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June 27, 2014

***VIA ELECTRONIC MAIL  
ORIGINAL BY HAND DELIVERY***

Mark D. Marini, Secretary  
Department of Public Utilities  
One South Station, 5<sup>th</sup> Floor  
Boston, MA 02110

*Re: D.P.U. 14-69 / Cape Light Compact Revisions to its Aggregation Plan*

Dear Secretary Marini,

Enclosed for filing please find the Cape Light Compact's Opposition to the Attorney General's Motion to Compel in the above-referenced proceeding. Also provided is a Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Jo Ann Bodemer". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Jo Ann Bodemer

JAB/drb

Enclosures

cc: Jonathan A. Goldberg, Esq., Hearing Officer, DPU (w/enc.)(via email and hand delivery)  
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COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF PUBLIC UTILITIES

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CAPE LIGHT COMPACT )  
 ) D.P.U. 14-69

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**OPPOSITION OF THE CAPE LIGHT COMPACT  
TO MOTION TO COMPEL BY THE ATTORNEY GENERAL**

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June 27, 2014

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COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF PUBLIC UTILITIES

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CAPE LIGHT COMPACT

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)  
) D.P.U. 14-69

**OPPOSITION OF THE CAPE LIGHT COMPACT  
TO MOTION TO COMPEL BY THE ATTORNEY GENERAL**

The Cape Light Compact (the “Compact”), pursuant to 220 C.M.R. § 1.04(5) and the Procedural Schedule, Service List and Ground Rules (“Procedural Schedule”) in this proceeding, submits its opposition to the Office of the Attorney General’s (the “AG” or “Attorney General”) Motion to Compel the Compact’s response to certain discovery (“Motion to Compel”).

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

On April 3, 2014 the Compact filed with the Department of Public Utilities (the “Department” or “D.P.U.”) for its review and approval, pursuant to G.L. c. 164, §134(a) (“Section 134”), revisions to its Aggregation Plan which was initially approved by the Department in D.T.E. 00-47 (2000) (hereinafter “Revised Aggregation Plan”). The Department docketed the matter as D.P.U. 14-69. On May 30, 2014, the Attorney General served her first set of information requests on the Compact. On June 13, 2014, the Compact objected to a majority of the Attorney General’s inquiries because, among other things, the questions seek information that is outside the scope of the Department’s review in this proceeding.

The purpose of this proceeding is for the Department to review revisions to the Compact's approved Aggregation Plan that memorialize institutional and operational changes that have occurred since initial approval in 2000. Pursuant to Department precedent, the scope of its review is limited to insuring the revisions are consistent with Section 134 and relevant Department regulations. More importantly, under principles of *res judicata* and collateral estoppel, the Attorney General is barred now from seeking an expansion of the Department's scope of review in this proceeding to include an analysis of a municipal aggregator's rate structure, revenues and expenses, as she is attempting to do through discovery for a third time in a series of municipal aggregation plan review proceedings. Similarly barred is her parsing of Section 134 by distorting the language of the statute to support her repeated attempts to expand the Department's scope of review. The Attorney General does not require the discovery she seeks to support her purely legal argument. Finally, the Attorney General does not require the requested historical information to complete a review of provisions of the Revised Aggregation Plan that remain unchanged from the Compact's approved Aggregation Plan. Based upon the foregoing, as more fully discussed below, the Department must deny the Attorney General's Motion to Compel in its entirety.

## **II. BACKGROUND OF THE COMPACT**

The Compact was originally formed in 1997 through an inter-governmental agreement pursuant to G.L. c. 164, §134 and G.L. c. 40, §4A as a result of enactment of the 1997 Massachusetts Restructuring Act. This Act enabled towns and cities to become municipal aggregators to purchase electric generation (the deregulated component of electric power supply) on an opt-out basis on behalf of all customers within such municipalities and

to directly administer energy efficiency programs. The Compact consists of Barnstable County, Dukes County and all of the twenty-one municipalities located within these counties on Cape Cod and Martha's Vineyard.

The Compact's Fifth Amended and Restated Inter-Governmental Agreement (provided as Attachment DPU 1-1) ("IGA" or Inter-Governmental Agreement") is its governing document. The IGA sets forth the purposes of the Compact, which include, among other things, aggregating consumers as part of the competitive market for electricity, negotiating the best terms and conditions for electricity supply, ensuring transparent pricing, providing equal sharing of economic savings based on current electric rates, providing and enhancing consumer protection, allowing consumers who choose not to participate to opt-out, as well as supporting environmental protection, energy efficiency and renewable energy development. See Attachment DPU 1-1 at 2-3 (listing objectives of Compact); see also Revised Aggregation Plan at § 2.2 (including *verbatim* the Inter-Governmental Agreement objectives cited above).

