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August 8, 2011

BY FIRST CLASS MAIL AND ELECTRONIC MAIL (jonathan.sclarsic@state.ma.us)

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Division of Open Government
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

***Re: Open Meeting Law Complaints/Cape Light Compact and
Cape & Vineyard Electric Cooperative, Inc.***

Dear Mr. Sclarsic:

This law firm represents the Cape Light Compact (the "Compact") and its sister organization, the Cape & Vineyard Electric Cooperative, Inc. ("CVEC").

We are in receipt of your letter dated July 7, 2011 to the Compact and CVEC requesting executive session minutes of each organization held between and on January 1, 2010 and March 18, 2011. We are also in receipt of your letter dated July 27, 2011 requesting a copy of the meeting notice and minutes (open session and executive session) for the Compact meeting held on March 23, 2011. The notice and the minutes that you requested are enclosed. In your letters, you also asked the organizations to provide your office with any and all information that they believe may be helpful to the resolution of the matters. On behalf of the Compact and CVEC, we are providing you with some background information regarding the organizations and regarding certain exemptions to the Open Meeting Law, in particular the exemption available to municipal aggregators and governmental cooperatives organized under G.L. c. 164, §136.

I. BACKGROUND

A. The Compact

The Compact was originally formed in 1997 through an inter-governmental agreement pursuant to G.L. c. 164, §134, c. 25A, §6 and c. 40, §4A as a result of enactment of the 1997 Massachusetts Restructuring Act which enabled towns and cities to establish municipal aggregators to purchase power on behalf of all customers within such municipalities and to directly administer energy efficiency programs. The Compact now consists of Barnstable County, Dukes County and all of the twenty-one municipalities located within these counties on Cape Cod and Martha's Vineyard. As set forth in the current version of intergovernmental agreement, the Third Amended and Restated Inter-Governmental Agreement dated February 9, 2011 (the "IGA") (copy enclosed), the purposes of the Compact include, among other things, aggregating consumers as part of the competitive market for electricity, negotiating the best terms and conditions for electricity supply, ensuring transparent pricing, providing equal sharing of economic savings based on current electric rates, providing and enhancing consumer protection, allowing consumers who choose not to participate to opt-out, as well as supporting environmental protection, energy efficiency and renewable energy development. The Compact offers a comprehensive approach to energy services, including competitive electricity rates with a green energy option, effective consumer advocacy, proven energy efficiency programs and energy education. The Compact provides electric power supply to approximately 150,000 customers on Cape Cod and 200,000 consumers from all twenty-one towns on Cape Cod and Martha's Vineyard are eligible to participate in the Compact's energy efficiency programs.

The Compact is governed by a Governing Board, which is responsible for the general management and supervision of the business and affairs of the Compact. The Governing Board consists of one representative selected by the Board of Selectmen or Town Council (in the Town of Barnstable's case) of each member municipality, plus one County Commissioner appointed by the Barnstable County Board of Commissioners and one representative appointed by the Dukes County Board of Commissioners. The Compact uses a weighted voting structure with respect to matters which financially impact the member towns; both quorum and weighted votes are tabulated according to the population represented.

More information about the Compact can be found at its web site:
<http://www.capelightcompact.org/about/history/>.

B. CVEC

CVEC was formed out of a strategic planning process commissioned and undertaken by the Compact because the Compact wanted to stabilize electric rates for its members and ratepayers with renewable energy generation. At the time of its formation, neither the Compact, nor its members, could develop electric generation projects and enter into long-term power purchase agreements at the wholesale level. Electric cooperatives such as CVEC, on the other hand, were empowered by statute to do so. Financing CVEC's operational costs to pursue

renewable energy projects would allow the Compact to stabilize electric rates for both its member communities and Compact ratepayers and to provide the benefits, as appropriate, to municipalities (thereby benefiting all taxpayers) and to the Compact (thereby benefiting all consumers). Finally, the cooperative structure insulated towns from the liability they would otherwise incur if they pursued projects directly. Compact members benefit from CVEC designing, financing and operating renewable energy projects.

