

**Cape Light Compact JPE  
Governing Board  
Executive Session Meeting Minutes  
Wednesday, November 10, 2021**

Pursuant to Massachusetts Governor Charles D. Baker's Order Suspending Certain Provisions of the Open Meeting Law on March 12, 2020, the Cape Light Compact JPE Board of Directors met on Wednesday, November 10, 2021 at 2 p.m. The meeting was held through a Zoom videoconference for members of the Board with audio call-in available for members of the public.

**Present Were:**

1. Peter Doyle, Barnstable Alternate
2. Robert Schofield, Executive Committee, Bourne
3. Francis Erdman, Bourne Alternate
4. Colin Odell, Executive Committee, Brewster
5. Peter Cocolis, Chatham
6. Timothy Carroll, Executive Committee, Chilmark
7. Brad Crowell, Dennis
8. Fred Fenlon, Eastham
  
9. Alan Strahler, Edgartown
10. Matthew Patrick, Falmouth
11. Dion Alley, Executive Committee, Oak Bluffs
12. Martin Culik, Chair/Executive Committee, Orleans
13. Nathaniel Mayo, Provincetown
14. Bob Higgins-Steele, Truro Alternate
15. Richard Elkin, Executive Committee, Wellfleet
16. Sue Hruby, West Tisbury
17. Joyce Flynn, Vice Chair/Executive Committee, Yarmouth
18. Mike Duffy, Yarmouth Alternate

**Absent Were:**

1. Forest Filler, Aquinnah
2. David Anthony, Secretary/Executive Committee, Barnstable
3. Erik Peckar, Dukes County
4. Valerie Bell, Harwich
5. Wayne Taylor, Mashpee
6. Leanne Drake, Sandwich
7. Kirk Metell, Tisbury
8. Jarrod Cabral, Truro

**Legal Counsel:**

Audrey Eidelman, Esq., BCK Law, P.C.  
 Jeffrey Bernstein, Esq., BCK Law, P.C.

**Staff Present:**

Maggie Downey, Administrator  
 Melissa Allard, Senior Administrative Coordinator

**Open Session Vote on entry into Executive Session pursuant to M.G.L. c. 30A §§21(a)(3) and (10) to discuss matters below, to return to open session:**

*Martin Culik at 2:37 PM moved to enter into Executive Session pursuant to M.G.L. c. 30A §21(a)(3) and (10) to (1) review and approve executive session minutes which contain discussions regarding pending or imminent regulatory litigation and trade secrets and confidential, competitively-sensitive or other proprietary power supply information related to a proposed Low-Income Community Solar project (when the release of the discussion would have a detrimental effect on the Compact’s negotiating position); (2) to discuss and potential vote on pending or imminent regulatory litigation related to Massachusetts Department of Public Utilities 2040, Cape & Vineyard Electrification Offering (CVEO) and the 2022-2024 Energy Efficiency Plan, DPU 21-126 to return to open session thereafter. Seconded by Robert Schofield.*

Peter	Doyle	Barnstable	Yes
Robert	Schofield	Bourne	Yes
Colin	Odell	Brewster	Yes
Peter	Cocolis	Chatham	Yes
Tim	Carroll	Chilmark	Yes
Brad	Crowell	Dennis	Yes
Fred	Fenlon	Eastham	Yes
Alan	Strahler	Edgartown	Yes
Matt	Patrick	Falmouth	Yes
Dion	Alley	Oak Bluffs	Yes
Martin	Culik	Orleans	Yes
Nate	Mayo	Provincetown	Yes
Bob	Higgins-Steele	Truro	Yes
Richard	Elkin	Wellfleet	Yes
Sue	Hruby	West Tisbury	Yes
Joyce	Flynn	Yarmouth	Yes

*Motion carried in the affirmative (16-0-0)*

**APPROVAL OF MINUTES:**

The Board considered the September 29, 2021 Executive Session Meeting Minutes.

