



# Cape Light Compact

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June 6, 2012

**By Electronic Mail Only**

Assembly of Delegates  
Second District Courthouse  
Barnstable, MA 02630

Re: *Chris Powicki June 5, 2012 Incorrect Citation of Cape Light Compact Massachusetts Department of Public Utilities Proceedings*

Dear Member of the Assembly:

The purpose of this letter is to provide factual information to the Assembly of Delegates regarding the Cape Light Compact's ("Compact") authority to collect a mil adder under its power supply contract and the permitted use of these funds.

The Cape Light Compact ("Compact") submitted its municipal aggregation plan ("Aggregation Plan") to the Department of Public Utilities ("Department") in May 2000. The Compact's filing included, among other things, a petition for approval, the Aggregation Plan, and a form of electric supply agreement ("ESA"). As required by statute, the Compact conducted extensive consultation with the Division of Energy Resources (later the Department of Energy Resources, both referred to as "DOER"), as it developed its Aggregation Plan. It was with DOER's advice and consultation that the Compact incorporated recovery of administrative costs in its Aggregation Plan. Thus, Section 6.2 of the Aggregation Plan discusses potential additional charges to customers to account for the administrative costs of the power supply program that could be derived from a portion of shared savings or a kilowatt hour charge.

In Mr. Powicki's June 5 letter to the Special Committee Members, he claims that the Department's approval of the Aggregation Plan only authorized the Compact to impose a mil charge to fund the administration of its power supply contracts and only after a public hearing specific to this topic (presumably relying on the language of the Aggregation Plan). However, Mr. Powicki ignores the ESA that was approved by the Department in D.T.E. 00-47 (apart from the Aggregation Plan itself). The ESA included not only an adder to cover the costs of the Compact's administrative operations but also an adder to support energy efficiency and renewable energy activities (in addition to those surcharges mandated by the Commonwealth).

In fact, the Department acknowledged both of these additional fees on page 15 of its Order approving the Aggregation Plan on August 10, 2000 in D.T.E. 00-47. The Department's Order placed no condition on the Compact's ability to impose these kWh fees other than the statutory requirement that the price for energy could not exceed the price of the standard offer.

In a separate proceeding in 2001, the Compact petitioned the Department for approval of a Default Service Pilot Program ("Pilot Program") pursuant to Section 339 of the Electric Utility Restructuring Act of 1997. The Pilot Program was based on the Compact's approved Aggregation Plan but served only default service customers. The Pilot Electric Supply Agreement ("Pilot ESA") submitted to the Department for approval contained a one mil/kWh charge to establish a reserve fund. The reserve fund in this instance was intended to cover any liabilities that were not otherwise covered by the electric supplier's insurance or other financial sureties and provided the Compact's Governing Board with reasonable discretion to administer any funds left over upon expiration of the Pilot ESA. The Department approved the Pilot ESA on March 22, 2002. Mr. Powicki's focus on the reserve fund approved under the Pilot ESA is misdirected, as *the Compact's current form of competitive electric supply agreement was authorized by the Department in an entirely different proceeding with a different form of contract and a different provision.*

On March 3, 2004, the Compact petitioned the Department for approval to enter into a Competitive Electric Supply Agreement (the "CESA"). The Compact filed three unexecuted forms of CESA with its petition for the Department's approval (one for each electric supplier under consideration by the Compact). These forms of CESA were structured in accordance with the Aggregation Plan, the ESA filed and approved by the Department in DTE 00-47 and the Pilot Electric Supply Agreement and extensions thereto approved by the Department in D.T.E. 01-63, D.T.E. 03-61 as well as a new Pilot Electric Supply Agreement in D.T.E. 03-99. Each form of 2004 CESA included a provision (Section 15.3) that authorized the Compact's supplier to collect one mil (\$.001) per kWh in a reserve fund.

