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June 1, 2012

To: Barnstable County Assembly of Delegates

From: Charles S. McLaughlin, Jr.
President, Cape and Vineyard Cooperative, Inc.

Re: CVEC Response to Special Committee Report

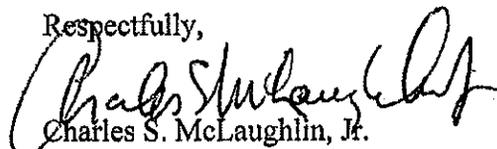
Dear Members of the Assembly,

I enclose for your consideration and recommended action CVEC's response to the Report of the Special Committee Inquiry into CLC and CVEC.

The Report is utterly lacking in evidentiary support and its conclusions reflect a complete lack of understanding of applicable law. Worse, its unfounded accusations and conclusions are incendiary and do great harm to the reputations and good work of staff and countless, unpaid volunteers.

The Report is unworthy of the Assembly and should be rejected outright.

Respectfully,


Charles S. McLaughlin, Jr.
President



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Response of CVEC to the Barnstable County Assembly of Delegates

Responding to a request of the County Commissioners for an opportunity to discuss the workings and accomplishments of the Cape and Vineyard Electric Cooperative, Inc. ("CVEC"), its board of directors elected to *voluntarily* participate in the Assembly's Special Committee (the "Committee") hearings. CVEC's expectation was that the process would be enlightening, organized, fair, objective, and unbiased, and that its fact-finding would be accurate. Unfortunately, those goals have not been achieved.

A. Squandered Opportunities

Instead, the Committee squandered several opportunities to "get it right" when presented with concrete suggestions on how to achieve that result. For example, CVEC representatives suggested that all matters relating to complaints about public records access and executive session minutes could easily be resolved by referring all records to County Counsel for an in-camera review. The purpose was to have an objective analysis of confidential documents and executive session discussions required by industry-standard confidentiality agreements to be kept from public viewing, a result expressly approved by the Legislature. The Special Committee ignored the suggested review.

Secondly, the Committee Chair indicated near the conclusion of its November 16th meeting that the next session (i.e., the proposed January 4, 2012 meeting) could likely be the last meeting of the sub-committee. Prior to the November 16th meeting, CVEC's President asked staff to confirm with the Subcommittee Chairman whether public comment would be allowed because, if public comment was to be allowed, the CVEC President intended to fill the room with CVEC supporters who could provide detailed answers and commentary to the Committee. The Subcommittee Chair then told staff, "Bring it on."

Thus, the published Subcommittee Agenda for the January 4, 2012 meeting indicated that public comment would be accepted. CVEC supporters were then invited and some 35 supporters including Board Members, Selectmen, and Town managers and Administrators came to speak and/or to listen to the proceedings. Apparently shocked at the turnout, the Chairman expressed surprise that so many were present and prepared to speak, even though he had been told that such

a turnout would be in attendance. Then, *in direct contravention of the published agenda and prior practice in every preceding meeting of the Subcommittee*, the Chairman announced that no public comment would be entertained and denied each official the opportunity to speak or to engage with the Committee in a discussion about the Committee's concerns.

A third opportunity was proposed by CVEC. Its President suggested to the Committee that it would be productive to create an agenda whereby a series of issues of concern could be identified for discussion with CVEC representatives. The expressed hope was that this format, which the Chairman agreed had been notably absent until then, would be a very productive way to explore and clarify issues, misunderstandings, incorrect conclusions, etc. Despite a clear indication from the Chairman that the suggested session would be scheduled, no invitation or agenda was ever forthcoming in this regard.

Instead, various Committee members complained several times during the fall sessions that they did not understand the materials, or the applicable law, or the conclusions that might be reached, even though they acknowledged at the time that they had read very little, if any, of CVEC's submitted materials.

This admitted ignorance did not, however, prevent several Committee members from calling during the fall sessions for investigations by the Inspector General and the Attorney General. And this admitted ignorance did not suggest to Committee members the obvious wisdom of constructive discourse and engagement with CVEC staff who could no doubt have helped to educate the Committee.