CVEC was formed on September 12, 2007 and was organized pursuant to Massachusetts General Laws c. 164, §136 and c. 156B. Membership in CVEC is restricted to governmental entities. There are currently nineteen members of CVEC: the Compact, the County of Barnstable, Town of Barnstable, Town of Brewster, Town of Harwich, Town of Dennis, Town of Tisbury, Town of Bourne, Town of Eastham, Town of Sandwich, Town of Provincetown, Town of Mashpee, Town of Edgartown, Town of Orleans, Dukes County, Town of Yarmouth, Town of Falmouth, Town of Chatham and Town of West Tisbury. CVEC's Bylaws and Articles of Organization specifically state "[a]ny municipality or county or political subdivision thereof, or body politic that meets the requirements of Internal Revenue Code Section 115, shall be eligible to apply for membership in CVEC, provided that the governing board of each Member has authorized its membership." Bylaws, §2.1; Articles, §VI (b) (copies of CVEC's organizational instruments are enclosed). CVEC's Bylaws and Articles of Organization state that it shall operate as an instrumentality of its government members. Bylaws, §9; Articles, §VI(e). The governing body of CVEC is a Board of Directors consisting of directors who are appointed by the members of CVEC and each member is entitled to be represented by one director. Bylaws, §4.2. CVEC also has an Executive Committee; most of the powers of the Board of Directors are delegated to the Executive Committee. There are five members of the Executive Committee. Three members are permanent members: the Compact, the Town of Barnstable and Barnstable County.

In accordance with its organizational statute, CVEC was organized to transact "any lawful business associated with the purchase, acquisition, distribution, sale, resale, supply and disposition of energy or energy-related services to wholesale or retail customers, subject to federal and state laws and regulations." G.L. c. 164, §136. The purposes of CVEC are to develop and/or own renewable and non-renewable electric generation facilities and to procure and/or sell long term electric supply or other energy-related goods or services including renewable energy certificate contracts at competitive prices to its members. Bylaws, §1.4. The functions, policies and goals of CVEC include exploring appropriate options for acquiring the best market rate for electricity supply; promoting and supporting the development of renewable energy resources; providing and enhancing consumer protection by improving quality of service and reliability; and utilizing and encouraging conservation and other forms of energy efficiency. Bylaws, §1.6.

More information about CVEC can be found on its web site:
<http://www.cvecinc.org/about/>.

II. USE OF EXECUTIVE SESSIONS BY THE COMPACT AND CVEC

All of the meetings of the Compact and CVEC are held in strict accordance with Massachusetts law. Each organization has used its best efforts to refine its notices and meeting procedures to conform to the changes that were made to the Open Meeting Law in 2010. The Compact and CVEC publish their meeting notices and agendas in advance and current practice is to reference the basis for executive session discussions in the meeting notices. The Compact meeting agendas and minutes can be found on the Compact's website at the following link: <http://www.capelightcompact.org/about/agendas-minutes/>. CVEC's current meeting agenda can be found at the following link: <http://www.cvecinc.org/about/calendar/>. CVEC meeting agendas that predate the establishment of its current website are available upon request. CVEC's meeting minutes can be found at the following link: <http://www.cvecinc.org/about/meeting-minutes/>.

A. Permissible Use of Executive Sessions

The Open Meeting Law provides that a public body may only meet in executive session for certain purposes enumerated in the statute. One of them is specific to certain kinds of government entities engaged in energy related activities. The Open Meeting Law provides that they may meet in executive sessions:

To discuss *trade secrets or confidential, competitively-sensitive or other proprietary information* provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

G.L. c. 30A, §21(a)(10) (emphasis added). The Compact and CVEC are precisely the kinds of government entities permitted to enter into executive session under this provision of the Open Meeting Law. The Compact is a municipal aggregator under Section 134 of Chapter 164. CVEC is a cooperative consisting of governmental entities organized pursuant to Section 136 of Chapter 164. Each of these entities frequently meets in executive session pursuant to this provision of the Open Meeting Law. For convenience in this letter, executive sessions convened pursuant to this provision of the Open Meeting Law are referred to in this letter as "Energy Related Executive Sessions."