The contract clause in Section 15.3 of the CESA stated, *"[t]he Compact may expend such funds for any purpose as may be allowed by law and as determined in the reasonable discretion of the Compact's Governing Board."* (Emphasis added.) Unlike the contract language approved in D.T.E. 01-63, the 2004 CESA reserve fund provision contained no limitation on the Compact's use of the funds until after the expiration of the agreement and no requirement for public reporting. Because the forms of CESA including the reserve fund clause were included as exhibits to the Compact's original petition in D.T.E. 04-32 (and are thus publicly available from the Department), Mr. Powicki's suggestion that the final 2004 CESA was established after the DTE approval order was issued and outside of the regulatory review process is untrue.

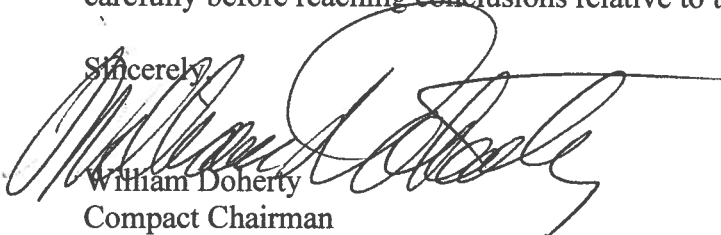
The Department approved this form of CESA (including the reserve fund) in an Order on May 4, 2004. The Department's only condition on the price terms of the CESA was that the price (including the adder) could not exceed the Commonwealth's standard offer service price (a statutory price benchmark for municipal aggregation programs that no longer applies because standard offer service expired in 2005).

The Compact's current CESA executed in 2010 is substantially the same as the form of CESA approved by the Department in 2004 and also includes a reserve fund clause that provides the Compact's Governing Board with the reasonable discretion to expend such funds for any purpose as may be allowed by law. This CESA is also on file with the Department and the language of this reserve fund clause is publicly available from the Department. The only portions of the 2004 CESA and the 2010 CESA that are confidential are the pricing exhibit and the form of financial surety, in accordance with G.L. c. 25, §5D and G.L. c. 4, §7, cl.26(s).

Because the Compact's CESA was reviewed and approved by the Department in D.T.E. 04-32, and that provision was distinct and separate from any contract provision approved by the Department in D.T.E. 00-47 or D.T.E. 01-63, Mr. Powicki's suggestion that the reserve fund is somehow limited to the adder originally approved by the Department in D.T.E. 00-47 is wrong. Moreover, as a matter of statutory construction, the language that provides the Compact Governing Board the reasonable discretion to administer the funds collected by its supplier must be construed separately from any heading or caption of the agreement. (The contract so provides that headings or captions are for reference only. Section 17.16 in the 2004 CESA and 17.15 in the 2010 CESA.).

I hope this letter reinforces the need and importance of the Assembly to review information very carefully before reaching conclusions relative to the Compact.

Sincerely,



William Doherty

Compact Chairman

County Commissioner

Former Member of the Assembly of Delegates

Cc: County Commissioners  
Cape Light Compact Governing Board  
CVEC Board of Directors  
Brewster Board of Selectmen

## Maggie Downey

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**From:** Eric Bibler <ebibler@gmail.com>  
**Sent:** Tuesday, June 05, 2012 10:29 AM  
**To:** Eric Bibler  
**Subject:** Special Committee Report - Comments on CLC Response Re Mill Charge/Reserve Fund & Supply Program  
**Attachments:** CLC2000AgPlan 00-47.pdf; CLCDPUorder 04-32.pdf; CLCfinalpilotsupplyagreement 01-63.pdf

**For Immediate Distribution to the Town Administrator, All Members of the Board of Selectmen, Energy Committee, Finance Committee and other Appropriate Boards and Committees**

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June 5, 2012

Re: Letter to Special Committee of Investigation on the Cape Light Compact and the Cape & Vineyard Electric Cooperative from Mr. Chris Powicki (see below)

Dear Town Officials, County Commissioners, Assembly Delegates and other interested parties:

Please find below a copy of a letter provided to the *Special Committee of Investigation on the Cape Light Compact and the Cape & Vineyard Electric Cooperative* by Mr. Chris Powicki, a renewable energy advocate and energy consultant who has followed the activities of both CLC and CVEC for many years (see minutes of CLC for numerous references to Mr. Powicki's attendance at public meetings).