The Compact's Governing Board sets the goals and policy of the Compact. Naturally, they have evolved over the last fourteen years to account for changes in the energy industry and developments in the renewable energy sector, including, but not limited to, adoption of the Green Communities Act, St. 2008, c. 169 and other energy related legislation. See DPU 1-5 (providing information regarding the Compact's Governing Board). The Compact offers a comprehensive approach to energy services, including competitive electricity rates with a green energy option, effective consumer advocacy and proven energy efficiency programs that include an energy education component. The Compact currently provides electric power supply to approximately 150,000 customers on Cape Cod and Martha's Vineyard; however, all electric customers may choose to participate

in the Compact's power supply program. All 200,000 consumers from all twenty-one towns on Cape Cod and Martha's Vineyard are eligible to participate in the Compact's energy efficiency programs.

### **III. THE AG'S DISCOVERY SEEKS INFORMATION OUTSIDE THE DEPARTMENT'S SCOPE OF REVIEW PURSUANT TO SECTION 134**

The majority of the Attorney General's inquiries seek information which is far outside the Department's review of a municipal aggregation plan pursuant to Section 134. Specifically, AG 1-2 through AG 1-8 and AG 1-12 through AG 1-17 seek historical information concerning the rate structure, revenues and expenses of the Compact. Based upon Department precedent, matters concerning a municipal aggregator's rates, revenues and expenses are outside the Department's authority in the context of a Section 134 review of a municipal aggregation plan. See D.P.U. 12-124, *City of Lowell* (2013) ("*Lowell*").

In *Lowell*, following the Attorney General's request for an expanded Department review to include inquiry into municipal aggregators' rates, the Department conducted a comprehensive analysis of its standard of review. D.P.U. 12-124, Order at 24-29. The Department concluded:

Based on our analysis of the [Section 134], the Department finds the Attorney General's proposed standard of review conflicts with the plain language of the statute, is inconsistent with the intent of Chapter 164, and leads to illogical results. Therefore, the Department declines to adopt the Attorney General's proposed standard of review. . . .

The Department's review will ensure that the plan meets the requirements of [Section 134], and any other statutory requirements concerning aggregated service. In addition, the Department will determine whether a plan is consistent with provisions in the Department's regulations at 220 C.M.R. § 11.01 *et seq.* that apply to competitive suppliers and electricity brokers.

*Id.* at 29-31.

The Department has repeatedly stated that its review is limited and does not include a review of an aggregator's proposed rates, revenues or expenses. *See e.g., id.* at 28-29; D.P.U. 14-10, *Hampshire Council of Governments* ("HCOG"), Ruling on Motion to Compel (2014) at 6-7 (appeal pending).

So too here, the Attorney General's inquiry into the Compact's rate structure and operational information is beyond the scope of the Department's review pursuant to Section 134. As such, the Attorney General's Motion to Compel responses to AG 1-2 through AG 1-8 and AG 1-12 through AG 1-17, which seek such information from the Compact, must be denied in its entirety.

#### **IV. THE ATTORNEY GENERAL IS ESTOPPED FROM SEEKING AN EXPANSION OF THE DEPARTMENT'S SCOPE OF REVIEW PURSUANT TO SECTION 134**

The Attorney General continues to seek an expansion of the Department's scope of review, pursuant to Section 134, to justify her inquiry into a municipal aggregator's rate structure, revenues and expenses. As discussed below, the doctrines of *res judicata* and collateral estoppel bar her from re-litigating this issue. Absent the expansion of the Department's scope of review, the Attorney General's inquiries are objectionable and outside the scope of this proceeding, as discussed *supra* in Section III. The Compact has so stated this objection with respect to the Attorney General's requests, AG 1-2 through AG 1-8 and AG 1-12 through AG 1-17, which seek information concerning the Compact's historical rates and operational information.

The judicial doctrine of collateral estoppel provides that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Martin v. Ring*, 401 Mass. 59, 61 (1987), quoting *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372, 479 N.E.2d 1386 (1985). Similarly, under principles of *res judicata*, parties may not re-argue the same claim based on different legal theories in subsequent litigation. *Mackintosh v. Chambers*, 285 Mass. 594 (1934); *Heacock v. Heacock*, 402 Mass. 21 (1988). These principles may be used defensively against a party upon a threshold finding that the party had “full and fair opportunity to litigate the issue in the first action” and there are no “other circumstances that justify affording another opportunity to relitigate the issue.” *Martin*, 401 Mass. at 62, quoting *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 541 (1985); see also *Green v. Brookline*, 53 Mass. App. Ct. 120 (2001); *Department of Employment v. Dugan*, 428 Mass. 138 (1998).