To our knowledge, there is no case law or agency guidance interpreting this provision in the Open Meeting Law.¹

B. Legislative History of G.L. c. 30A, §21(a)(10)

The Open Meeting Law exemption for municipal aggregators and cooperatives was enacted in Chapter 445 of the Acts of 2008, *An Act Regulating Public Entities Licensed by the Department of Telecommunications and Energy*, approved by the Governor on December 30, 2008. The final bill did not contain a preamble, but an earlier version of the bill, Senate No. 1980, included an emergency preamble, which may give some insight into the intent of the legislation. The preamble stated, “[w]hereas, The deferred operation of this act would tend to defeat its purpose, which is forthwith to save money on energy purchases by extending to public entities licensed to participate competitively in the wholesale electric markets as suppliers, brokers, or aggregators the same ability to protect trade secrets, competitive or proprietary information now extended to municipal light companies and further to provide certain reporting and record-keeping requirements, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.” Senate No. 1980.

The bill came about initially as a result of the Hampshire Council of Governments (“HCOG”) and the difficulty HCOG was having participating in the wholesale electricity market. Suppliers did not want their customers or competitors to know the details of their pricing proposals to HCOG. HCOG was unable to enter into nondisclosure agreements with suppliers and other entities and it was unable to keep the pricing terms for power supply it wanted to purchase confidential. The Compact and CVEC were also consulted at an early point and shared similar difficulties and concerns, which they conveyed to their then State Senator Robert O’Leary, among others. HCOG sought assistance from State Senator Stanley Rosenberg to extend the same protections to HCOG that were afforded municipal light plants under G.L. c. 164, §47D.

The municipal light plant protections in Section 47D were enacted as part of the Electric Restructuring Act, St. 1997, c. 164, §197. The protections provide that municipal light plants are exempt from public record requirements of the public records law and the open meeting requirements of the Open Meeting Law “in those instances when necessary for protecting trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter when such municipal lighting plant

¹ We also note that the Massachusetts Public Records Law exempts from disclosure “trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit.” G.L. c. 4, §7(g). We inquired with Rebecca S. Murray, Esq. in the Public Records Division as to whether her office had any guidance on what constitutes trade secrets or commercial or financial information as we thought it be helpful in construing the provision in the Open Meeting Law dealing with the Energy Related Executive Sessions and were informed that there was no helpful guidance on this subject.

board determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling, or distributing electric power and energy pursuant to this chapter.” G.L. c. 164, §47D.

From this firm’s review of HCOG correspondence on the proposed legislation, it appears that Inspector General Gregory Sullivan spoke in favor of the bill on June 12, 2007 to the Joint Committee on Telecommunications and Energy. There is also correspondence from Senator Rosenberg's office indicating that Jack McCarthy, Senior Assistant Inspector General was one of the authors of the legislation. In a letter dated June 12, 2007 from Senator Rosenberg to the Chairs of the Joint Committee, he stated as follows:

Initially this legislation came to our office as a specific exemption for the Hampshire Council of Governments (HCOG) as they have had trouble procuring wholesale energy without the ability to sign a non-disclosure agreement. As that bill began its way through the legislative process last session it caught the attention of the Inspector General Gregory W. Sullivan. *The current legislation before you is the result of a concentrated effort over the past year between the Office of Inspector General and the HCOG to resolve this issue not only for Hampshire County but for all multi-municipal entities in the Commonwealth.*

The legislative history clearly indicates that energy related Massachusetts government entities needed an exemption to the Open Meeting Law in order to effectively conduct their business. There are other state statutes that permit similar exemptions to their open meeting laws. See i.e., Minn. Stat. §308A.327(3). In addition, the Federal Sunshine Act permits federal agencies to close meeting portions “where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to ... disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C.A. §552b(c)(4).

