Cape Light Compact

Tel: (508) 375-6644 • Fax: (508) 362-4136
www.capelightcompact.org

POST OFFICE BOX 427 • BARNSTABLE SUPERIOR COURT HOUSE • BARNSTABLE, MASSACHUSETTS 02630

May 31, 2012

US Mail and Electronic Mail

Assembly of Delegates
Second District Courthouse
Barnstable, MA 02630

Re: *Cape Light Compact's Response to Assembly of Delegates Special Committee on Inquiry into Cape Light Compact*

Dear Assembly Members:

The Cape Light Compact ("CLC") Governing Board is in receipt of the *Report to the Barnstable County Assembly of Delegates from the Special Committee on Inquiry into Cape Light Compact (CLC) and Cape & Vineyard Electric Cooperative, Inc. (CVEC)* dated May 2, 2012 (the "Report"). I am responding to the Report on behalf of the CLC Governing Board.

I am very disappointed in the overall content and tone of the Report. The Report contains numerous inaccuracies, allegations and statements not supported by facts or data. It is most unfortunate that the Special Committee did not seek the advice and assistance of Barnstable County legal counsel on a matter that has had significant implications for the reputation and perceived character of CLC Board members, CLC staff and Barnstable County as a whole. I know that the Chair of the Special Committee was advised to pursue this avenue on several occasions. I believe that had this advice been heeded, the content and tone of the Report would be very different. The Report in its current form discredits and disserves the Assembly of Delegates, a governmental body that I, and several former CLC Board members, served on. I strongly recommend that the Assembly of Delegates reject the Report as currently written and work closely with County legal counsel to reproduce a document that is fact-based and free of specious allegations and incendiary comments.

Below are the primary reasons why I am recommending this action. Also, a detailed response,

attached to this letter, details many of the numerous inaccuracies, specious statements and blatantly false allegations contained in the Report.

- The Special Committee recommends that a ***forensic audit*** of CLC books be conducted by the Massachusetts Inspector General's Office. A forensic audit, as defined by the Association of Certified Fraud Examiners, is *"the use of professional accounting skills in matters involving potential or actual civil or criminal litigation and can include fraud, valuation, bankruptcy, and a host of other professional services."* The recommendation of the Special Committee to request a forensic audit implies that the Assembly of Delegates intends to pursue or otherwise request the filing of criminal charges against the CLC Board members and CLC staff. Is that truly the intent of the Assembly of Delegates?

  Furthermore, when I asked individual members of the Special Committee whether they understood and knew what a forensic audit was, they replied that they did not, and that they were not intending to imply wrongdoing or seek criminal charges against the CLC. This gross misuse of a defined accounting term has done irreparable harm to the reputations of CLC Board members and CLC staff. If the intent of the Special Committee was to conduct an additional audit of CLC funds, then the report should be rewritten to reflect this fact without the use of the term forensic. I have no objection to the Assembly of Delegates undertaking an audit of the CLC's past activities because the CLC has acted consistent with the Massachusetts law at all times and has done nothing illegal or improper. Going forward, I would support implementing the recommendations made by the Barnstable County's auditors at the May 16th Assembly of Delegates Finance Committee meeting - to expand the CLC audit presently conducted by Barnstable County on CLC funds. Again, had County Counsel advice been sought, the entire issue of whether the Special Committee is recommending criminal charges against the CLC would be moot.

- *In numerous places throughout the Report, the Special Committee states that the CLC does not have a budget. This is absolutely incorrect.* The CLC has two budgets: an energy efficiency budget, and an operating budget, and these budgets are maintained and tracked in separate funds. The CLC administers the ratepayer funded energy efficiency program in its capacity as a Program Administrator consistent with Massachusetts law. M.G.L. c. 164, §134(b); DTE 00-47C (2001) (approving CLC's first Energy Efficiency Plan); DTE 03-39 (2003) (approving CLC's second phase of Energy Efficiency Plan); DTE 05-34 (2005)(approving CLC's third phase of Energy Efficiency Plan); DPU 07-47 (2007) (approving CLC's 2007-2012 Energy Efficiency Plan); DPU 08-113 (2009) (approving CLC's 2009 Energy Efficiency Plan update); DPU 09-119 (2010) (approving CLC's first three year Energy Efficiency Plan for years 2010-2012). An annual energy efficiency plan consisting of both proposed costs/expenditures and proposed kWh savings is submitted to the Massachusetts Department of Public Utilities ("DPU") for review, through an adjudicatory proceeding, and approval. *The DPU is charged with reviewing and approving the CLC annual energy efficiency budget included in its energy efficiency plans.* See M.G.L. c. 25, § 19(a) (granting authority to Department to review proposed funding of energy efficiency programs); M.G.L. c. 25A, §11G (granting authority to

Department to review and approve energy efficiency expenditures after a showing of cost effectiveness); see also D.P.U. 98-100 (issuing Department's Energy Efficiency Guidelines); D.P.U. 08-50A (amending Energy Efficiency Guidelines). *The CLC budgets have been approved every time they were before the DPU.*