It is well settled law that “a party cannot preserve the right to bring a second action after the loss of the first, merely by having circumscribed and limited the theories of recovery” that it chose to raise in the first proceeding. *Mackintosh*, 285 Mass. at 597. Massachusetts courts have also expanded the applicability of collateral estoppel to include findings not strictly essential to the final judgment in the prior action as long as it is clear that the issues underlying them were *treated as essential* to the prior case by the court and the party to be bound, and the product of full litigation and careful decision. *Green*, 53 Mass. App. Ct. at 126-127 (citations omitted). The purpose of the doctrine is “to conserve judicial resources, to prevent the unnecessary costs associated with multiple

litigation, and to ensure the finality of judgments.” *Martin*, 401 Mass. at 61. The doctrine may be applied with respect to administrative agency determinations so long as the tribunal rendering judgment has the legal authority to adjudicate the dispute. *Id.* at 61-62; see also *Green*, 53 Mass. App. Ct. at 123-24 (noting settled law that prevents relitigation of final order of an administrative agency in an adjudicatory proceeding by a party to the proceeding) (citations omitted).

A. **The Attorney General Has Had A Full And Fair Opportunity To Litigate The Issue Of The Department’s Scope Of Review.**

The Attorney General cannot dispute that she has had multiple opportunities to fully litigate the scope of the Department’s review of a municipal aggregator’s proposed plan, including the issue of a municipal aggregator’s operational information. See D.P.U. 12-124 (denying the Attorney General’s motion to compel discovery seeking information relating to rate structure, revenue and expenses because not within the Department’s scope of review; denying the Attorney General’s motion for clarification of the Department’s scope of review); see also, *e.g.*, D.P.U. 14-10, Ruling on Motion to Compel (2014) (denying the Attorney General’s motion to compel discovery seeking similar information as sought from the Compact here) (appeal pending). Moreover, it is clear that the issue of the Department’s scope of review was treated as essential to the Department’s decision in *Lowell*. See D.P.U. 12-124, Order at 24-29 (providing thorough analysis of the Attorney General’s argument seeking an expansion of the Department’s scope of review and reiterating and reaffirming the Department’s limited scope of review).

Nevertheless, the Attorney General inexplicably refuses to accept that the scope of the Department’s review does *not* include a review of a municipal aggregator’s rate

structure and operational expenses. She continues to believe that she is entitled to this information despite multiple orders to the contrary. In *Lowell*, the Attorney General first argued that she was entitled to this information because, like utility rates, a municipal aggregator's rate structure should be reviewed under a "just and reasonable" standard. See D.P.U. 12-124, Order at 17. And, twice, she was told that her position was misplaced, with the Department refusing to broaden its scope of review under Section 134. See D.P.U. 12-124, Order at 15 and 29 (referring to denial of AG's motion and affirming ruling). Then, a few months later, in the *HCOG* aggregation proceedings, she advanced a different legal theory to support review of the same information and, once again, the Department refused to allow a review of a municipal aggregator's rate structure, revenue and expenses. See D.P.U. 14-10, Ruling on Motion to Compel at 7 (pending appeal).

Despite multiple orders to the contrary, the Attorney General continues to advance different and unfounded legal theories to try and force an expansion of the Department's scope of review under Section 134. There is simply no statutory or common law basis for her position. Therefore, she must be estopped in this proceeding in the interest of conserving the resources of the Department and the parties, preventing the unnecessary costs associated with multiple litigations, and ensuring the finality of the Department's orders.

**B. The Attorney General's Statutory Construction Argument Is Barred And Legally Erroneous.**

Pursuant to the well settled principles of claim and issue preclusion noted above, the Attorney General's latest argument supporting her position that Section 134 provides the Department the authority to review the Compact's rate structure, revenue and

expenses, is barred. Indeed, *Lowell* provided the Attorney General with a full and fair opportunity to litigate the scope and meaning of Section 134. See D.P.U. 12-124, Order at 5-6 and 16-17 (summarizing the Attorney General’s statutory construction argument in support of her position for expanding the Department’s scope of review). As noted *supra* in Section III, in *Lowell* the Department declined to adopt the Attorney General’s interpretation of Section 134. D.P.U. 12-124, Order at 24-29. The Attorney General did not appeal this decision. Therefore, under principles of *res judicata* she is barred from repackaging in a new guise the same underlying argument, as she is attempting to do within this proceeding. See *Mackintosh*, 285 Mass. at 597.

Of note, the Attorney General advanced the same statutory construction argument for review of a municipal aggregator’s rate structure, revenues and expenses in the *HCOG* proceeding as she does here. The Department declined to adopt the Attorney General’s reading of Section 134 and declined to expand its scope of review. See D.P.U. 14-10, Ruling on Motion to Compel (“[t]he Department’s determination of whether a municipal aggregation plan meets the requirements established by law or the Department concerning aggregated service does not expand the Department’s authority to *all* laws that may govern a municipal aggregation program.”) (emphasis added)(pending appeal).<sup>1</sup> Interestingly, the Department’s analysis in denying the Attorney General’s motion to compel in *HCOG* is nearly identical to its denial in *Lowell*. In each case, the Department correctly held that the Attorney General’s position is inconsistent with the intent of the

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<sup>1</sup> In *Lowell*, the Attorney General argued that a proper reading of Section 134, consistent with the legislative intent, required the Department to broaden its scope of review. Here, and in the *HCOG* proceeding, she misreads the statute’s use of the word “concerning” – contending, out of context, that the use of such a broad term supports the expansion of the Department’s scope of review.

statute as a whole and leads to illogical results. *Cf.* D.P.U. 14-10, Ruling at 6 *with* D.P.U. 12-124, Order at 29.