C. Trade Secrets or Confidential, Competitively-Sensitive or Other Proprietary Information in the Energy Industry

Currently, it is the practice of the Compact and CVEC to treat the following types of information, among others, as confidential: power supply pricing; the identity of power suppliers; the methods used to evaluate power supply price offers; the evaluation of bidder’s and other third-party developer’s prices and terms and conditions; energy forecasting models; internal financing methods and *pro formas*; and forecasts of prices for energy, capacity, renewable energy certificate (“RECs”) and ancillary products. If such information is prematurely disclosed, it will adversely affect each entity’s ability to conduct its business in relation to other entities making, selling or distributing electric power and energy. See the attached statements of Joseph Soares and Jonathan Wallach setting forth the Compact’s empirical market basis for confidential treatment of this information.

The Compact and CVEC exercise the following internal controls in order to ensure that their confidential information is protected: 1) board discussions regarding confidential information are held in executive session; 2) confidential information and materials are clearly marked as confidential and not for public discussion and/or dissemination; 3) confidential information and materials are frequently collected from board members at the end of the meeting; and 4) staff and consultants frequently execute nondisclosure agreements (“NDAs”) prior to receiving confidential information.

In addition, in order for the Compact to engage in even preliminary discussions with potential power suppliers, the suppliers require the Compact to sign confidentiality agreements or NDAs. When the Compact first began conducting its power supply procurements, it would receive numerous requests from suppliers to sign their standard confidentiality agreements before suppliers would consider submitting responsive bids and pricing. The Compact now includes its own standard form of confidentiality agreement as part of its bid package in order to maximize participation by potential bidders. See enclosed form of confidentiality agreement. In addition, in order for the Compact to procure competitive power supply, it needs certain customer usage from the distribution company, NSTAR. NSTAR required the Compact to enter into an NDA in order to obtain and use such information. See enclosed NSTAR NDA.

D. DPU Practices Regarding Trade Secrets or Confidential, Competitively-Sensitive or Other Proprietary Information

The Compact and CVEC participate in many regulatory proceedings before the Department of Public Utilities (“DPU” or the “Department”). The Compact has participated in many rate, contract and other adjudicatory proceedings involving investor-owned utilities. It is an active participant in proceedings involving NSTAR contracts which could affect Compact ratepayers such as the recently concluded D.P.U. 11-05, 11-06 and 11-07 consolidated proceedings reviewing NSTAR’s request to enter into three long-term wind energy and REC contracts and offered expert testimony. The Compact itself is the petitioner in various proceedings involving its energy efficiency programs as it is the only non-utility energy efficiency program administrator. See for example, D.P.U. 07-47, D.P.U. 08-113 and D.P.U. 09-119. The Compact is an intervenor in the NSTAR/Northeast Utilities merger proceeding which is ongoing, D.P.U. 10-170. It has also been a party in many proceedings implementing various provisions in the Green Communities Act. D.P.U. 08-88 (Rulemaking to Implement the Provisions on Long-Term Contracts for Renewable Energy), D.P.U. 09-46 (Investigation regarding terms and conditions pursuant to Sections 60 and 98 of the Green Communities Act) and D.P.U. 09-77 (Timetable and methods for the solicitation and execution of long-term contracts for renewable energy).

Utilities and other parties participating in DPU proceedings routinely request trade secrets and confidential information be protected from disclosure pursuant to G.L. c. 25, §5D which provides as follows:

Notwithstanding the provisions of clause Twenty-sixth of section seven of chapter four and section ten of chapter sixty-six, the department may protect from public disclosure, *trade secrets, confidential, competitively sensitive or other proprietary information* provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the department shall protect only so much of the information as is necessary to meet such need. The department shall promulgate procedural rules and regulations consistent with this section as it deems necessary to implement the provisions hereof.