Mr. Powicki's letter takes issue with the "inaccurate information, red herrings and questionable claims" contained in a letter from Mr. William Doherty, Chairman of the Cape Light Compact, to the Assembly of Delegates that was widely distributed to officials throughout member towns on Cape Cod and Martha's Vineyard and points out that this is only the most recent example of CLC's proclivity for "attacking the messenger" rather than addressing the substance of any questions or concerns expressed by members of the public.

It should be noted in this context that the *Special Committee of Investigation* was convened by the Barnstable County Assembly *in direct response to a petition signed by over 300 individuals* that begged the Assembly of Delegates to intervene on their behalf, to assist them in obtaining public documents, including information relating to the finances, the budgets and the governance of both CLC and CVEC.

It should also be noted, notwithstanding this letter from Mr. Doherty -- and notwithstanding another, *even more caustic and astonishing, letter* to the Assembly from Mr. Charles McLaughlin, President of CVEC, which arguably surpasses Mr. Doherty's letter for blatantly "inaccurate information, red herrings and questionable claims" and hostility -- that despite months of trying, the Special Committee of Investigation *had little more success* in obtaining routine public documents -- including financial statements, budgets, meeting minutes or other evidence of board approval of various highly consequential events, including the expenditure of huge sums of money -- than individual members of the public they sought to assist in this regard.

Mr. Powicki highlights some very substantive issues in his letter regarding the decision by the respective managements and boards of the Cape Light Compact and the Cape & Vineyard Electric Cooperative to divert more than \$2.4 million from CLC to CVEC -- and whether it was appropriate for them to do so.

Mr. Powicki also notes that despite the fact that the Compact has the privilege of distributing approximately \$20

million per year in energy efficiency funds for use in member towns -- which naturally causes the member towns to regard CLC as a great boon to the region -- it is an open question whether CLC has succeeded in accomplishing the objective for which it was founded as a municipal aggregator: namely, to assist electricity ratepayers on Cape Cod and Martha's Vineyard to obtain the most competitive possible rates available for electricity.

Consider that the electric rates paid by consumers on Cape Cod are second in the nation only to the electric rates in Hawaii -- and then consider objectively if some independent evaluation of the success of this program is warranted.

The Board of Selectmen in each of the member towns of the Cape Light Compact appoints a representative to the board of governors of CLC to represent, *in a fiduciary capacity*, the consumers of each town. The consumer / members of the Compact, therefore, are placing their trust in their respective boards of selectmen to appoint representatives who will faithfully represent the interests of consumers, as well as the interests of the towns.

Both the Cape Light Compact and the Cape & Vineyard Electric Cooperative have repeatedly asserted to the Barnstable County Commissioners, to the Barnstable County Assembly of Delegates, to the Special Committee and to individual members of the public -- including members of the Compact -- that they are accountable to NO ONE except to their own boards of directors -- the representatives of the member towns.

More specifically, they have argued that Barnstable County has "no jurisdiction" over either of them and that, to the extent that they were willing to cooperate with the Special Committee (which, essentially they did not), they were only agreeing to do so "voluntarily" -- a point that both Mr. Doherty and Mr. McLaughlin have been at pains to reinforce.

This is an odd -- and ultimately indefensible -- position for them to take, since: a) the County was instrumental in creating both of them; b) the County provides funds annually to CLC; c) since the County pays the salary and benefits of the Assistant County Administrator, Ms. Maggie Downey, who devotes virtually all of her time to managing these entities (according to a report prepared by MMA Consulting); d) CLC advertises itself on the Barnstable County webpage as a "department" of the County; e) the Barnstable County charter seems clear in providing some powers of oversight to the Assembly of Delegates; f) Barnstable County guarantees some financial obligations of CVEC; g) the Barnstable County Treasurer acts as the Treasurer of CVEC and his services are paid by the County; and h) Barnstable County acts as the Fiscal Agent of both CLC and CVEC.

But the far more relevant point is that every board of selectmen on Cape Cod and Martha's Vineyard should heed this message from the Cape Light Compact and CVEC and should recognize that, to some extent, this assertion is true.

It is not true that Barnstable County has no legitimate interest or responsibility to fulfill with respect to these two organizations. But what is undeniably true is that every select board on the Cape and Vineyard bears a fiduciary responsibility to observe -- and protect -- the interests of the residents in each town.