In *Lowell*, the Attorney General argued that in order for the legislative intent of Section 134 to be effectuated, the Department was required to expand its scope of review. Here, and in the *HCOG* proceeding, she again focuses her statutory argument on the word “concerning” as it appears in Section 134, throwing up the red herring that its use requires the Department to consider *all* laws in the Commonwealth during its review of a municipal aggregation plan. See D.P.U. 14-69, Motion to Compel at 12-15.

The exaggerated emphasis on the word “concerning” without considering the related term “aggregated service” is strained and erroneous. *See e.g., Fleming v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 374 (2000) (the words of a statute are to be given their ordinary meaning without overemphasizing their effect upon the other terms appearing in the statute); *Sullivan v. Town of Brookline*, 435 Mass. 353, 360 (2001) (same). More importantly, the Attorney General’s position is belied by Section 134’s legislative history that notes that municipal aggregator rates are outside the scope of the D.P.U.’s review. Report of the Joint Special Committee Relative to Restructuring of the Electric Utility Industry, dated March 20, 1997 at 101 (negotiated rates are to be regulated by respective local governments while rates for distribution would be regulated by D.P.U.). In other words, the Department was correct when it repeatedly held that its scope of review pursuant to Section 134 does not include a review of a municipal aggregator’s rate structure, revenues or expenses.

In sum, based upon the foregoing, the Attorney General’s third attempt at rewriting Section 134 apple is barred by principles of claim and issue preclusion, in

addition to being an utterly strained and illogical construction of the municipal aggregation statute.

**C. The Attorney General’s Argument Under *Emerson College v. City of Boston* Is Similarly Barred.**

Based upon her nonsensical construction of Section 134, the Attorney General contends that the Department must conduct a review of the Compact’s operational adder (“Operational Adder”)<sup>2</sup> pursuant to the three-part test enunciated in *Emerson College v. City of Boston*, 391 Mass. 415 (1984), that determines whether a municipal fee is in application an impermissible tax. As more fully discussed below, the Attorney General is barred from raising now a new theory in support of her request for an expanded scope of Department review.

The Attorney General concedes she is attempting to re-litigate the same issue under a different legal theory. Indeed, in a feeble attempt to avoid being barred by estoppel principles, she states: “the reason that the Disputed Requests are relevant here is a completely different reason that the Attorney General’s Office sought answers to its information requests in D.P.U. 12-124.”<sup>3</sup> D.P.U. 14-10, Attorney General’s Brief in Support at 2. The Attorney General also admits that she was first aware of *Emerson College* as a basis for broadening the Department’s scope of review as far back as 2001, when the Compact submitted its initial Aggregation Plan for the Department’s approval

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<sup>2</sup> As part of its revisions to its Aggregation Plan, the Compact renamed the “mil adder” to “operational adder” to better reflect the use of these funds for operational expenses. In this brief, the term mil adder is used generically.

<sup>3</sup> In *Lowell*, the Attorney General argued that the Department’s scope of review should include a review of a municipal aggregator’s rate structure, revenue and expenses under a theory that, as with utility rates, an aggregator’s rates should also be subject to a “just and reasonable” standard. In *HCOG* and here, she now asserts that the Department’s scope of review should include a review of a municipal aggregator’s rate structure, revenue and expenses under a theory that municipalities are not permitted to levy taxes under the guise of a fee. See Attorney General’s Motion to Compel, at 7-11 (advancing tax vs. fee argument under *Emerson College v. City of Boston*, 391 Mass. 415 (1984)).

in D.T.E. 00-47. D.P.U. 14-69, Attorney General's Brief in Support at 11-12. However, pursuant to her own internal evaluation, the Attorney General decided that it was not relevant to the Compact's municipal aggregation plan, or the City of Lowell municipal aggregation plan because she now claims it was clear that the funds collected through the respective adders did not exceed the expenses of providing the power supply service. See D.P.U. 14-10, Attorney General Brief at 11-12 (analyzing the *Emerson College* test and concluding it did not need to be raised in *Lowell*); see also D.P.U. 14-69, Attorney General Brief at 11-12 (noting that she considered *Emerson College* in D.T.E. 00-47 but did not raise because determined it was not applicable).