G.L. c. 25, §5D (emphasis added). The language used in this statute (highlighted above) is identical to the language in the provision in the Open Meeting Law pertaining to Energy Related Executive Sessions. The type of information that parties seek to protect in DPU cases pursuant to this statute is broad in scope. For instance, the Department will afford protective treatment for bid information in response to a request for proposals for energy, capacity and RECs (because release of such information would put the party at a competitive disadvantage, harm future bid processes and discourage future bidders from making concessions). Hearing Officer Ruling on Motions of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, for Confidential Treatment, D.P.U. 10-54 at 7-10 (July 15, 2010); Hearing Officer Ruling on Motions for Confidential/Protective Treatment, D.P.U. 11-BSF-A, -B, -C, -D at 3 (May 18, 2011) (protection afforded to confidential competitively sensitive or proprietary bid data and number of bidders); see also *Fitchburg Gas and Electric Light Company*, D.T.E. 98-121 at 2 (March 31, 1999) (disclosure of competitively sensitive information regarding prospective bidders could undermine efforts to secure the highest bids during ongoing divestiture process). The Department will also grant protective treatment for long-term price forecasts for energy, capacity and RECs as well as the modeling used to develop such forecasts (because disclosure of consultant work product which is confidential, competitively sensitive and proprietary would place the consultant at a competitive disadvantage and damage the party's ability to secure the consultant's services in the future). Hearing Officer Ruling on Motions, D.P.U. 10-54 at 7-10. In addition, the Department will grant protective treatment of contract negotiation information (because if such information were disclosed it would adversely affect a party's ability to engage in future contract negotiations and place it at a competitive disadvantage). *Id.* The Department will also protect bids, engagement letters and other documentation related to consultant services (because to disclose such information would significantly impair a party's ability to obtain future bids from consultants who may refrain from bidding if it is known that their competitively-sensitive information is subject to public disclosure). Hearing Officer Ruling on Motions for Confidential Treatment, D.P.U. 09-39 at 3, 5-6 (April 14, 2010).

Pricing terms are also routinely granted confidential treatment. Boston Gas Company, D.P.U. 11-GC-04, Letter Order at 2 (April 25, 2011) (pricing terms of gas contract are competitively sensitive and deserve protection from public disclosure); Hearing Officer Ruling on Motions for Confidential/Protective Treatment, D.P.U. 09-BSF-A, -B, -C, -D, D.P.U. 10-

BSF-A, -B, -C, -D, D.P.U. 11-BSF-A, -B, -C, -D at 3 (May 18, 2011) (bid and pricing data, bid analyses, contract terms and the number of bidders per contract afforded protective treatment as trade secrets, confidential, competitively sensitive, or proprietary information); Hearing Officer Ruling on NSTAR Electric Motion for Confidential Treatment and RESA Motion to Compel Production of Documents, D.P.U. 07-64 at 7 (November 19, 2007) (protection afforded as disclosure of contract price terms could damage NSTAR's ability to secure least-cost electricity supply for its customers). See also Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices).

The Compact was afforded protection pursuant to this statute in order to protect information pertaining to financial security provided by four competitive electric suppliers negotiating forms of competitive electric supply agreements with the Compact. Stamp Approval of Motion for Protective Treatment of Confidential Information, D.T.E. 04-32 (March 23, 2004). The Compact has also sought protection pursuant to this statute for the terms of its energy pricing as well as the financial security provided by the Compact's competitive electric supplier. Motion for Protective Treatment of Confidential Information, D.P.U. 10-xx (June 10, 2010) (pending D.P.U. ruling).