Instead, when the Committee's first draft report was reviewed (and released to the Press but not to CVEC representatives); not one member of the Committee expressed *any* desire to hear from CVEC representatives, or to consider any comments from those in the best position to critique the draft report. Instead, the Committee met in a final session, provided no opportunity for public input, and ritually approved the draft report as a final report. Only when the final report had been approved by vote was it released to CVEC.

In light of the history above, the Committee's conclusion (bottom, page 6) that, "The Sub-committee was left with the choice of reaching its conclusions without the full cooperation of the agencies involved" is disingenuous and should shock the reader's intelligence.

The result is entirely predictable – a report built on a foundation of admitted ignorance and riddled with factual and legal conclusions that are unsupported, speculative, incendiary, and wrong.

B. Conflicts of Interest

The Committee observes (page 7) that,

“Virtually all of the major actors in CLC and CVEC have multiple roles and positions.”

...

“In making these decisions, these individuals are serving more than one master, raising the potential for breach of the fiduciary duty owed separately to each of these of these various organizations, from county employer to CLC to CVEC. This potential for decision making impaired by conflicts of interest, is compounded where, as here, governance structures are interlocking, and vest control in a few individuals.

Besides defaming the named CLC and CVEC individuals by suggesting acts of criminal activity (violation of the conflict of interest statute, G.L. c. 268A) with no supporting evidence whatsoever, the report wrongly complains that control of the two boards is vested in a few individuals. Four comments are in order.

1. Multiple Intergovernmental Board membership is expressly approved by the Legislature and is NOT a violation of c. 268A:

The Sub-Committee Report notes negatively that CVEC’s President is also a Barnstable Town Attorney while failing to note that he has no role whatsoever with respect to the Compact. It also fails to note that at no time has McLaughlin acted with respect to CVEC matters as counsel for either the Town or CVEC. (Note: A pattern that appears throughout the report is to make a disparaging comment about CLC or CVEC and casually blend in a reference to the other organization when that organization has no involvement in or relevance to the issue under discussion. The pattern appears intentional and intended to blur lines of analysis in order to tarnish both organizations without regard.)

McLaughlin has served as CVEC’s President and Barnstable’s representative since CVEC’s creation. Like every member of the Assembly, and like every member of a regional district or intergovernmental agency, he represents his town’s interests and balances those with the interests of CVEC as a whole. *This activity is expressly allowed by G.L. c. 268A, §17 (c)* which states,

“No municipal employee shall, *otherwise than in the proper discharge of his official duties*, act as agent or attorney for anyone ... in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.” (Emphasis supplied.)

Thus, any member of CVEC may, in the proper discharge of his official duties, act on behalf of an agency such as CVEC even when the interest of the city or town which employs the individual is a party to or has a direct and substantial interest in the matter pending before CVEC. In drafting c. 268A, the Legislature clearly contemplated and approved the common occurrence where municipal representatives serve on many governmental bodies in an official capacity with no personal interest in the outcome. Note that this statute was given out to all members of the Committee and discussed with the Committee but was ignored by the Committee and its report writer, herself a member of the Bar. One must ask why.

2. Full Board participation:

The record clearly shows that the full CVEC board participates in and votes on almost every decision that CVEC has made. There is no evidence to the contrary in the Committee record. The actions taken by CVEC's Executive Committee compromise a miniscule percentage of CVEC's corporate actions. The Special Committee's conclusions to the contrary have no basis in fact and are wholly the product of biased imaginations. Had the Committee Chairman allowed comments from the CVEC Board at the January 4, 2012 meeting, the Special Committee would have been disabused of their conclusions in short order.

3. CVEC has never been controlled by its minority CLC Board Members:

As explained further below, contrary to the Committee's pre-conceived conclusion that CVEC is controlled by and is a corporate puppet of CLC, CVEC's full board and its Executive Committee have for most of CVEC's existence been made up of individuals who are not also members of CLC. The boards of CLC and CVEC are not interlocking and therefore all Committee commentary and conclusions based on that knowingly erroneous conclusion should be disregarded outright. The Committee has had access to this information throughout these proceedings and appears to have consciously ignored the truth.