The Attorney General was legally required to present *all* of her arguments on the issue of the Department's ability to regulate or review the use of a mil adder when that very issue was litigated in *Lowell*. It is a fundamental principle of *res judicata* and collateral estoppel that an advocate must advance all of her arguments lest she risk being barred in the future. See *Heacock*, 402 Mass. 21; *Mackintosh*, 285 Mass. 594. Her disingenuous attempt now at reclassifying her characterization of the mil adder, from a "formula rate" subject to a just and reasonableness review in *Lowell* to a "fee" subject to an impermissible tax inquiry, is to no avail. No matter how the Attorney General wants to classify the mil adder, the Department has already found that a review of a municipal aggregator's rate structure (including the collection of a mil adder) is outside the scope of its review. D.P.U. 12-124, Order at 28-29.

The flaws in the Attorney General's position are patent; the Attorney General does not get to pick and choose when to raise a legal theory in support of her position that the Department's scope of review includes the review of a municipal aggregator's rate

structure, revenue and expenses. The Attorney General is not the arbiter of fact and law--the Department is.

In any event, within the context of a Department proceeding pursuant to Section 134, neither the Department nor the Attorney General have the statutory authority to review the rate structure, revenues or expenses of a municipal aggregator. See D.P.U. 14-69, Procedural Schedule at note 1 (noting Attorney General's authority pursuant to G.L. c. 12, §11E, limits her participation as a full party to issues relating to the rates, charges, prices and tariffs of *electric companies*, which a municipal aggregator is not by law) and Memorandum, dated May 29, 2014, at 2 (noting Department's limited scope of review).

As a matter of law, the Attorney General is estopped from raising a new theory to support the same claim regarding the Department's scope of review pursuant to Section 134. Accordingly, to the extent the Attorney General seeks to compel discovery based upon *Emerson College* and the broadening of the Department's scope of review under Section 134, the Attorney General's Motion to Compel should be denied.

**V. INQUIRY UNDER *EMERSON COLLEGE* IS NOT APPROPRIATE IN THIS PROCEEDING**

The Attorney General asserts that she needs much of the discovery sought for the purpose of determining whether the Compact's revenues are appropriate under the *Emerson College* three-part test. As a threshold matter, the *Emerson College* analysis is not reached unless and until there is a change in the Department's scope of review under Section 134. This is a proceeding for the approval of the Compact's Revised Aggregation Plan, not a retrospective review and investigation of the Compact's

operations under its approved Aggregation Plan. Each of the questions asked seeks historical operational information, with some seeking information well over a decade old. See e.g., AG 1-5, AG 1-7 and AG 1-12.

Evening assuming *arguendo* that the estoppel principles, discussed *supra* in Section IV, do not bar the Attorney General from advancing her statutory argument, the Compact maintains that the Attorney General does not require the information she seeks to make such a claim. The Attorney General proves this very point by arguing for the expansion of the Department's scope of review to include *Emerson College* in the *HCOG* proceedings and in the instant case, without the responses to the discovery at her disposal. See D.P.U. 14-69, Attorney General Brief at 9-12; D.P.U. 14-10, Attorney General Brief at 9-11. Indeed, it is a purely legal argument of statutory interpretation that if adopted would be applied prospectively, with no need for the review of historical operational information. See *Smith v. Massachusetts Bay Trans. Auth.*, 462 Mass. 370 (2012) (noting the presumption of prospective application of legislation). Generally, absent a clear statement of legislative intent favoring retroactivity of a statute there is a presumption in favor of prospective application. See *id.* As such, the Attorney General has no basis to seek historical operational information.

**A. Review Of The Operational Adder Pursuant To Emerson College Is Outside The Scope Of This Proceeding.**

Assuming, *arguendo*, the Attorney General's position regarding the Department's scope of review is adopted, the *Emerson College* three-factor test is not applicable within the context of a proceeding to review a municipal aggregation plan. The purpose of the Department's review is to determine if the *proposed aggregation plan* (and in the case of the Compact, its Revised Aggregation Plan) satisfies the requirements of Section 134.

The analysis that would be required under *Emerson College* is inapt in such a proceeding. Indeed, the analysis contemplated by *Emerson College* is akin to the Department's review of the Compact's energy efficiency surcharges, *i.e.*, are ratepayer energy efficiency funds in excess of energy efficiency expenses, if so, the excess should be carried forward to off-set future energy efficiency expenses.<sup>4</sup> See *e.g.* D.P.U. 12-34 (reviewing and reconciling the Compact's energy efficiency surcharge). As in energy efficiency matters, such an analysis would be better suited outside the context of "plan" approval. See *e.g.* D.P.U. 08-50 (2009), Order at 29 (bifurcating Department review and approval of energy efficiency plan from its review of ratepayer funding requirements).

**B. In Any Case, The Compact's Operational Adder Comports With The Emerson College Three-Pronged Test.**

Even were it to be applied, the Attorney General's analysis under *Emerson College* is fatally flawed. Her categorization of the mil adder as either a tax or a fee is unduly narrow. Moreover, her analysis conflicts with her stated position in other proceedings and judicial explication of the *Emerson College* tests.