*Robert Schofield moved the Board to accept the minutes as amended, seconded by Richard Elkin.*

Peter	Doyle	Barnstable	Yes
Robert	Schofield	Bourne	Yes
Colin	Odell	Brewster	Yes
Peter	Cocolis	Chatham	Yes
Tim	Carroll	Chilmark	Yes
Brad	Crowell	Dennis	Yes
Fred	Fenlon	Eastham	Yes
Alan	Strahler	Edgartown	Yes
Matt	Patrick	Falmouth	Yes
Dion	Alley	Oak Bluffs	Yes
Martin	Culik	Orleans	Yes
Nate	Mayo	Provincetown	Yes
Bob	Higgins-Steele	Truro	Yes
Richard	Elkin	Wellfleet	Yes
Sue	Hruby	West Tisbury	Yes
Joyce	Flynn	Yarmouth	Yes

*Motion carried in the affirmative (16-0-0)*

**CAPE AND VINEYARD ELECTRIFICATION OFFERING (CVEO):**

Maggie Downey stated that the Board should have received a copy of the Department of Public Utilities (DPU) order that was issued last Friday on CVEO. She stated that it was first proposed by the Compact in the 2019-2021 Plan and was not approved by the DPU. The Compact was given specific directives by the DPU to work with stakeholders and revise CVEO. The Compact revised and refiled CVEO in May 2020 and had not received an Order or any direction from the DPU on CVEO since the initial filing. In October, the Compact included the revised CVEO program in the 2022-2024 Energy Efficiency Plan. She stated that she is going to turn the discussion over to Jeff Bernstein to present options on moving forward and will be looking for a vote from the Board at the end.

Jeff Bernstein reviewed the attorney-confidential Review of DPU 20-40-A Order Cape Light Compact JPE Petition for Approval of CVEO PowerPoint.

Jeff Bernstein stated that the decision was rendered last Friday. The DPU denied CVEO on the following grounds: CVEO is contrary to laws of the Commonwealth so it cannot be approved as an

“enhancement” under a municipal aggregator’s special statutory authority in G.L. c. 164, §134(b), solar PV is not an energy efficiency resource for purposes of the Green Communities Act (GCA) because it does not seek to lower a customer’s consumption, and installation of battery storage is outside the scope of energy efficiency and demand reduction under the GCA and therefore cannot be supported by ratepayer-provided energy efficiency funding. He stated that the DPU said the Solar Massachusetts Renewable Target (SMART) solar incentive program showed that the legislature wanted to move away from incentives and that the DPU did not interpret the GCA to allow any incentives for solar PV. Also, the DPU said that it had some concerns about the reasonableness and certainty of the bill impacts that would result from implementation of CVEO.

Jeff Bernstein stated that the Compact has two options. It can appeal the DPUs decision directly to the Massachusetts Supreme Judicial Court (SJC). He stated that the Compact has twenty days to file the appeal first with the Secretary of then DPU and then ten days later to the SJC. He stated that it is not an extensive document where you set out your case, but rather it is where you lay out the framework of your claims. Jeff Bernstein stated that that the other option is to not appeal DPUs decision and wait to see if it denies the other Compact enhancements proposed in the Compact’s 2022-2024 Energy Efficiency Plan.

Jeff Bernstein stated any full party to DPU 20-40-A, which includes the Compact, Department of Energy Resources (DOER), the Attorney General’s Office (AGO) and LEAN, can file a Petition for appeal within twenty days from the date of the order. He stated that the AGO has taken an advocacy position that is in contravention of what the DPU decided. Therefore, it is possible if there is an appeal, the AGO will refuse to defend the DPU and could file briefs to support the Compact position. He stated that the appeal process is lengthy and likely take over a year to reach a decision. Appeals of agency decisions are based on certain standards. An appeal of DPU 20-40 would claim that DPU made errors of law in its statutory construction of the GCA and that approval of CVEO would conflict with laws of the Commonwealth as well as in certain factfinding. He stated that the SJC has been very deferential to the DPU and other administrative agencies, even where good grounds exist to overturn the agency order.