Thus far, virtually every select board on Cape Cod has exhibited a policy of benign neglect toward this fundamental obligation. That is a kind way of saying that virtually none of them have taken this responsibility seriously.

As the Special Committee noted during its proceedings, a search for records pertaining to CLC and CVEC -- including such basic items as Annual Reports and financial records -- repeatedly came up empty handed. No relevant records could even be found at ANY of the town halls where they were sought.

In fact, select boards throughout the Cape & Vineyard do NOT receive annual reports from their representatives

and do not have any real understanding of the finances or the activities of either CLC or CVEC.

We categorically know that to be true because despite months of urging and effort -- from members of the public and the Special Committee -- neither CLC nor CVEC, to date, have made publicly disclosure much of this material. It is impossible believe that individual select boards are conversant with this information if a Special Committee of Investigation has been unable to obtain it after nine months of effort!

We urge every select board in every town that is a member of CLC or CVEC to begin taking this fiduciary responsibility seriously. If these select boards are not willing protect the interests of consumers and taxpayers in this capacity, then they should relinquish their memberships, rather than to neglect their duties.

As the report of the Special Committee of Inquiry makes clear, serious questions have been raised about the administration of funds, about serial lapses in the governance and about the basic structure of both these entities.

It is also clear from their report -- notwithstanding the indignation of Mr. Doherty and Mr. McLaughlin -- that the Special Committee was not successful in obtaining sufficient information from CLC and CVEC to provide them with any confidence -- let alone any proof -- that these concerns were unwarranted.

To the contrary, it is absolutely clear to anyone who attended their public meetings, observed their deliberations or read their Final Report that the concerns of the Special Committee members were only *magnified* by their failure to get to the bottom of these troubling questions.

CLC and CVEC state that only the select boards can have any real influence of their governance and the administration of their affairs.

If falls now to these select boards -- having been duly informed of these concerns -- to do their duty and to insist that all of them be fully and fairly investigated by the government agencies which were established to perform this very task: the Massachusetts Inspector General and the Office of the Attorney General - Ratepayer Advocacy Division.

Sincerely,

Eric Bibler

Cc: CLC Board

Cc: CVEC Board

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To: Special Committee of Inquiry on the Cape Light Compact and Cape & Vineyard Electric Cooperative (Barnstable County Assembly)

Re: Management and Disposition of Funds Collected by CLC through the Mill Adder Charge on Ratepayers / Need for Objective Evaluation of the CLC Power Supply Program

June 5, 2012

Dear Special Committee Members –

I've been following your investigation of CLC and CVEC and found your report's recommendations to be sound. Having closely monitored the activities of these regional energy agencies for a number of years and periodically offered critical evaluations, I am not surprised by their responses to your report, as I've experienced this unfortunate behavior a number of times: Rather than heed the message, they attack the messenger with inaccurate information, red herrings, and questionable claims. Generally, I urge you to stick to your guns. Specifically, I encourage you to consider the following.

Among many other things, the recent communication from CLC Chair Bill Doherty addresses the Special Committee's questions and concerns regarding the imposition of mill charges, the management of the reserve fund, and the disposition of revenues. As your questions and concerns get to the heart of the conflicted decision-making, lack of accountability, and subjugation of consumer/public interests to personal/professional motivations often associated with the management and operations of CLC and CVEC, I've prepared this note in response to assertions in the Doherty communication.

CLC was authorized to charge a mill adder by the Massachusetts Department of Telecommunications & Energy (DTE), the predecessor of the Department of Public Utilities (DPU), back when it received formal approval in 2000 to act a municipal aggregator under DTE Order 00-47. The Doherty communication refers to this approval and specifically references contract language under DTE Order 04-32 as its authorization to use mill charge funds at the "reasonable discretion of the CLC Board." Drawing on the DPU file room at [http://www.env.state.ma.us/DPU\\_FileRoom/frmDocketListSP.aspx](http://www.env.state.ma.us/DPU_FileRoom/frmDocketListSP.aspx), I've attached three key documents and pasted and highlighted relevant excerpts below that govern the mill adder's imposition and use. Please refer to the excerpts below and note that the 2000 CLC aggregation plan is worth a full reading, as it gives a sense of the noble intentions at the beginning of CLC, in terms of consumer engagement, transparent and participatory decision-making, and broad accountability.