For the Special Committee to imply that the CLC does not have a budget is inaccurate, inflammatory, and inconsistent with the Massachusetts law. It should also be noted that the Massachusetts Attorney General's Office also reviews carefully the CLC's energy efficiency budget and kWh savings and participates in the proceedings before the DPU. The CLC Governing Board has voted and approved the budget for the CLC energy efficiency program since 2001. The Special Committee acknowledges this fact, but erroneously concludes that the CLC Governing Board never approved an energy efficiency budget. *I believe the real issue here is that the Special Committee lacked the "time and expertise[1]" to understand that the material the CLC compiled for them, which the Report and Special Committee members characterize as not being germane, was in fact the CLC energy efficiency budget.* Please refer to the attachment for additional supporting data on this fact. The CLC is required to prepare a budget in a format mandated by the Commonwealth of Massachusetts, and it has done so for eleven years. Just because the energy efficiency program budget is not in a format familiar to the members of the Special Committee does not mean there is no CLC energy efficiency program budget. The numerous misstatements in the Report that the CLC does not have such a budget are grossly inaccurate and not supported by the documents that were provided to the Special Committee.

Since its inception and up until July 1, 2009, the CLC's operating budget was primarily funded by Barnstable County, and supplemented by federal and state grants authorized by the County Commissioners. The Barnstable County portion of the budget was reviewed and approved by the County Commissioners and the Assembly of Delegates every year from fiscal year 1998 until fiscal year 2012. In addition to the County funded portion of the CLC operating budget, the CLC Board of Directors has approved an operation budget for the past three fiscal years. *For the Special Committee to say that the CLC has no operating budget is simply mind-boggling*!

- *The Report contains inappropriate and inaccurate statements regarding the CLC Governing Board* and suggests repeatedly that there is a conflict between CLC service of board members, staff and counsel with CVEC when in fact CVEC was founded by the CLC and was expressly designed to do things to support the CLC's power supply objectives but which the CLC could not itself do.

- *The Special Committee's claim that "a majority of the CLC Executive Committee also serves as a majority of the CVEC Executive Committee" is completely false and utterly unsupported.* Beyond this specific inaccuracy, the Report implies that the CLC

[1] From page 2 of the Report, "The SubCommittee concluded in early February that it lacked the time and expertise and authority to conduct or to require a comprehensive financial review or to impose structural changes to either of these two organizations."

Governing Board was not informed or involved in the major policy decisions, such as the formation of CVEC or the initial grant to CVEC. Both of these allegations are unsubstantiated and appear to rely on an assumption that because the CLC Governing Board minutes are not verbatim transcripts of the entire CLC Governing Board meeting, none of these items were discussed. To say that the CLC is "purportedly governed" by the appointed members is inflammatory and does a gross disservice to the volunteer CLC Governing Board members who have rigorously participated in all CLC policy discussions and programs. CLC Board members have dedicated thousands of volunteer hours, and in fact have over 150 years of combined experience in the energy industry. Further, for the Report to imply that the CLC Executive Committee "appears to be the primary decision-making body" and that the CLC Governing Board members have not been involved or informed is disrespectful to all CLC Governing Board members, past and present.

We live in a digital information age. The Report contains inaccurate information and inflammatory remarks against the CLC that must be addressed. An individual who may do an interest search using Google.com, for instance, citing former Chairman Bob Mahoney or Charlotte Striebel or CLC staff members such as Kevin Galligan or Maggie Downey would find the Report linking them to a forensic audit of their work; by definition this implies that their work is subject to an investigation of fraud and embezzlement. Failing to carefully corroborate all statements in the Report has done irreparable harm to the reputations of all CLC Board members, staff, consultants and legal counsel.

For the reasons outlined both in this letter and the attachment I strongly recommend that the full Assembly of Delegates reject the *Report to the Barnstable County Assembly of Delegates from the Special Committee on Inquiry into Cape Light Compact (CLC) and Cape & Vineyard Electric Cooperative, Inc. (CVEC)* and recommend that the Report be entirely rewritten with assistance from Barnstable County legal counsel to ensure that a final Report contains accurate information supported by facts and is devoid of inflammatory remarks that do not serve the CLC or the Barnstable County Assembly of Delegates. Until such time as the inaccuracies and inflammatory remarks are removed, the Report should be removed from the Assembly of Delegates website and all other public circulation and all officials and the public should be notified that the Report is under revision and reconsideration.

Sincerely,

William Doherty
CLC Chairman
County Commissioner
Former Member of the Assembly of Delegates

Cc: County Commissioners
CLC Governing Board
Barnstable Town Council and Finance Committee

Brewster Board of Selectmen and Finance Committee
Bourne Board of Selectmen and Finance Committee
Chatham Board of Selectmen and Finance Committee
Dennis Board of Selectmen and Finance Committee
Eastham Board of Selectmen and Finance Committee
Falmouth Board of Selectmen and Finance Committee
Harwich Board of Selectmen and Finance Committee
Mashpee Board of Selectmen and Finance Committee
Orleans Board of Selectmen and Finance Committee
Provincetown Board of Selectmen and Finance Committee
Sandwich Board of Selectmen and Finance Committee
Truro Board of Selectmen and Finance Committee
Wellfleet Board of Selectmen and Finance Committee
Yarmouth Board of Selectmen and Finance Committee
Aquinnah Board of Selectmen and Finance Committee
Chilmark Board of Selectmen and Finance Committee
Edgartown Board of Selectmen and Finance Committee
Oak Bluffs Board of Selectmen and Finance Committee
Tisbury Board of Selectmen and Finance Committee
West Tisbury Board of Selectmen and Finance Committee
Richard Sullivan, Secretary Executive Office of Energy and Environmental Affairs
Mark Sylvia, Commissioner, Division of Energy Resources
Kenneth Kimmell, Commissioner, Department of Environmental Protection
Jonathan Sclarsic, Esq., Attorney General's Office
Danielle Rathbun, Esq. Massachusetts Attorney General's Office
Rebecca Murray, Secretary of State's Office
Robert S. Troy, Esq., Barnstable County Counsel
Christian Rogers, Sullivan, Rogers & Company
Robert Mahoney, Former CLC Chairman, Former Selectman, Town of Dennis
Charlotte Striebel, Former CLC Vice Chairman, Former Speaker of the Assembly of Delegates, Town of Yarmouth