Jeff Bernstein stated that if the Compact does not appeal the DPUs decision, it can wait to see what the DPU does with the other enhancements in the Compact’s 2022-2024 Three-Year Plan. The DPU would certainly remove CVEO from D.P.U. 21-126. Jeff Bernstein stated the order in DPU 20-40-A contains multiple factual inaccuracies. One of them is that ratepayer-provided energy efficiency funding cannot be used to support the costs of installing battery storage. Also, the DPU claimed that the Compact did not account for declining compensation blocks when analyzing SMART as a funding source; in fact, the Compact characterizes the ConnectedSolutions program as an outside funding source and removes these costs from the projected budget for battery storage.

Jeff Bernstein stated that if the Compact chooses not to appeal, the DPU order in 20-40-A will become settled law for CVEO as well as, among other things, to the determinations about funding solar PV and battery storage with energy efficiency funds. Also, the DPU analysis on bill impacts with respect to CVEO could prejudice the Compact in any future appeal regarding a denial of Compact enhancements due to ratepayer impact. He stated if the Compact chooses to appeal, then it will probably want to appeal

the expected denial of CVEO (again) and potentially other enhancements in DPU 21-126. He stated that the Compact would then seek to consolidate the two appeals.

Jeff Bernstein reviewed the budget for appeal. Phase one (filing petitions and other preliminary court papers) would be in a range of \$6,000 to \$8,400 and phase two would be in a range of \$45,000 to \$57,000 for briefing and oral argument. He stated that if there are other parties in the case supporting the Compact it would help some, but the Compact is going to be putting in the great majority of the effort.

Sue Hruby stated that she would put her vote in for an appeal because it seems that based on the State's direction things are shifting towards renewable energy and reducing greenhouse gas emissions. She asked if the DPU is heavily fossil fuel oriented. Jeff Bernstein stated that the current DPU has been very hostile towards renewable energy, and he does not believe that is going to change if the composition is the same. He stated that recently he and Audrey Eidelman went before the Supreme Judicial Court (SJC) in a siting case to represent a town that was arguing that Eversource should not be allowed to install a new transmission line but should pursue distributed solar and battery storage instead; the SJC upheld the Siting Board and rejected the town's appeal.

Peter Cocolis stated that he believes that we should move ahead with an appeal as well. He stated that in the order it said that one of the Department's other reasons for denying CVEO was because the law does not allow this kind of effort due to it not being energy efficient and the costs imposed on the consumer. He asked if he read that right. Jeff Bernstein answered yes. He stated that the Department did independent fact findings on the Compact bill impacts. Audrey Kiernan stated that the Compact's primary argument is that the use of solar paired with battery storage was supported by the exact language of the Green Communities Act (GCA). She stated that in the alternative the Compact argued that even if the DPU found that not to be the case, the Compact as a municipal aggregator has the statutory authority under the municipal aggregation statute to offer programs that are different from the statewide plan. She stated that the Compact cannot be denied energy efficiency programs unless it proposes something that is in violation of the law of the Commonwealth. She stated that is why the DPU tried to find a reason suggesting that if the CVEO program was implemented it would violate the laws of the Commonwealth.

Colin Odell stated that the DPU order does provide a potential path forward, one that is cooperation between the SMART program and the Compact offering. He asked if the SJC is likely to view that and denied the Compact's appeal. Jeff Bernstein stated that there is no substantive proposal on the table, and the language was more of an attempt to justify its denial.