The 00-47 and 04-32 documents do not support the claims in the Doherty communication. Under DTE Order 00-47, CLC was authorized to impose a mill charge only to fund the administration of its power supply contracts and only after a public hearing specific to this topic. Under DTE Order 04-32, CLC was allowed to do the same things, as the CLC averred in its 04-32 filings that the supply program would be funded in the same manner. When the Doherty communication uses the words "reasonable discretion," it refers to the reserve fund under its power supply contracts—with this fund representing the practical embodiment of the adder DTE originally approved.

Because the ConEdSol-CLC contracts established under DTE Order 04-32 continue to be withheld under spurious claim of confidentiality, CLC's first supply contract, filed under 01-63, is attached as a reference. Under the 01-63 supply agreement's terms, the reserve fund was created as a surety and source of support for administrating the instant contract, not as a source of generic funding for whatever CLC officials desire. The charge was set at 1 mill and intended to sunset rather than continue indefinitely. The fund was explicitly defined as subject to regular and full public reporting. Only after the instant agreement had expired could collected funds be expended and/or refunded to consumers at the "sole reasonable discretion of the Compact's Governing Board."

The reserve fund clause in the CLC-ConEdSol contracts established under DTE Order 04-32 may differ to some extent from that under 01-63. With respect to any claims that DTE approved this language, it's important to note that such contracts were established after DTE Order 04-32 was issued and thus outside of the regulatory review process. Only by seeing the contracts could it be ascertained as to how the reserve fund is to be administered and applied and whether the language has evolved over time in response to the changing needs of and relationships between CLC, ConEdSol, and CVEC. Certainly, the charge itself has changed – it was set at a half mill (\$0.0005) during contract negotiations in 2004 but waived for residential consumers at supply inception in January 2005 to allow CLC to beat NStar's price (by \$0.0001); there was no mill charge at some point (perhaps consistent with a sunset provision); the charge was re-imposed and bumped up to a full mill after a conversation between CLC and its supplier.

Regardless, the Doherty communication avers that the mill charge and reserve fund have been handled appropriately under 04-32 and its antecedent, 00-47, when in reality publicly available documents identify inconsistencies between what was authorized, what has been done, and what is being claimed.

CLC's initial, limited, and almost noble intent has been twisted and stretched in a variety of ways—most notably by diverting ratepayer funds to CVEC and by using funds held by CLC to pay expenses incurred by CVEC—such that there's little resemblance to the starting point.

The record demonstrates the critical importance of a full-blown investigation into all contracts, accounts, and transactions relating to the mill charge and reserve fund, as called for by the Special Committee.

The record also demonstrates the need for a critical evaluation of the CLC's power supply program.

In particular, the CLC aggregation plan approved under 00-47 envisioned that the mill charge could represent a fraction of shared savings from the supply program, and DTE concluded under 04-32 that there was no reason in 2004 to review CLC's pricing after the transition to full retail competition ended in March 2005. In reality, CLC's supply program has not produced the envisioned savings.

Instead, it has imposed \$30 million in additional electricity costs on residential consumers on the Cape and Vineyard since its inception, while effects on commercial and industrial consumers remain to be quantified.

I would be glad to provide the data documenting these adverse impacts on the residential consumer base. Given the contents of applicable orders and what's actually occurred, it would be appropriate for the Special Committee to augment its referrals to the Inspector General and other agencies by requesting that DPU initiate a review of the CLC supply program and its impacts on all classes of consumers under 04-32.

Please feel free to let me know if you have any questions or would like additional information. And thanks for taking on a challenging task under difficult and politically charged circumstances.