CAPE LIGHT COMPACT RESPONSE

TO FALSE ASSERTIONS MADE IN

REPORT TO THE BARNSTABLE COUNTY ASSEMBLY OF DELEGATES

DATED MAY 2, 2012

The Report to the Barnstable County Assembly of Delegates (the "Report") dated May 2, 2012 and prepared by the Special Committee on Inquiry into Cape Light Compact and Cape & Vineyard Electric Cooperative (the "SubCommittee") contains numerous factual errors and shoddy analysis. This document sets forth the major misstatements in the Report and the revisions that the SubCommittee should make to the Report to correct the record. Unlike the Report (which makes numerous unsubstantiated statements), each of the statements made by the CLC can be independently verified.

As a threshold matter, the CLC notes that the SubCommittee has no jurisdiction over the CLC. The CLC is a separate and distinct regional body, controlled by its twenty-one town members and its two county members. Barnstable County may exercise its rights as a member of CLC, but it does not control the CLC.

Barnstable County also provides certain services on a contractual basis to CLC through an Administrative Services Agreement. The Assembly fails to recognize that many of its primary complaints, misguided though they may be, could have been addressed by the Assembly itself in its direction to Barnstable County with respect to its performance of financial management and other such services.

Finally, the Report makes various allegations of serious misconduct and the whole tone of the Report is accusatory, even though it states early on that the Subcommittee makes no such claims of intentional wrongdoing. The Report is thus internally inconsistent.

STATEMENT FROM REPORT (Page 2): *In making the following observations and recommendations, the SubCommittee acts on the assumption that no intentional wrongdoing has occurred, however, the SubCommittee believes that comprehensive forensic audit and review of the operations of these two organizations is necessary to protect the public interest.*

CLC Correction/Recommendation: According to the Association of Certified Fraud Examiners, a forensic audit is *"use of professional accounting skills in matters involving potential or actual civil or criminal litigation and can include fraud, valuation, bankruptcy, and a host of other professional services."* The SubCommittee should clarify whether it intends to seek criminal charges against the CLC. If not, the request for a "forensic audit" should be deleted and a description of the audit that SubCommittee would like to see performed should be inserted to reflect the true intent of the SubCommittee.

Supporting Documentation[1]: May 11, 2012 email from Chris Rogers, Sullivan & Rogers Company, to Maggie Downey.

Supporting Authority: Association of Fraud Examiners.

[1] All supporting documentation will be available on the CLC's web site at www.capelightcompact.org on or before June 7, 2012.

STATEMENT FROM REPORT (Page 3, FN 4): *Most of the pages of CLC's voluminous response could have been simply made available to the SubCommittee (Request 4) or were not germane to the SubCommittee's inquiry, such as Annual Reports on Energy Efficiency Activities, which focus on energy saved by program efforts.*

CLC Correction/Response: The material submitted to the SubCommittee was germane because the CLC Energy Efficiency Plan is the CLC projected energy efficiency budget, and the CLC Annual Report is a report to the Department of Public Utilities ("DPU") on the actual expenditures for the energy efficiency program funds. To state that this material is not relevant and focuses only on energy savings demonstrates that the SubCommittee simply did not understand the material presented to them. Many Massachusetts state agencies (i.e., the DPU, the Massachusetts Attorney General's Office, and the Massachusetts Executive Office of Energy and Environmental Affairs [and its constituent Department of Energy Resources "DOER")]) have direct oversight or involvement in the CLC energy efficiency budget. The CLC is required by law to submit its annual energy efficiency budget to the DPU.

By way of background, with the passage of the Green Communities Act in 2008 (the "GCA"), the process by which energy efficiency programs and budgets are developed and reviewed has changed. Prior to passage of the GCA, the CLC submitted annual plans to the DPU for DPU review and approval. Now, the CLC works with the other energy efficiency program administrators to develop a three-year plan, which is reviewed and revised with direct oversight by the Massachusetts Energy Efficiency Advisory Council ("EEAC"). After EEAC makes its recommendations, a statewide three-year plan is submitted to the DPU for review and approval. Annual reports detailing actual expenditures and energy savings are submitted each year in August. If the CLC departs more than 20% from approved three-year budgets and savings it must submit a modification petition to DPU for approval.

Supporting Documentation: EEP Budget (previously provided to the SubCommittee).

Supporting Authority: DTE 00-47C (2001) (approving the CLC's first Energy Efficiency Plan); DPU 09-119 (2010) (approving the CLC's current plan, which was its first three year Energy Efficiency Plan for years 2010-2012); G.L. c. 25, § 21; Order in D.P.U. 08-50-C (establishing template for energy efficiency annual reports).