Matt Patrick discussed the Legislature in drafting the Restructuring Act (Act), which enabled the Compact to become a municipal aggregator and to receive the energy efficiency line charges. He also wrote the same section for renewable energy line charges that he used for the energy efficiency line charges, and it ended up in the Act. He stated that the renewable energy line charge was interpreted differently than the energy efficiency line charge. He stated that maybe it could be useful when bringing up the intent of the legislature. Jeff Bernstein stated that he would have to think about how to weave that argument in. Audrey Kiernan stated that the DPUs position will remain that CVEO uses ratepayer funding to support renewables. She stated that she does not think the DPU differentiates between where

the ratepayer funding is coming from. She thinks that its argument is that the SMART program already exists and provides ratepayer funding for solar PV, and it was drafted by the Legislature to do so with the goal of making solar PV self-supporting overtime. Therefore, its position would be that for the DPU to authorize the Compact to expend additional dollars as part of its Energy Efficiency Plan to install solar would contradict the legislative intent in reducing ratepayer impacts from solar installation. She stated that she would have to think about whether that municipal aggregation statute would help us.

Colin Odell asked if energy efficiency funds can be used for the legal costs of this appeal. Jeff Bernstein stated that energy efficiency funds can be used rather than operating funds.

Martin Culik asked if the AGO and DOER supported CVEO. Maggie Downey stated yes, that both entities and the Energy Efficiency Action Council (EEAC) voted to support CVEO as part of the Resolution filed with the 2022-2024 Plan. She stated that she had not reached out to them yet because she wanted to see what the Board wanted to do first. Martin Culik asked if we could figure out whether they would support an appeal. Jeff Bernstein stated that the Compact can ask them but because DOER is part of the Baker administration and the AGO usually defends state agencies whose decisions are the subject of appeal, he does not believe the Compact would get a meaningful response quickly and the Compact has to file its appeal before Thanksgiving. Martin Culik asked if the Compact can suggest a negotiated settlement outside of an appeal. Jeff Bernstein stated he believes it is highly unlikely that the DPU is going to reverse its own Order even if it receives a lot of political pressure. Maggie Downey stated that she believes the DPU thinks it has provided enough incentives for solar which is why CVEO is targeted at low-income customers.

Colin Odell asked if the Compact could withdraw an appeal if it starts to get too expensive and it is not making any headway. Jeff Bernstein answered yes, the Compact can dismiss the appeal at a later date.

*Colin Odell moved that the Compact move forward with an appeal of the denial of CVEO. Seconded by Matt Patrick.*

Brad Crowell asked given the odds, is there any way to get a strategic victory even if we lose in court, either by affecting future behavior of the DPU or making the public aware of the situation. Jeff Bernstein stated that it is an uphill battle, but it is an appeal with a good legal basis. He stated that certainly raising consciousness and organizing around this decision might lead to the Legislature overturning the DPU interpretation. He stated that there is already a lot of concern being raised by legislators around electrification issues and around what the PAs have been doing and the Compact may be able to parlay this into some political points.

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Martin	Culik	Orleans	Yes
Nate	Mayo	Provincetown	Yes
Bob	Higgins-Steele	Truro	Yes
Richard	Elkin	Wellfleet	Yes
Sue	Hruby	West Tisbury	Yes
Joyce	Flynn	Yarmouth	Yes

*Motion carried in the affirmative (16-0-0)*

**Return to Open Session**

*At 3:34 PM, Martin Culik asked for a motion to end the executive session, moved by Robert Schofield, seconded by Joyce Flynn.*

Peter	Doyle	Barnstable	Yes
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Bob	Higgins-Steele	Truro	Yes
Richard	Elkin	Wellfleet	Yes
Sue	Hruby	West Tisbury	Yes
Joyce	Flynn	Yarmouth	Yes

*Motion carried in the affirmative (16-0-0)*

Respectfully submitted,

Melissa Allard

**LIST OF DOCUMENTS AND EXHIBITS:**

- Meeting Notice/Agenda
- September 10, 2021, Draft Executive Session Meeting Minutes
- Review of DPU 20-40-A Order Cape Light Compact JPE Petition for Approval of CVEO PowerPoint