attorney General’s Office of Municipal Local Services. M. Downey will seek a sense of the Board to authorize a meeting with the AGO to discuss resolution of this issue.

The Executive Committee has copies of the two analyses. There was discussion about confidentiality of documents used during executive session and the Open Meeting Law.

Atty. Ritchie provided a history of his experience. He said he is a member of the New Hampshire and Massachusetts Bar Associations and has worked in both AG’s Offices. He began his work in Municipal Law in the early 1980’s while Town Counsel for Amherst. He accepted a position in a newly created municipal law dept. where he stayed for 11 years to then become General Council for Dept. of Agriculture. He said much of his work is with school committees and Towns of Dover, Wayland and regionally in northern Worcester County. He expressed appreciation for the opportunity to work with J. Bernstein and expressed praise of him for his knowledge and articulation on energy issues. He provided a history of the Home Rule Amendment which enabled municipalities to do tasks/services provided the task/service was not prohibited by state law. The Mass. Home Rule Law was modeled after Iowa’s.

He said CLC was formed collectively to do what any town could have done individually.

He said he questions the appropriateness of the AG’s position who has asserted that the mil adder is either a tax or a fee. He said the adder is neither a tax nor a fee. He spoke in depth about the *Emerson* Test and said the adder is simply a part (an element) of the rate structure. He reviewed the 3-prong test to determine if a charge is a tax or a fee:

- 1) The benefit has to be particularized (i.e., the people who are charged receive the benefit).
- 2) Participation has to be optional. (AG agrees this prong is satisfied.)
- 3) There has to be a backflow of benefits and the charge cannot be designed to raise revenues for other purposes or generally. With the adder, the benefits are limited to the purposes for which the Compact has created.

The Power Supply Program and the Cape Light Compact's participation on behalf of ratepayers could result in savings to towns. Atty. Ritchie said *Emerson* only relates to revenue streams. He said the Cape Light Compact has a rate structure that is thoughtful and intelligent. The Cape Light Compact program is not limited to power supply and consists also of advocacy, CLC Green Program, energy efficiency, developing renewable energy. Revenue is derived from Energy Efficiency Funds, Grants and the operational adder. It is an adapted budgeting process.

Atty. Ritchie said in his view, the Attorney General does not have ability to challenge the adder through a DPU proceeding.

There was discussion about staff changes in the AG's Office. A meeting with the new First Assistant Attorney General has been requested to discuss and review the matter and the AG's Office has indicated availability toward the end of March.

There was discussion raised by B. Crowell as to the permanency of the resolution of this issue. The Compact seeks a resolution of the issue in a manner in which the AG's office can be comfortable making the matter binding and not subject to being revisited by future Attorney Generals.

There was discussion about the potential of a false perception of an admission of any wrong-doing on the part of Cape Light Compact in signing a "Settlement Agreement." There was discussion about the terminology of a draft settlement agreement. Resolving this issue with the AGO is an alternative to a legislative resolution.

There was discussion about strategy if Attorney General Healy does not agree to a settlement. The draft provides two options in that case: 1) a finding that the Compact is absolutely right or 2) that the Compact is not absolutely right but the parties just intend move on. S. Rolbein agreed, adding "content" of the agreement is more important than the name "settlement."

P. Cabana suggested adding the words the adder "is part of a charge" and to note the Cape Light Compact agrees that it is a charge. Atty. Bernstein said that language to that effect is in the draft brief.

D. Anthony clarified that the AG has a right to discuss the matter but only separately from the scope of the DPU proceeding for the update of the Aggregation Plan. The Cape Light Compact's position according to *Emerson* is that the adder is within its rights.

R. Zweig suggested using the phrase "part of the rate structure". He noted that the Inter-governmental Agreement has been reviewed and approved by all of the Town's Boards of Selectmen.

Susan Hruby arrived to the meeting at 3:05 p.m.

F. Fenlon requested a hard copy of the *Emerson* Decision. There was discussion about Cape Light Compact seeding Cape & Vineyard Electric Cooperative to help carry out its program. Pursuit of renewable energy remains a major objective within the Aggregation Plan.

Chr. Flynn suggested referring to a settlement as a "settlement of the issue" or a "resolution" of the matter.

Atty. Bernstein read a portion of the draft. In summary, it calls for the Cape Light Compact to continue with its plan without appeal by the Attorney General.

*The sense of the meeting was in unanimous support for M. Downey, Atty. Bernstein and Atty. Ritchie to meet with the Attorney General's office to resolve the issues formerly raised in DPU 14-69.
Atty. Ritchie left the meeting at 3:10 p.m.*

At 3:11 p.m. D. Anthony moved the Board vote to exit Executive Session and reconvene in Open Session, seconded by T. Mayo and voted by roll call vote as follows:

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|-----------------------------------|------------|-------------------------------------|------------|
| <i>1. D. Anthony, Barnstable</i> | <i>Yes</i> | <i>10. B. Worth, Harwich</i> | <i>Yes</i> |
| <i>2. R. Schofield, Bourne</i> | <i>Yes</i> | <i>11. T. Mayo, Mashpee</i> | <i>Yes</i> |
| <i>3. D. Keuch, Brewster</i> | <i>Yes</i> | <i>12. R. Toole, Oak Bluffs</i> | <i>Yes</i> |
| <i>4. P. Cocolis, Chatham</i> | <i>Yes</i> | <i>13. R. Castillo, Orleans</i> | <i>Yes</i> |
| <i>5. T. Carroll, Chilmark</i> | <i>Yes</i> | <i>14. T. Donegan, Provincetown</i> | <i>Yes</i> |
| <i>6. P. Cabana, Dukes County</i> | <i>Yes</i> | <i>15. E. Horn, Sandwich</i> | <i>Yes</i> |
| <i>7. B. Crowell, Dennis</i> | <i>Yes</i> | <i>16. R. Elkin, Wellfleet</i> | <i>Yes</i> |
| <i>8. F. Fenlon, Eastham</i> | <i>Yes</i> | <i>17. J. Flynn, Yarmouth</i> | <i>Yes</i> |
| <i>9. R. Zweig, Falmouth</i> | <i>Yes</i> | <i>18. Susan Hruby, W. Tisbury</i> | <i>Yes</i> |

Respectfully submitted,

Karen E. Loura
Administrative Assistant

LIST OF DOCUMENTS & EXHIBITS:
Meeting Notice/Agenda