The Compact disagrees with the Attorney General's pigeon-holing of the mil adder as either an impermissible tax or a permissible fee. *Nowhere does she consider that it is neither a fee nor a tax.* The Compact's power supplier develops a price that incorporates its Operational Adder as part of the rate charged to Compact customers. *Emerson College* and its progeny are distinguishable to the extent that each involved the review of a statute or ordinance enacted to provide for the collection of a fee to raise

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<sup>4</sup> Unlike Section 134, the Department has the expressed statutory authority to review and approve the revenue, program costs and expenditures of energy efficiency program administrators. G.L. c. 25, §19. Pursuant to well-settled canons of statutory construction, the Compact submits that if the General Court wanted to provide the Department this same authority under Section 134 it clearly could have so stated but chose not to do so.

municipal revenues for a particular purpose. See *infra* at 16-20. Quite simply, this is not what is occurring within the context of a municipal aggregation plan. The Compact offers competitive power supply at a particular rate, including its Operational Adder, which consumers on the Cape and Vineyard may choose to opt-out of paying for at any time.

Equally flawed is the Attorney General's application of the *Emerson College* three-prong test, which provides that fees are not a tax if:

- (1) "they are charged in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society'";
- (2) "they are paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge";
- and
- (3) "the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."

*Emerson College*, 391 Mass. at 424. Each of these three components is discussed in *seriatim* below to demonstrate that the Operational Adder easily satisfies this construct.

**1. The first prong is satisfied as the benefits of the Operational Adder accrue primarily to the party paying the fee**

The Attorney General's analysis here utterly fails to acknowledge that courts do not require that *all* benefits flow to the party paying the fee, and will not determine a fee is impermissible because some benefit is realized by the general public. See *e.g.*, *Commonwealth v. John Caldwell*, 25 Mass. App. Ct. 91 (1987) (noting that as long as fee payer is primary beneficiary of services, first prong satisfied). Indeed, the Attorney General herself has recently advanced this very point to the Supreme Judicial Court of the

Commonwealth in *Denver Street LLC v. Town of Saugus*, 462 Mass. 651 (2012).<sup>5</sup> In *Denver Street*, the Attorney General correctly acknowledged:

The fact that some additional general benefit may incidentally accrue to the public does not make the charge less “fee-like” once one has found that the fee payers are actually getting some special benefit for their money, which is the hallmark of a fee. Most government services or regulatory programs provide some broad benefit to the general public even where they provide a more particularized benefit to a paying class. If a general benefit to the public, such as an improved environment or improved public health or safety, were sufficient to make fees into taxes, hardly any fee could be charged for any purpose with which a government might be legitimately concerned.

Brief Amicus Curiae Commonwealth of Massachusetts, by the Office of the Attorney General, 2012 MA S. Ct. Briefs 10927 (2011) at \*16-\*17; see also Brief Amicus Curiae of the Attorney General, *Silva v. City of Attleboro*, 2008 MA S. Ct. Briefs 10330 (2009) at \*11 (“Although the burial permit system undoubtedly also serves certain more general public interests, that fact does not turn burial permit fees into “taxes,” nor is there any need to undertake the difficult task of determining whether “private benefits” outweigh “public benefits.”).

Indeed, according to the Attorney General in *Silva*, as long as there is the existence of a particularized benefit, the inquiry into the first prong is satisfied. See *Silva* Attorney General’s Brief at \*21. The Compact roundly agrees.

Thus, contrary to her narrow and unsupported analysis of the first prong in the instant case, the Compact customers participating in the Compact’s power supply program do receive a particularized benefit not shared by the rest of Cape and Vineyard

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<sup>5</sup> It is curious, to say the least, that the Office of Ratepayer Advocacy urges an argument to the Department here which is so at odds with the position that the Attorney General has taken before the highest court of this Commonwealth.

residents, *i.e.*, aggregated power supply. Using for example the Attorney General's example of the Compact's consumer advocacy, it is perfectly acceptable should some of the Compact savings attributed to its regulatory activities, which totals over \$142 million since 1997, inure to the benefit of the general public. The Compact's customers clearly have benefited because the primary objective is to facilitate the competitive generation market. It is settled law that a secondary public benefit does not transform a municipal fee into a tax. See *Caldwell*, 25 Mass. App. Ct. at 94.

**2. The second prong is satisfied as the Operational Adder may be avoided by simply opting-out**

Even the Attorney General concedes that the second prong is satisfied since the power supply program is optional by its express terms. D.P.U. 14-69, Motion to Compel at note 7.

**3. The third prong is satisfied as the Operational Adder is collected to offset the cost of the Compact's provided services**

*Emerson College* and its progeny establish that a fee is permissible provided that the charges collected offset the expenses of providing the services rather than raising revenues generally. See e.g., *Caldwell*, 25 Mass. App. Ct. at 97. An *Emerson College* inquiry does not require the examination and analysis of the wisdom of public policy choices as to how the fees are used or require a determination of whether the expense is reasonable or just. It simply seeks a determination as to whether the fee is collected to support the services provided. See *Caldwell*, 25 Mass. App. Ct. at 97.