CVEC was formed in the fall of 2007. At the time of its formation and during the early stages of its operations, there were three initial members and three members of the board of directors and the Executive Committee. As time passed and new members were added, board membership and CVEC membership grew.

By 2009, the full board consisted of nine members. Three members of the board were also members of the CLC board. The common members were John Cunningham of Brewster, Peter Cabana of Tisbury, and Barry Worth of Harwich. There was one common member of the Executive Committee, Barry Worth.

In 2010, the full board consisted of sixteen members. Six members of the board were also members of the CLC board. The common members were John Cunningham of Brewster, Peter Hefler of Duke's County, Kitt Johnson of Edgartown, Barry Worth of Harwich, Charles Kleenap of Sandwich, and Peter Cabana of Tisbury. There was one common member of the Executive Committee, Barry Worth.

In 2011, the full board consisted of nineteen members. Seven members of the board were also members of the CLC board. The common members were John Cunningham of Brewster, Peter Cabana of Tisbury, Kitt Johnson of Edgartown, Barry Worth of Harwich, Bud Dunham of Sandwich, and Tim Twombly of West Tisbury. There was one common member of the Executive Committee, Barry Worth.

In 2012, the full board consisted of twenty-one members. Six members of the board were also members of the CLC board (notably, five of the six are from Martha's Vineyard). The common members were Kitt Johnson of Edgartown (now retired), Peter Cabana of Tisbury, Barry Worth of Harwich, Richard Toole of Oak Bluffs, Bill Straw of Tisbury, Tim Twombly of West Tisbury, and Barry Worth of Harwich. There was one common member of the Executive Committee, Barry Worth.

4. Common Counsel and the Obligation to Quote Rules Fully and Accurately:

The subject of joint representation of CLC and CVEC by the same attorney has been squarely addressed in CLC's response. CLC's response is entirely correct and is fully adopted here by reference.

Lawyers may represent multiple parties with the consent of the clients after full disclosure. The matter is covered by Rule 1.7 of the Supreme Judicial Court's Rules for Professional Conduct and a copy of the Rule was provided to the Committee. For the reader's convenience, it is reproduced *in full* here:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

It is thus clear beyond debate that both CLC and CVEC may use the same counsel after full disclosure and client consent. That said, there has never been and there is no evidence before the Committee to support its suggestion that CLC's interests and CVEC's have ever been divergent. Hence, joint representation has been entirely proper and there has been no need to apply Rule 1.7 to that representation because no apparent or actual conflict of interest has ever existed between CLC and CVEC.

The Committee's venturing into a discussion of SJC Rule 1.8 dealing with a pecuniary interest in a matter was thus nothing more than a red herring designed to inflame the debate, injuring the good name of an outstanding attorney in the process. The matter is more fully and accurately discussed in CLC's response to the Report and will not be repeated here.

Moreover, it was inexcusable for the Committee member who drafted the Report, herself a lawyer, to provide only a small portion of the relevant Rule 1.8, thereby creating the **completely erroneous impression** that the selected snippet of the Rule was in fact and in law the full, controlling citation on the matter. The member's draft clearly misled the remainder of the Subcommittee, and could eventually mislead the full Assembly, into concluding that a violation of the Canons of Ethics had been committed by CVEC counsel. **No such violation has occurred.** Such a misleading quote from a Rule of the Supreme Judicial Court ought to be carefully noted by the Assembly.

Moreover, as noted in the CLC response, **the record before the Subcommittee contains no evidence that Counsel ever advised or consulted with CLC** when the subject grant was made by ConEdison Solutions to CLC. And Counsel's letter of September 21st, 2011 to CVEC did not, contrary to the Committee allegation, opine on the propriety of the grant; it only recited facts and left the reader to his or her own conclusions based on the factual recitation. All of which makes the Committee's allegation of an ethical violation of the Canons an even more egregious and baseless charge.

Finally, CVEC counsel has acted at all times in full conformity the highest possible professional standards of conduct.

All of these arguments were made to the Subcommittee. For the Committee and its report writer to conclude as they both did, ***with no evidence whatsoever*** to suggest an actual or the appearance of conflict, is reprehensible.