STATEMENT FROM REPORT (Pages 3 and 4): *However, the funds included in the Barnstable County audited financial statements appear to be only a portion of the total annual revenues and expenditures of CLC. In 2010 the Barnstable County Audit reported "Program Revenues" for Cape Light Compact in the total amount of $7,393,074, while information provided to DPU by CLC reported revenues of $18,637,242. Again, in 2011, the Barnstable County Audit reported "Program Revenues" of only $837,000 while the information provided to DPU by CLC reported revenues of $25,270,151.*

CLC Correction/Response: The 2010 Barnstable County Audit reported CLC program revenue of $7,393,074 as of June 30, 2010. This amount reflects only the CLC activities reported as Special Revenue Funds in Barnstable County's financial statements. The SubCommittee then incorrectly compares CLC energy efficiency projected revenue of $18,637,242, which includes activity from CLC Agency Funds and Special Revenue Funds for the time period of January 1, 2010 through December 31, 2010. The comparison of the above amounts is inaccurate because the SubCommittee is comparing revenues that consist of two entirely different funds. Also, the time periods are not the same; the DPU information is for projected budgeted information for a calendar year, while the audit information is for actual revenue from July 1, 2009 through June 30, 2010. The SubCommittee makes the same inaccurate comparison in 2011. The Barnstable County Audit reports actual program revenue of $837,000 as of June 30, 2011 and then the SubCommittee compares the CLC energy efficiency projected Agency and Special Revenue Funds of $25,270,151 for calendar year 2011. The SubCommittee *cannot* compare financial information consisting of different funds and from two different time periods and state that because these numbers are different there is some impropriety with the CLC budgets and that there is no CLC energy efficiency budget. The SubCommittee does not understand or know how to interpret the financial information provided.

Supporting Documentation: The CLC budgets are publicly available on the CLC's website at the following link: http://www.capelightcompact.org/budgets/. At that link, two separate budgets (an operating budget and an energy efficiency program budget) for the years 2010-2012 are provided.

STATEMENT FROM REPORT (Page 4, first paragraph): *These Reports do not include program budgets or audits, but detail potential energy savings, translated into economic value, from various energy efficiency programs.*

CLC Correction/Response: This statement is incorrect. The CLC Three Year 2010-2012 Energy Efficiency Plan includes the proposed energy efficiency budget (see Exhibit E, Table IV.C. –Electric PA Budgets, page #'s 8 and 9 of 49 of the CLC 2010-2012 Energy Efficiency Plan for each year's projected budget, and as modified in the 2011 Mid-Term Modifications submitted to the DPU, see page 1 of 1, Exhibit H, Table IV.C., Electric PA Budgets). The CLC also submitted to the SubCommittee the 2010 Annual Report, which details the actual expenditures for calendar year 2010 (see pages 4 of 163, Table I.A.: Program Portfolio Summary – Total Program Costs, and page 159 of 163, Table IV.C.: Customer Sector Budget Allocation of the Cape Light Compact Annual Report). It appears that the SubCommittee is looking for a budget in a format similar to a county department budget, and because it is not familiar with the required format for a state-mandated energy efficiency budget, it concluded that the there is no CLC energy efficiency budget. This is not correct, and the approval CLC has received from the DPU of its annual calendar year energy efficiency budget further demonstrates that the conclusion is wrong.

Supporting Documentation: The CLC budgets are publicly available on the CLC's website at the following link: http://www.capelightcompact.org/budgets/.
At that link, two separate budgets (an operating budget and an energy efficiency program budget) for the years 2010-2012 are provided.

STATEMENT FROM REPORT (Page 4, second paragraph): *Whatever the magnitude of the revenues and expenses of the CLC, the organization must have an annual budget for its operations.*

CLC Correction/Response: This statement implies that the CLC does not have an annual budget for its operations and is inaccurate. As described previously, the CLC has an annual energy efficiency budget reviewed and approved by the DPU in an adjudicated proceeding. Since its inception, fiscal year 1998, and up until July 1, 2010, the CLC's operating budget was primarily funded by Barnstable County, and supplemented by federal and state grants authorized by Barnstable County Commissioners. The Barnstable County portion of the budget was reviewed and approved by Barnstable County Commissioners and the Assembly of Delegates annually. In addition to Barnstable County-funded portion of the CLC operating budget, the CLC Governing Board has reviewed and approved an operating budget for each of the past three fiscal years,.

Supporting Documentation: The CLC budgets are publicly available on the CLC's website at the following link: http://www.capelightcompact.org/budgets/.
At that link, two separate budgets (an operating budget and an energy efficiency program budget) for the years 2010-2012 are provided.

STATEMENT FROM REPORT (Page 4, second paragraph): *Likewise, under the statute which permits CLC's existence (G.L. c. 40, §4A) "periodic financial statements" must be issued for all participants. These budgets and financial statements are unquestionably "public records" and are within the scope of the SubCommittee's request. That the budget and financial statements have not been provided when requested and are not publically (sic) available causes immediate concern.*

CLC Correction/Response: G.L. c. 40, Section 4A does not define "financial statements." The CLC satisfies this requirement for its energy efficiency budget by filing an annual report and by making available its operating budget (which is approved by the CLC's Governing Board and audited annual by Barnstable County auditors through its normal budget process). The SubCommittee's statement is inaccurate because the CLC budgets, as approved by the DPU, were provided to the SubCommittee; however, the SubCommittee concluded this information was not germane.