For example, in *Caldwell*, the issue was not whether the harbormaster was doing a good job or overcompensated for his work at the harbor. *Id.* The inquiry was whether

the slip fee collected was used to offset the expense of providing harbor services. *Id.* So too here, the inquiry would be equally limited.

As such, the Attorney General's suggestion that the Compact's legal fees are unreasonable is entirely beyond the scope of an *Emerson College* inquiry, and is all too reminiscent of her rejected argument in *Lowell* that the mil adder should be reviewed to determine if it is just and reasonable. See generally D.P.U. 12-124. The Compact's legal expenses include costs associated with its participation in Department proceedings concerning the Compact's administration of its power supply program as well as participation in a variety of proceedings concerning competitive power supply and regulated utility activities which affect participants in the Compact's aggregation as well as prospective participants (since consumers not participating can opt back in) and Cape and Vineyard ratepayers more generally.

Equally beyond the *Emerson College* inquiry is the Compact's funding of the Cape & Vineyard Electric Cooperative, Inc. ("CVEC"), which the Compact created and is a member of.<sup>6</sup> It is through its relationship with CVEC that the Compact has chosen to achieve its mission to support and develop renewable energy projects located in and for the benefit of its member municipalities and Compact ratepayers on the Cape and Vineyard. As with any other policy determination made by the Compact as to how it will best promote its purposes under its Aggregation Plan, the Attorney General's inquiry as to whether it is reasonable or appropriate is beyond the scope of the *Emerson College* analysis.

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<sup>6</sup> CVEC was organized and created by the member municipalities of the Compact for the purpose of developing and pursuing renewable energy projects on the Cape and Vineyard. All but two of the Compact's municipal members are members of CVEC. See [www.cvecinc.org/about/cvec-clc-faqs/](http://www.cvecinc.org/about/cvec-clc-faqs/)

In sum, the Attorney General has woefully failed in establishing the relevancy and need for the discovery sought in support of her inquiry under *Emerson College*. To the extent she seeks to compel such discovery, the Attorney General's Motion to Compel must be denied.

**VI. THE REMAINING DISCOVERY SEEKING HISTORICAL INFORMATION, EXECUTED ESAS AND RFP DOCUMENTATION IS NOT REQUIRED FOR REVIEW OF THE COMPACT'S REVISED AGGREGATION PLAN**

The Attorney General also seeks to compel the Compact's responses to three additional discovery questions: AG 1-10 (seeking historical rate information since the Compact's inception); AG 1-20 (seeking a copy of the Compact's executed electric service agreement ("ESA")); and AG 1-21 (seeking all bid and RFP related documents issued by the Compact in connection with its power supply program). The Compact disagrees with the Attorney General's position claiming she is entitled to this information. The Compact has objected to these questions on the grounds that they seek information that is outside the scope of the Department's review of the revisions to the Compact's Aggregation Plan, pursuant to Section 134, among other things. See Compact's Responses to the Attorney General First Set of Information Requests, dated June 13, 2014.

**A. The Discovery Is Not Required To Review The Statutory Requirement For The Equitable Treatment Of All Customer Classes.**

With respect to AG 1-10 and AG 1-20, the Attorney General claims that she requires this information so she can determine whether the Compact's revised municipal aggregation plan provides "for the equitable treatment of participating customers." See

Motion to Compel at 16-18. In D.P.U. 12-124, the Department stated its standard for determining whether a plan satisfies “the equitable treatment of all customer classes” as follows:

The Department has stated that this requirement does not mean that all customer classes must be treated equally; rather, customer classes that are similarly situated must be treated equally.

D.P.U. 12-124, Order at 47.

In making this evaluation, the Department reviews a plan to determine if the varying pricing or terms and conditions among different classes are set to account for the disparate characteristics of each customer class. *Id.* Toward this end, the Department reviews the plan terms to determine if this statutory provision is satisfied. *Id.* The Department does not inquire about actual rates (or proposed rates, in the case of newly forming municipal aggregators), rather its inquiry is limited to the plan terms to insure that classes of customers similarly situated (e.g., residential customers) are provided the same rate. *Id.* In addition, the Department ensures that the plan provides for the right of all customers to raise and resolve disputes and to receive notifications of their rights. *Id.* Based upon this established standard of inquiry, the Attorney General’s request seeking the historical rates, by month, for every month since the inception of the Compact, is not only onerous but unnecessary to the Department’s analysis.<sup>7</sup>

Furthermore, as stated *supra* in Section I, this proceeding is for the review of the Compact’s Revised Aggregation Plan. This is *not* an investigation of the past practices of

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<sup>7</sup> The Attorney General asserts that the Compact has not met its burden to support its unduly burdensome objection. The Compact disagrees. Accepting for the sake of argument that the Attorney General requires the historical rate information she seeks to make her determination regarding equitable treatment, there is no need for a month-by-month breakdown since the Department’s approval in D.T.E. 00-47. For instance, data showing rates by class for the prior 12 months would allow such a determination. Accordingly, the Compact maintains its objection that this question is unduly burdensome.

the Compact. Historical operational information, including rates, is not relevant to Department's review of the Revised Aggregation Plan. Rather, inquiry should be limited to the revised plan, whether the revised plan satisfies Section 134 requirements, and clarification of the Compact's proposed future activities pursuant to the plan.