Chris Powicki

Principal, WEEinfo Services

2042 Main Street

Brewster, MA 02631

774-487-4614

## **From the April 2000 AgPlan under 00-47:**

### **3.0 PROGRAM FUNDING**

Funding for Compact programs comes from a variety of sources: grants, appropriations, and monies for energy efficiency funded by ratepayers. Development of the Compact has been funded as part of the Barnstable County budget through appropriations by the County. The Energy Efficiency program will be funded through the monies to be collected and allocated for that program under state law. The budget for the Energy Efficiency program will be specified in a separate plan to be submitted for approval by town meeting and the Department of Telecommunications and Energy. The development of the Power Supply program which has been funded as a regional service by County appropriations is budgeted at the following levels:

FY 1999 \$297,000 (expended)

FY 2000 \$259,500 (budgeted)

These start-up costs are anticipated to be higher than on-going costs of contract maintenance for the power supply program. Barnstable County funding of the Power Supply program at a reduced level is anticipated to continue to cover contract maintenance as a regional service for consumers at a fraction of the savings achieved. In the event that Barnstable County funding would no longer be available, the Compact may utilize a variety of funding sources, including without limitation: funds based on a fraction of consumer benefits expressed as a kilowatt hour charge [equivalent to fractions of a mill per kilowatt hour], as a portion of shared savings, or separate private funds. (See section 6.2 on the process for approval of such alternative funding.)

### **6.2 Other Costs To Consumers**

Aside from any funds appropriated through a public process by the counties, or a member town, consumer bills will reflect all charges for the administrative costs of the power supply program. If power supply program funding were to be derived from a portion of shared savings or a kilowatt hour charge [in an amount equivalent to fractions of a mill], such determination would also take place in a public process, that would include public notice, a public hearing, and a weighted vote by Compact representatives. [A weighted vote on the Compact Governing Board follows the standard of weight by population of each town.] Department of Telecommunications and Energy approval of such a charge would be sought to

the extent that such approval is required. Such a charge could be a percentage of the savings customers are achieving through the program.

### **From the 2004 DPU Order under 04-32:**

The Compact states that the following aspects of the 2004 Aggregation Plan remain unchanged from the 2000 Plan: (1) its organizational structure; (2) the operation and funding of the Plan; (3) the rate setting and other costs that will apply to participating customers; (4) the method for entering and terminating energy supply agreements with other entities; and (5) the rights and responsibilities of participating customers (Exh. DTE-1-12).

### **From the 2002 Pilot Contract under 01-63:**

15.3 Reserve Fund - In order to ensure timely access to funds and: (a) provide the Compact with further financial security in the event Supplier declines to or otherwise fails to indemnify it pursuant to Article 13 and that the insurance coverage pursuant to Article 15.1 and the other 23 financial sureties provided pursuant to Article 15.2 are unavailable or insufficient, and (b) provide the Compact with a special reserve fund ("Reserve Fund") to give further assurances that the Compact will be able to respond appropriately to any risks associated with this Agreement, Supplier agrees to collect on behalf of the Compact, one mill (\$.001) for every kWh sold to Participating Consumers for the first eight (8) months after the Start-Up Service Date. Supplier shall remit to the Compact or its designee on a monthly basis, by electronic funds transfer or such other mutually acceptable method, the amounts due pursuant to this Article 15.3 and provide reasonable supporting documentation as to the total number of kWh sold in each preceding month upon which such payment is calculated.

Once paid to the Compact or its designee, Supplier shall have no further interest or claim in such Reserve Fund. The Compact may use the Reserve Fund to cover any costs, claims, liabilities, damages, expenses (including reasonable attorney's fees), causes of action, suits or judgments, incurred by or on behalf of the Compact or Member Municipalities. The Compact shall cause all funds collected for it by Supplier hereunder to be deposited in a dedicated, interest-bearing account and shall keep records of the receipts, expenditures and balance in such account which shall be provided on a quarterly basis to Supplier and any governmental agencies which may request such records. These records shall be a matter of public record pursuant to G.L. c. 4, §7, cl. 26 and G.L. c. 66, §10. To the extent there are funds remaining in the Reserve Fund at the expiration or termination of this Agreement (and after the running of any statute of limitations periods which the Compact may deem appropriate or prudent), the Compact may expend such funds and/or rebate them to Participating Consumers for any purpose as may be allowed by law and shall be determined in the sole reasonable discretion of the Compact's Governing Board.