Supporting Documentation: The CLC budgets are publicly available on the CLC's website at the following link: http://www.capelightcompact.org/budgets/.
At that link, two separate budgets (an operating budget and an energy efficiency program budget) for the years 2010-2012 are provided.

Supporting Authority: G.L. c. 40, Section 4A.

STATEMENT FROM REPORT (Page 7): *Particularly in regard to transactions between these two organizations, and specifically the multiple decisions by CLC to fund CVEC's activities with funds that are intended to benefit the consumer rate-payers of CLC, the interests of these two organizations are not necessarily the same.*

CLC Correction/Response: First, no ratepayer energy efficiency funds have ever been used to fund CVEC activities. Secondly, the CLC strongly disagrees that the two organizations interests are not the same. The SubCommittee failed to examine the origins and history of the two organizations which was set forth in numerous documents provided to the SubCommittee and was thoroughly explained in the presentation made to the SubCommittee in September of 2011. The CLC formed CVEC as a result of a strategic planning process commissioned and undertaken by the CLC because the CLC wanted to stabilize electric rates for its members and ratepayers through renewable energy generation. That process included an extensive outside analysis in 2006 by LaCapra Associates, a respected full-service, independent energy consulting firm which helps municipal and cooperative utilities, among others, make sound policy, planning, investment, pricing, and procurement decisions. The LaCapra analysis was discussed at length at several Cape Light Compact Governing Board meetings. At the time of its formation, neither the CLC, 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 to do so. Financing CVEC's operational costs to pursue renewable energy projects would allow the CLC to stabilize electric rates for both its member communities and CLC ratepayers and to provide benefits, as appropriate, to municipalities (thereby benefitting all taxpayers) and to CLC (thereby benefitting all ratepayers). The CLC determined that the only way to provide economic long-term electricity supply to the Cape and Vineyard was to create an entity to do what the CLC could not directly – develop renewable energy projects, enter into wholesale contracts and bring tax exempt low-cost financing vehicles to bear in support of those projects.

It is important to not lose sight of the fact that the renewable energy projects pursued by CVEC will bring an estimated $40 million in avoided energy supply costs over twenty years to the benefit of all ratepayers. This estimated savings was outlined in an October 5, 2011 memorandum by Synapse Energy Economics, Inc. This memorandum was provided to the SubCommittee.

Supporting Documentation: Powerpoint presentation to the Assembly of Delegates September 21, 2011; CVEC's requests for private letter ruling from the Internal Revenue Service and from the Massachusetts Department of Revenue; October 5, 2011 memorandum by Synapse Energy Economics, Inc. (previously provided to the SubCommittee).

STATEMENT FROM REPORT (Page 8): *A majority of the CLC Executive Committee also serves as a majority of the CVEC Executive Committee.*

CLC Correction/ Recommendation: In the five years since CVEC was formed, there has been only one common member of the CLC and CVEC Executive Committee – Barry Worth. Mr. Worth's term on CVEC's board will be ending July 2012. The SubCommittee's statement should be stricken from the Report.

Supporting Documentation: See below for the complete executive committee membership list.

Members of CLC Executive Committee in calendar year 2007 – Bob Mahoney (Chairman), Charlotte Striebel (Vice Chairman), Kitt Johnson (Treasurer), Barry Worth (Secretary), and William Doherty (at large member)

Members of CLC Executive Committee in calendar year 2008 – Bob Mahoney (Chairman), Charlotte Striebel (Vice Chairman), Kitt Johnson (Treasurer), Barry Worth (Secretary), and William Doherty (at large member)

Members of CLC Executive Committee in calendar year 2009 – Bob Mahoney (Chairman), Charlotte Striebel (Vice Chairman), Kitt Johnson (Treasurer), Barry Worth (Secretary), and William Doherty (at large member)

Members of CLC Executive Committee in calendar year 2010 – Bob Mahoney (Chairman), Charlotte Striebel (Vice Chairman), Kitt Johnson (Treasurer), Barry Worth (Secretary), and Bob Schofield (at large member)

Members of CLC Executive Committee in calendar year 2011 – Bill Doherty (Chairman), Steve Lempitski (Vice Chairman), Kitt Johnson (Treasurer), Barry Worth (Secretary), and Bob Schofield (at large member)

Members of CLC Executive Committee in calendar year 2012 – Bill Doherty (Chairman), Robert Schoefield (Vice Chairman), Peter Cocolis (Treasurer), Barry Worth (Secretary), Peter Cabana (member at large)
Members of CVEC Executive Committee as of September 2007 – Charles McLaughlin (President), Mark Zielinski (Treasurer), Maggie Downey (Clerk), Barry Worth (CVEC member), John Cunningham (CVEC member)

Members of CVEC Executive Committee as of September 2008 – Charles McLaughlin (President), Mark Zielinski (Treasurer), Maggie Downey (Clerk), Barry Worth (CVEC member), John Cunningham (CVEC member)

Members of CVEC Executive Committee as of September 2009 – Charles McLaughlin (President), Mark Zielinski (Treasurer), Maggie Downey (Clerk), Barry Worth (CVEC member), John Cunningham (CVEC member)

Members of CVEC Executive Committee as of September 2010 – Charles McLaughlin (President), Mark