Moreover, the relevant sections in the Compact's Aggregation Plan that are implicated under the "equitable treatment" analysis were not substantively revised relating to this issue. See Redline Aggregation Plan at Section 8 ("Equitable Treatment of All Classes of Customers" contains no revisions) and at Section 6.0 ("Ratesetting and Other Costs to Participants" contains no revisions relevant to rates by classes; the revisions to this section are limited to the goal of the Compact when negotiating pricing, not the pricing by rate class). Therefore, the Compact submits that no inquiry is required since there have been no revisions to disrupt the Department's original approval of the Compact's Aggregation Plan relative to this statutory requirement.

For the same reasons, the Attorney General's request for the Compact's executed ESAs to determine whether they provide for the equitable treatment of classes are not required. Moreover, as the Compact stated to the Attorney General, the form of ESA, provided as Attachment DPU 1-2(a), is substantively the same as the executed ESA. See DPU 1-2. The Attorney General has not articulated any reason that she would need to review the price terms and other competitively sensitive information to conduct any appropriate inquiry under Section 134.

**B. The Discovery Is Not Required To Review The Methods For Entering And Terminating Contracts.**

Finally, the Attorney General seeks the executed ESAs and all of the related bid<sup>8</sup> and RFP information to determine whether the “plan fully and accurately describes the Cape Light Compact’s methods for entering into and terminating contracts.” Section 5 of the Compact’s Aggregation Plan addresses the Compact’s methods for entering into and terminating contracts, and did not undergo *any* substantive revisions. See Redline Aggregation Plan at Section 5. As such, the Compact submits that the Department’s original approval is still in full force and effect and no further inquiry is required. To the extent the Attorney General believes she is entitled to make another review, the form ESA provides the substantive terms she requires.

In sum, to the extent the Attorney General seeks historical rate information, executed electric services agreements and related bid and RFP documents, the Compact respectfully requests the Department deny her Motion to Compel.

**VII. CONCLUSION**

Based upon the foregoing, the Compact respectfully submits that the Attorney General’s discovery requests, among other things, are outside the scope of the Department’s established standard of review of a municipal aggregation plan, pursuant to Section 134. More importantly, the Attorney General’s repeated requests for a wholesale expansion of the Department’s scope of review to include a review of a municipal

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<sup>8</sup> The Attorney General’s suggestion that the Compact opened the door to bid information by providing its Consultant’s review of certain bids as part of the Compact’s Motion to Strike is absurd. Contrary to the AG’s characterization, the Compact is not picking and choosing when information is relevant but was defending against the inclusion of factually inaccurate representations becoming part of the record.

aggregator's rate structure, revenue and expenses must be rejected under well settled principles of *res judicata* and collateral estoppel and are legally unfounded, once again. Anything less will continue the waste of resources and taxpayer funds to defend against specious legal arguments.

Accordingly, the Compact respectfully requests the Department deny the Attorney General's Motion to Compel in its entirety.

Respectfully submitted,

THE CAPE LIGHT COMPACT

By its attorneys,



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Dated: June 27, 2014

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF PUBLIC UTILITIES**

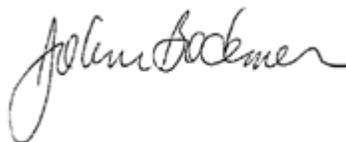
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Petition of the Towns of Aquinnah, Barnstable, Bourne, )  
Brewster, Chatham, Chilmark, Dennis, Edgartown, )  
Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, )  
Orleans, Provincetown, Sandwich, Tisbury, Truro, West )  
Tisbury, Wellfleet, and Yarmouth, and the Counties of ) D.P.U. 14-69  
Barnstable and Dukes, acting together as the Cape Light )  
Compact, to the Department of Public Utilities, for )  
approval of a revised municipal aggregation plan )  
pursuant to G.L. c. 164, § 134. )

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the Cape Light Compact's Opposition to the Attorney General's Motion to Compel upon Secretary Mark D. Marini and Hearing Officer Jonathan Goldberg via electronic mail and hand delivery and upon the remaining Service List by electronic mail delivery in this matter.

Dated this 27<sup>th</sup> day of June, 2014.



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