C. Transparency, the Open Meeting Law, and the Public Records Law

1. Transparency at Inception

As evidenced by its request for a private letter ruling filed with the Internal Revenue Service within a few months of its formation and a similar filing with the Massachusetts Department of Revenue around the same time, CVEC was transparent about its operations and

intended activities from its inception. CVEC's organizational instruments CVEC require it to comply with the Open Meeting Law.

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).

2. CVEC is precisely the type of government entity permitted to enter into executive session under this provision of the Open Meeting Law.

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 and it is proper, appropriate and necessary for it to do so in order to conduct its business. The Open Meeting Law Division of the Office of the Attorney General ("OAG") is currently drafting a determination dealing with energy related executive sessions. Should the OAG's determination place new constraints on CVEC's activities, CVEC of course will fully comply with such interpretations.

The Subcommittee's conclusion, prepared by its member who is herself an attorney, that "the attorney who is the President of CVEC ignored the definition of 'public record'" while withholding production of confidential documents displays a profound ignorance of the applicable law. The accusation is, in essence, that CVEC cannot invoke the confidentiality provisions of Chapter 164 (an express exception to the public records law) and has no legal basis withhold confidential information clearly protected by Chapter 164 is wrong as a matter of law. CVEC has the legal authority and the contractual mandate to do so. The fact that the Special Committee does not like the result does not remotely entitle to the report writer to make such unfounded and legally incorrect accusations.

It is not the Special Committee's place to administer or enforce the Open Meeting Law; its attempt to do so and its conclusions offered are beyond its competence and jurisdiction and are incorrect as a matter of law.

3. The Public Records Law: an exemption similar to that in the Open Meeting Law

The relevant statutory provisions of the law read as follows:

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. (emphasis supplied). G. L. c. 4, § 7(26)(s).

CVEC uses this exemption to the Public Records Law in order to properly conduct their business. Despite numerous complaints filed by Eric Bibler and others, the Public Records Law Division of the Secretary of the Commonwealth has never ruled that CVEC have improperly withheld documents from disclosure. To the contrary, CVEC's actions in this regard have been repeatedly deemed proper. CVEC staff and directors are acutely aware of their obligations and will fully comply with the Public Records Law at all times.

Again, it is not the Special Committee's place to administer or enforce the Public Records Law; its attempt to do so and its conclusions offered are beyond its competence and jurisdiction and are incorrect as a matter of law.

4. The Purpose of Barnstable County Regional Government

Ironically, the Special Committee ignores its own organizational statute and charter which promotes the relationship that exists between the Compact, CVEC and its members. Chapter 801 of the 1985 Acts and Resolves of Massachusetts authorized the voters of Barnstable County to adopt a charter (the "Act"). In the Act, Barnstable County is granted broad powers, including the following power with respect to staffing and personnel issues:

SECTION 16. County Powers.

Barnstable county after adoption of a charter pursuant to this act may, in accordance with the provisions of such charter, and subject to the provisions of general law and the Constitution of the Commonwealth:

(i) Organize and regulate its internal affairs; ***create, alter, abolish offices, positions and employments and define functions, powers and duties thereof; establish qualifications for persons holding offices, positions and employments;*** and provide for the manner of their appointment and removal and for their term, tenure and compensation.

Act, § 16 (emphasis added). This provision of the Act clearly gives Barnstable County employees the ability to serve in multiple offices, including offices at different levels of government (both county and municipal). This point is driven home by another provision in Section 16 of the Act which states as follows.

The grant of powers under this act is intended to be as broad as consistent with the construction of the Constitution of the Commonwealth and the General Laws relating to local government. The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its own form of government, to reorganize its structure and to alter and abolish its agencies, subject to the general mandate of performing services whether they be performed by the agency previously established or by a new agency or other department of county government. ***Based on the need to develop effective services to meet problems which cross town boundaries and which cannot be met effectively on an individual basis by the municipalities, or the state, this act shall be construed as intending to give the county power to establish innovative programs and to perform such regional services as the Constitution of the Commonwealth and the General Laws permit and to establish such other programs and services as may from time to time be permitted.***

Act, § 16 (c) (emphasis added). The Act also contains a provision regarding the applicability of other laws:

The intent of this act is to enable Barnstable county to cause any duty that has been mandated to it by the legislature to be performed in the most efficient and expeditious manner, and, absent a clear legislative declaration to the contrary, ***without regard to organizational, structural, or personnel provisions contained in prior general law,*** and further, the intent of this act is to encourage a review of the functions which Barnstable provides.