Zielinski (Treasurer), Maggie Downey (Clerk), Barry Worth (CVEC member), John Cunningham (CVEC member)

Members of CVEC Executive Committee as of September 2011 – Charles McLaughlin (President), Mark Zielinski (Treasurer), Maggie Downey (Clerk), Barry Worth (CVEC member), Kitt Johnson (CVEC member) - Kitt Johnson served as CVEC member from September to December 2011. John Checklick (CVEC member) replaced Kitt Johnson

STATEMENT FROM REPORT (Page 9, first paragraph): *In this context, the fact that both organizations are represented by the same counsel heightens concern that conflicts of interest will arise and impact decision making.*

CLC Correction/Response: The CLC has a bylaw in place to make sure that when it shares legal counsel with other government entities its interests are protected. It states as follows:

> *The purpose of this bylaw is to allow the Compact from time to time to retain counsel who may also represent its Members or other public entities in matters in which the Compact has a direct or substantial interest without violating G.L. c. 268A, Section 11(a) and (c). Such dual or common representation allows the Compact to pool resources for a common purpose, develop mutual interests, and preserve scarce Compact funds. Pursuant to this bylaw, the official duties of Compact counsel include, but are not limited to, representing Members or other public entities in: (i) administrative and judicial proceedings in which the Compact is also a party; (ii) contract negotiations or project development matters in which the Compact or its Members have an interest, and (iii) other matters in which the Compact has a direct or substantial interest, provided that in each instance, such dual or common representation would not cause a violation of rules governing attorney conduct. Compact counsel shall discharge such duties only when requested in writing by the Compact's Governing Board. Prior to making such a request, the Compact's Governing Board shall determine whether the interests of the Compact would be advanced by such dual or common representation and shall evaluate if actual or potential conflicts of interest exist. If any conflicts are identified, they shall be described in the written request. Counsel shall then make its own determination whether such dual or common representation would not cause a violation of rules governing attorney conduct.*

Furthermore, periodically the CLC sends its counsel letters specifically requesting shared legal representation. In addition, use of shared legal counsel by public entities has been endorsed by the Office of the Inspector General which has specifically recommended the use of shared legal counsel for affiliated public entities in connection with a forensic audit it performed for the North Attleborough Electric Light Department.

Supporting Documentation: CLC's Third IGA; legal representation letter dated March 11, 2011.

Supporting Authority: State Ethics Commission opinion EC-92-10; See, *An Investigation of the Use of Certain Bond Funds by the North Attleborough Electric Department*, Massachusetts Office of Inspector General (December 2005).

STATEMENT FROM REPORT (Page 9): *That Firm was asked to and did give its opinion that these transfers to CVEC were a lawful use by CLC of rate-payer funds. The question that arises is: ' is it appropriate for an attorney to advise his client, a publicly-funded enterprise, about the legality of the transfer of public funds to another corporation, also represented by the same attorney, when the attorney knows that, if the transaction goes forward, a significant part of the transferred funds will be used to pay fees to the attorney and his firm? '* [fn 10 omitted]

The SubCommittee's conclusion is that this question has not been given the consideration it deserves, by CLC or CVEC or, for that matter, by counsel representing these two organizations.

CLC Correction/Response: CLC counsel was never asked to provide *any opinion* at the time the transfers were made regarding their lawfulness or any other aspect of that transaction. Some years later CLC counsel was asked to provide background information on the transaction and reviewed applicable records and documents and provided an information letter dated September 15, 2011. It was not an opinion.

The SubCommittee's "question" is improper to ask and is based on a disregard of the facts. As noted, no opinion was ever given. And, as demonstrated by the response to the previous statement, in any event joint representation was specifically authorized by CLC and carefully considered in the circumstances in which it was provided.

Also, there would have been no need for a transfer at any time in the past or present because there is a Rule of Professional Conduct - 1.8(f) – which explicitly permits a third party to pay fees in such a circumstance after consultation with and consent by all parties. The SubCommittee's premise for this allegation is therefore doubly flawed. To be clear, if CVEC incurs a legal bill tomorrow, and the CLC (a founding member) wants to pay for it, it is permissible under the Rules of Professional Conduct. The choice whether to make a transfer or pay such costs directly is thus entirely a matter of policy and internal accounting procedures.

Supporting Documentation: Information letter dated September 15, 2011 (provided to the Assembly on September 21, 2011.

Supporting Authority: Entire text of Rule of Professional Conduct 1.8(f).

STATEMENT FROM REPORT (Page 9, FN 10): *It is a violation of the Rules of Professional Conduct for an attorney to "acquire . . . a pecuniary interests adverse to a client unless ... (among other requirements) the client consents thereto in writing."*

CLC Correction/Recommendation: The Report omits key portions of the rule cited and is therefore very misleading. The full text of Rule 1.8(a) reads as follows:

> **RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS**
>
> (a) A lawyer shall not enter into a business transaction with a client or knowingly *acquire* an ownership, possessory, security, or other *pecuniary interest adverse to a client unless*:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) *the client consents in writing thereto.*

The Report only used the words in italics, and clearly the SubCommittee's selective cutting and pasting from the Rule fundamentally distorts its meaning. As is evident from the full text of the Rule, this Rule is intended to prohibit attorneys from acquiring an ownership interest in its client, such as when an attorney takes stock from a client in lieu of payment. As stated by the Supreme Judicial Court of Massachusetts in *In Re Discipline of an Attorney*, 451 Mass. 131 (2008):