E. What Constitutes Confidential Information Under Massachusetts Law

Under the Massachusetts Rules of Civil Procedure, parties can seek protective orders in order to prevent disclosure of "trade secret[s] or other confidential research, development, or commercial information." Mass. R. Civ. P. 26(c)(7). These terms are not defined in the Massachusetts Rules of Civil Procedure. The Massachusetts courts take numerous factors into account when deciding whether certain information is a trade secret. In *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835 (1972), the SJC articulated the test as follows:

The crucial issue to be determined in cases involving trade secrets, therefore, is whether the information sought to be protected is, in fact and in law, confidential. In our view, the result in each case depends on the conduct of the parties and the nature of the information. Although 'no general and invariable rule can be laid down' the Restatement of Torts, s 757, comment b, sets out six factors of relevant inquiry: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 361 Mass. at 840 (some citations omitted); see also *Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 49 (1998). The type of information that the Compact and CVEC treat as confidential would clearly be afforded protective status based on application of this test.

F. Litigation

Public bodies may also enter into executive session “[t]o discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.” G.L. c. 30A, §21(a)(3). The Compact and CVEC have frequently met in executive session pursuant to this provision in the statute.

As noted above, the Compact and CVEC are frequently parties to DPU and other regulatory proceedings. The nature of these regulatory proceedings varies widely. Some are rulemaking or similar “notice and comment” proceedings while others are trial-type evidentiary proceedings where a specific party’s rights are adjudicated and other parties may participate by demonstrating standing. Those latter regulatory litigation cases involve discovery, motion practice, testimony and cross-examination under oath and post-hearing briefs. Parties frequently call lay and expert witnesses to support their position. Among the far more adversarial is the imminent DPU proceeding which triggered the pending Open Meeting Law complaints by Eric Bibler on behalf of Save Our Seashore. Mr. Bibler is an ardent opponent of the wind project being developed by CVEC in the Town of Brewster. It is clear that Mr. Bibler is systematically trying to damage the day to day operations of the Compact and CVEC by, among other things, overwhelming the organizations with public records law requests, Open Meeting Law complaints, requests to other officials to “investigate” the Compact and CVEC and a general barrage of other aggressive and unnecessary communications with the organizations that are filled with personal attacks, innuendo and distortions.

By way of additional background, CVEC’s special permit application in connection with its wind project was effectively denied by Brewster’s Planning Board for lack of a supermajority earlier this year. CVEC could appeal the denial to Superior Court pursuant to G.L. c. 40A, §17. Instead, CVEC voted to seek an exemption from the special permit process from DPU pursuant to G.L. c. 40A, §3 and publicly announced its decision to do so. The DPU special permit exemption process is an adversarial proceeding. Among other things, the proceeding will involve extensive discovery and extensive witness testimony. Filing a DPU petition in connection with a petition for an exemption from a special permit process is a huge undertaking. See the enclosed checklist for the extensive filing requirements for zoning exemption petitions which is also available at <http://www.mass.gov/Eoca/docs/dte/siting/checklfze.pdf>.

Petitions for zoning exemptions are adjudicatory proceedings. See Final Decision of *Russell Biomass, LLC and Western Mass Electric Company*, E.F.S.B. 07-4/D.P.U. 07-35/07-36 at 2. To illustrate this point, in the Russell Biomass proceeding there were six intervenors, four parties who participated as limited intervenors, ten witnesses, two hundred exhibits, five days of evidentiary hearings and numerous briefs were submitted. CVEC expects that the DPU proceeding on its petition to be at least as extensive. Appeals of DPU decisions are filed directly with Massachusetts’ highest court, the Supreme Judicial Court. More information regarding the nature of this type of proceedings is available by reviewing the Final Order in the Russell Biomass case which is available at the following link:

<http://www.env.state.ma.us/dpu/docs/electric/efsb07-4/dpu07-35/36/42109efsbfind.pdf>.