Act, § 15(D) (emphasis added). The Act makes it clear that Barnstable County is to perform its regional functions without regard to staffing constraints that may be imposed by other laws (including G.L. c. 268A, the Conflicts of Interest Law). The voters of Barnstable County did

adopt a charter in accordance with the Act (the "Charter"). Article 6 of the Charter deals with joint performance of functions. The Charter encourages towns to jointly perform their functions:

Units of local government shall be encouraged to make the most effective and efficient use of their powers and their resources and may cooperate with one another, through the Cape Cod regional government, to provide services and facilities in a manner that will best serve geographic, economic, population, and other factors and without regard for any existing political boundaries.

The term local service function as used in this article is intended to mean any government service, or group of closely allied governmental services performed by a unit of local government for its inhabitants and for which, under constitutional and statutory provisions and judicial interpretation, units of local government, as distinguished from the state government, have the primary responsibility to provide and to finance.

Charter, §6-1. The Compact and CVEC are clearly government agencies which perform local service functions. Should the Assembly determine that Barnstable County employees are prohibited from serving on boards of regional entities performing local service functions such as and CVEC, such prohibition would clearly conflict with the express purposes of the Act and the Charter. The ability of Barnstable County to perform its regional local service functions would be substantially impaired by such a prohibition. Such a prohibition could have far-ranging consequences, and not just to the activities and staffing of the Compact and CVEC, but to every county agency or program which uses county staff or funding or permits dual service on regional or local boards.

Areas of Agreement:

The Legislature has expressly blessed the construct of confidentiality for electric cooperatives. If CVEC rejects industry practice and refuses to keep confidential its responses to RFPs and deliberations, it is unlikely that there will ever be serious interest from the private sector in its RFPs with the predictable result that bid prices on projects will suffer from lack of competition and even a complete dearth of bidders.

Secondly, with respect to the subject of audits, CVEC would be more than willing to solicit a full report from its auditors with respect to its operations and to report back to the full assembly within a reasonable timeframe. As well, CVEC would entertain the opportunity to consult with a mutually agreed-upon government practices and operations consultant to see if any of its practices can be improved, given the confidentiality requirements imposed on it as per the above discussion. Again, the Report could be produced within a reasonable timeframe.

Thirdly, CVEC will embark upon a self-examination this fall to determine what its future holds. This public process will consume several meetings this fall, to be followed by a full report to CVEC and all interested parties.

Conclusion:

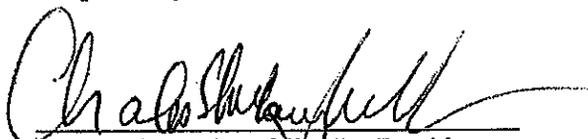
The writer of the Report has produced a document that is bereft of factual support. Its incendiary style (for example, "back-room dealing", page 6; "purportedly governed by Boards of Directors", page 8; "acquisition of pecuniary interest", page 9; "assumption [of] no intentional wrongdoing" while recommending a "forensic audit", page 2; "had [they] scrupulously adhered to letter and spirit of ... law", page 6; "serving more than one master, raising potential for breach of fiduciary duty", page 7) demonstrates an animus of unknown origin, the intent of which is clearly to destroy CVEC and the good work and reputations of its volunteers.

Because of this animus and utter lack of foundational evidence to support its dramatically false and inaccurate conclusions, the Report is unworthy of the Assembly's high position, role, and importance in the scheme of regional, county government. County Government is better, far better, than the content of the Report. With so many vital regional issues soon to be debated, this ill-advised inquiry needs to be ended with finality.

Therefore, the full Assembly should reject the Report outright and expressly repudiate its findings. The full Assembly should issue an apology to CVEC, the Compact, their employees, directors, officers and members for the damage the Report has caused to the reputations of all of them.

June 1, 2012

Respectfully submitted,



Charles S. McLaughlin, Jr., President