> *We agree with the board that these provisions in the attorney's fee agreement do not trigger the protections of rule 1.8(a), or the prohibitions of rule 1.8(j). The board is correct that rule 1.8(a) is generally concerned with business dealings between a lawyer and a client, or the lawyer's acquisition of a "pecuniary interest" adverse to his client, that commence after the legal representation begins, see C.W. Wolfram, Modern Legal Ethics § 8.11.3, at 481–482 (1986); the focus of the rule is not on a fee agreement between a lawyer and client that marks the creation of their lawyer-client relationship.*

CLC counsel never has had and never will have any kind of ownership stake or pecuniary or remotely related interest in the CLC; it can't for the simple reason that the CLC is a governmental entity. Attorneys are entitled by law to receive fair value for services rendered. To read Rule 1.8 as prohibiting attorneys from being paid from their clients is an absurd construction of the Rule. To charge or imply that CLC counsel may have violated this rule is reckless and unsupported as set forth above and in the response to the previous statement. The SubCommittee's statement should be stricken from the Report.

Supporting Authority: Rule 1.8 of the SJC Rules; *In Re Attorney Discipline; Mulhern v. Roach* 398 Mass. 18 (1986).

STATEMENT FROM REPORT (Page 10): *Minutes were produced from 2005 to the present, and throughout, from the minutes, it does not appear that a single operating budget was ever proposed to, debated by, much less altered or amended or otherwise approved by the Board of Directors.*

CLC Correction/Response: This statement is inaccurate. The CLC Governing Board approved, and its minutes reflect, discussion and approval of operating budgets. At least five sets of minutes submitted to the Assembly document such discussions. In addition, the March 2006 meeting minutes show that Maggie Downey presented the CLC's operating budget to the Assembly.

Supporting Documentation: March 29, 2006 meeting minutes; June 10, 2009 meeting minutes; June 9, 2010 meeting minutes; March 23, 2011 meeting minutes; April 12, 2011 meeting minutes; May 11, 2011 meeting minutes. All of these minutes were previously provided to the SubCommittee.

STATEMENT FROM REPORT (Page 12, FN 12): *The reserve fund is of particular interest to the SubCommittee. The reserve is collected from rate payers, and although a small sum for each ratepayer, the reserve fund appears to accrue millions of dollars annually. These funds are drawn down by CLC, from ConEdSolutions, pursuant to contract. These funds should be audited with the books and accounts of CLC (See: Recommendations, post.) This type of payment back from a contractor to the entity granting the contract has, at the very least, an appearance of impropriety and could, under some circumstances, be characterized as a "kickback".*

CLC Correction/Response: The statement that the CLC adder to its power supply price is a "kickback or improper" is inaccurate, highly inflammatory and disregards established industry practice and the facts. The CLC reserve fund is derived from an adder to the CLC's voluntary, opt-out aggregation power supply program. The CLC sought, and received, approval from the DPU to collect this adder as part of its initial regulatory filing to become a municipal aggregator. The language of the form of contract with ConEd Solutions ("ConEd") that was approved in the applicable DPU proceeding, DPU 04-32, expressly states that the uses of the fund are at the reasonable discretion of the CLC Board. The DPU approved this form of contract in DPU 04-32, all CLC filings made in DPU proceedings can be found on the DPU web site. The only condition on the price was that inclusive of the mil adder the price could not be above standard offer (which is no longer a condition that applies since standard offer service no longer exists).

In addition, who the CLC supplier is has absolutely nothing to do with the CLC's authority to collect an adder; the form of contract and RFP materials provided to ConEd and other suppliers *all* anticipated the collection of such an administrative fund which does not represent any contribution from the supplier but simply a pass-through. Similar adders are also part of three other Massachusetts municipal aggregators' power supply programs; the only difference being is that those aggregators consist of one governmental entity. There is no impropriety associated with the collection of CLC's reserve fund, which in all instances has been approved by the DPU and is consistent with not only the practice in Massachusetts but in other states with competitive supply contracts.

Supporting Authority: *Petition of Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, Yarmouth, and the Counties of Barnstable and Dukes, Acting Together as the Cape Light Compact, for Approval Pursuant to G.L. c. 164, § 134, to Enter Into a Competitive Electric Supply Agreement as an Opt-out Municipal Aggregator*. D.P.U. 04-32 (2004)

STATEMENT FROM REPORT (Page 13, second paragraph): *The contracts between CLC and ConEdison Solutions for the purchase of electricity have all been claimed by Maggie Downey to contain "proprietary and competitive information" and hence to be beyond a public request. This claim bears examination, since some of these contracts are years old, and hardly likely to provide information to competition which could be detrimental to CLC's present position. Any examination of the CLC operations should include examination of the basis in their contracts with ConEdison Solutions for "grants" or "contributions" from the seller of electricity (ConEdison) to the buyer (CLC).*

CLC Correction/Response: This comment is inflammatory and implies that the CLC is using the claim of proprietary and competitive information as a means to exclude or hide information on grants or contributions from ConEd. The Public Records Law exempts from disclosure:

> *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. 4, § 7(26)(s). The CLC uses this exemption to the Public Records Law in order to properly conduct their business. The Open Meeting Law contains similar language and permits the CLC to use executive sessions to discuss trade secrets or confidential, competitively-sensitive or other proprietary information. The CLC and CVEC submitted a detailed letter to the Open Meeting Law Division of the Office of the Attorney General setting forth their practices regarding confidential information. Here is a key excerpt from the letter:

> *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.*

The CLC also submitted statements from one of its primary energy consultants and from its power supply planner to demonstrate the need for confidentiality in the energy industry, even years after the fact.