G. The Bibler Complaints

1. Disclosure of the Compact's and CVEC's unreleased executive session minutes will defeat the lawful purposes of the executive sessions

Your July 7, 2011 letter states that your office received complaints from Mr. Bibler dated June 16, 2011 alleging that the Compact and CVEC violated the Open Meeting Law by failing to release executive session minutes after they no longer warranted non-disclosure. The Compact and CVEC are quite different from other public bodies subject to the Open Meeting Law. For most public bodies, when a particular matter or project is complete or they have decided to terminate their participation with respect to a particular matter or project, it is appropriate for executive session minutes regarding those matters or projects to be released. This is not the case with the Compact and CVEC. Because these entities are continuously participating in power purchase transactions, development of renewable energy projects and other energy-related matters and transactions, disclosure of most older executive session minutes would adversely affect their ability to conduct business in relation to other entities making, selling or distributing electric power and energy. By way of example, in executive session the Compact may discuss a particular power supplier's proposal to provide the Compact with competitive electric supply and may decide to terminate negotiations with that supplier. While contract negotiations may have terminated, it would adversely affect the Compact's ability to negotiate future contracts if suppliers were able to learn the Compact's strategic plan, its issues of concern and the considerations it uses in evaluating proposals by reviewing the Compact's older executive session minutes. The Compact and CVEC have a continuing interest in protecting the practice of the Compact and CVEC to treat the following types of information, among others, as confidential: power supply pricing; the identity of power suppliers; the methods used to evaluate power supply price offers; the evaluation of bidder's and other third-party developer's prices and terms and conditions; energy forecasting models; internal financing methods and *pro formas*; and forecasts of prices for energy, capacity, RECs and ancillary products. Disclosure of older minutes which includes discussion of these issues would defeat the lawful purposes of the executive sessions. If the Compact's and CVEC's confidential information is disclosed through the release of executive session minutes, it would adversely affect the Compact's and CVEC's ability to conduct their business in relation to other entities making, selling or distributing electric power and energy.

2. The Compact's March 23, 2011 meeting

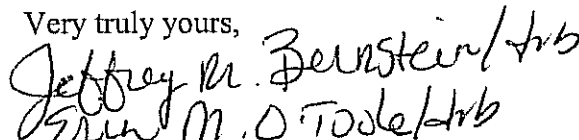
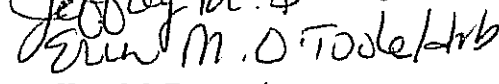
Your July 27, 2011 letter states that your office received a complaint from Mr. Bibler dated July 20, 2011 alleging that the Compact violated the Open Meeting Law by deliberating on matters that were not appropriate for executive session when discussing the transfer of funds to CVEC. The executive session that was convened at the March 23, 2011 meeting was for two permissible purposes under the Open Meeting Law. It was convened to discuss litigation strategy regarding various DPU proceedings and to have an Energy Related Executive Session. G.L. c.

30A, §21(a)(3) and (10). Based on the background information provided in this letter and a review of the executive session minutes from this meeting, it should be clear that the March 23, 2011 executive session was convened for lawful purposes.

III. CONCLUSION

We appreciate that you have given us the opportunity to provide you with the background material set forth in this letter. We believe that the Compact and CVEC at all times have endeavored to comply with the Open Meeting Law and all other applicable provisions of the General Laws, consistent with their unique missions as, respectively, an energy aggregator and a governmental energy cooperative.

Please do not hesitate to contact either of us if you have any questions regarding this matter.

Very truly yours,


Jeffrey M. Bernstein
Erin M. O'Toole

JMB/EMO:drb
Enclosures

cc: Margaret T. Downey (w/enc.)
Charles McLaughlin (w/o enc.)

List of Enclosures

March 23, 2011 Meeting Agenda
March 23, 2011 Compact Open Session Minutes
Compact and CVEC Executive Session Minutes
Third Amended and Restated IGA
CVEC Bylaws
CVEC Articles
Compact Confidentiality Agreement
NSTAR NDA
Checklist for Filing Petition for Zoning Exemption
Statement of Joseph Soares
Statement of Jonathan F. Wallach