Supporting Documentation: Letter to the OAG; Statements of Jonathan Wallach and Joseph Soares.

Supporting Authority: **G. L. c. 4, § 7(26)(s);** G.L.c. 30A, §§ 21(10).

STATEMENT FROM REPORT (Page 15, first paragraph and FN 15): *Of great concern is the fact that notwithstanding the provisions of the statute under which CLC is organized, and under which it has operated for the past ten years, there has never been a complete audit of the organizations books and records. CLC is required to issue "periodic financial statements" to all participants. However, the "annual statements that are produced for member communities do not contain statements of income and expense, assets and liabilities or statements of profit and loss. Rather the statements produced for member communities purport to total up the "energy conserved" or "energy saved" by Energy Star programs, consumer awareness and other programs administered by CLC for each member Town. These reports contain no reference to financial statements documenting the operations of CLC as a business entity.*

CLC Correction/Response: The CLC funds have been included in every Barnstable County audit since its inception. This was confirmed with the Barnstable County Auditors, Sullivan, Rogers, & Company. The CLC funds are included in the Barnstable County audit as Agency Funds, which are used to account for activities that Barnstable County holds in a custodial capacity. For financial reporting purposes according to the Generally Accepted Accounting Principles ("GAAP"), Agency Funds only report a Statement of Net Assets (assets and liabilities) and do not present results of operations (revenues and expenses). This fact was confirmed by the auditors at the Assembly of Delegates Finance Committee meeting of May 16, 2012. The auditors confirmed that the CLC funds have been included in Barnstable County's annual audit; however, they advised the Finance Committee that if Barnstable County wished to obtain assurance that they are fulfilling their fiduciary responsibility to the CLC, they could request the CLC to obtain a stand-alone audit. In addition, Barnstable County could have a separate "agreed-upon procedures" engagement performed for the specific purpose of determining whether or not Barnstable County is fulfilling its fiduciary responsibility related to CLC.

In addition to CLC's operating funds being reported as an Agency Fund in the Barnstable County audit, the CLC has provided an Annual Report of its energy efficiency program to the DPU for every year since it began administering the energy efficiency program eleven years ago. The Annual Report is the required methodology for reporting on the expenditure and revenues for ratepayer funded energy efficiency programs in Massachusetts. The CLC Annual Report, which the SubCommittee incorrectly labels "annual statements," is the state-mandated annual financial statement of expenditures and energy savings for the CLC energy efficiency program.

Footnote 15 of the Report refers to the CLC as a business entity and criticizes the CLC Annual Reports as "purporting to total up the energy saved for member communities." This statement is inaccurate and inflammatory. Furthermore, the CLC is not a "business entity." The CLC is an intergovernmental organization made-up of its twenty-three member towns and counties. The inference that the CLC should produce financial documents associated with a business, as opposed to a public entity, demonstrates a fundamental lack of understanding by the SubCommittee as to the nature of intergovernmental organizations. As set forth above, the

CLC Energy Efficiency Budget is extensively reviewed by outside parties. To imply that there is no reporting of expenditures is to impugn the state agencies, the DPU, Massachusetts Attorney General Office, DOER and others which have regulatory oversight and/or input into the CLC's energy efficiency program and the expenditure of these funds. The CLC operations budget, which is handled and managed by Barnstable County pursuant to contract, is subject to and in fact audited as Special Revenue Funds, which are reported in a different manner than Agency Funds by Barnstable County's independent auditor. The Assembly was free to impose additional requirements on those audits.

Supporting Documentation: May 17, 2012 email from Matt Hunt, Sullivan, Rogers & Company, to Maggie Downey.

STATEMENT FROM REPORT (Page 15): *There has never been a complete audit of the organizations books and records.*

CLC Correction/Response: In accordance with the Administrative Services Agreement between CLC and Barnstable County, Barnstable County serves as the fiscal agent for the CLC member towns/counties. The CLC does not have any independent treasury functions (cannot issue checks or receive funds outside of Barnstable County accounts). Beyond state mandated annual reporting of energy efficiency revenues and expenditures, and energy savings to the DPU, the CLC has control over the methodology of the audits of funds held in trust by Barnstable County.

As noted by the Barnstable County auditor at the May 16, 2012 Assembly of Delegates Finance Committee meeting and confirmed in a May 17 email from the auditor, the CLC funds have been included in the Barnstable County audit since inception as both Agency Funds and Special Revenue Funds. The CLC funds are reported in the Barnstable County financial statements pursuant to Generally Accepted Accounting Principles (GAAP). *Since the Barnstable County audit is under the jurisdiction of the Assembly of Delegates, had the Assembly wanted CLC funds to be reviewed differently it would have behooved the Assembly of Delegates to request a change in this practice many years ago.*

Supporting Documentation: Administrative Services Agreement (previously provided to the Assembly); January 30, 2012 letter from auditor (previously provided to Assembly); email from auditor dated May 17, 2012.

Supporting Authority: Order in D.P.U. 08-50-C (establishing template for energy efficiency annual reports).