

MEMORANDUM

TO: Eric Nakajima, MBI Director
cc: Phil Holahan, MTC Deputy Executive Director and General Counsel
Elizabeth Copeland, MTC Associate General Counsel
FROM: Gregory A. Sandomirsky
DATE: December 9, 2015
RE: WiredWest Operating Agreement

This memo will summarize selected issues based on a review of the 11/29/15 draft Operating Agreement for the WiredWest Municipal Light Plant Cooperative LLC (the LLC or the Coop).

Overview. The proposal is to convert the existing WiredWest Communication Cooperative Corporation (WW) into a new LLC. The initial Members of the LLC would all be municipal light plants (MLPs) formed under MGL 164:34 and would be the ones identified in an Exhibit to the Agreement on the date of execution, apparently as soon as January 9, 2015. MLPs which have been part of WW to date but do not join the LLC would no longer be members of WW. The LLC would also be a Coop under MGL 164:47C. Its Statement of Principles are similar to those adopted by WW in the past, including providing universal access by a fiber-to-the-premises network. Each Member of the LLC would agree to make a stated Capital Contribution, payable in installments over time. Percentage Interests in the LLC would be set on the basis of the amounts of the Capital Contributions made or committed. Member voting rights and distributions of any net income are set up to be proportionate to the Percentage Interests, which reflect the relative amounts of the Capital Contributions at any point in time.

LLC/COOP Technical Status. The presumption appears to be that an MLP coop can be formed and registered as a limited liability company under MA law. This may be correct, but it is not entirely clear by what legal authority. MGL 164:47C constitutes such a coop as a body politic and corporate and a public instrumentality. That Section includes a reference to a “corporation,” but does not clearly specify how to form an MLP Coop in detail. The range of available options for structuring an MLP coop is not a settled question. It may be prudent to conceptualize the proposed Coop as a public instrumentality operated much like a limited liability company, rather than as a true limited liability company which happens to have only MLPs as public members. This might mean, among other things, “registering” and submitting to regulation like MLPs do, rather than like LLCs do.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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Initial Membership. A Member must be an MLP and the associated town must have fully approved funding for the necessary capital contributions the MLP is agreeing to make. Provisional Membership is allowed for MLPs which are willing to sign up as of the January 9 date but want to have until June 30, 2016 to come forward with proof that the their town is fully on board with the necessary funding, such as bonding authorizations. Provisional Members don't have voting rights in the meantime, but they can get pro-rata Participating Interests on the same terms as the Initial Members when they do come in fully. Minimum required pre-subscription rates are not addressed in this document.

Amount of Capital Contributions. It is not completely clear whether the key weighting factor, Capital Contributions, is measured by *just* the town-derived moneys to be put in (presumed to be bond proceeds) or by *the sum of* the town moneys *plus* the MBI grants, but it appears the latter is intended. It is not clear whether the total project cost figures MBI has used to size the grants will be used to size the Contributions. Further, it is not clear whether in kind contributions of some sort will be allowed to count as Contributions at fair market value, but they may be. The definition of "Broadband Assets" is broad, and Members are required to contribute all their Broadband Assets ("whether now or hereafter acquired"), but the key Schedules are not filled out.

New Membership Admission. The initial membership group is set on day one. Admission of new members after that is in the discretion of the existing members and would require a "Super Majority" vote (two-thirds vote) by Participating Interests. There is no assurance that any additional members will be admitted at all, and the existing members expressly reserve the right to determine the terms on which each new member will be admitted. There is no window (beyond the 6 months for the Provisional Members) during which admission is on pre-stipulated terms. There is nothing stating that new members have to be treated in a manner similar to the initial members or similar to each other. It is expressly contemplated that classes of members could be developed for new members, which suggests variance in voting and other rights. It is possible that rights to distributions could be subordinated by class.

Withdrawal from Membership. Withdrawal is expressly prohibited for ten years (the Restricted Membership Period). Even after that Period, withdrawal is only permitted *provided* "the Cooperative has not entered into financial obligations...*based on or requiring* the participation of said Member." Further, "[l]iabilities under contracts in force at the time of any such [withdrawal] shall not be affected, except to the extent provided in such contracts." This certainly suggests that long-term contractual obligations or financial obligations relating to debt, if approved by the Members, could restrict withdrawal of Members. It might well be in a lender's interest to do so. Upon withdrawal, the withdrawing member is entitled to a payment equal to its Capital Account (Capital Contributions less distributions already received, if any). If the Coop does not have the funds available, it gives the withdrawing Member an unsecured three-year note at prime. *No elements of the fiber network itself (or any other Coop assets) transfer or revert to a withdrawing Member by the terms of the Agreement.*

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Ownership of Network. By the terms of the Agreement, the Members contribute money and get Participating Interests. *Ownership of all tangible and intangible “Broadband Assets” of the Members relating to the WW Regional Network is clearly in the Coop.* The Members retain no direct interest in or control over the Broadband Assets or the Regional Network. As owner, subject to the requisite votes, the Coop can encumber, sell, lease, license or otherwise dispose of its assets in whole or in part as it may choose. *On its face, this approach is not consistent with the policy previously adopted by the MBI Board.*

Additional Capital Contributions. A Super Majority can call for Additional Capital Contributions to be made by the Members if necessary or desirable. These calls, however, are *discretionary* for each Member. There is no “capital call” or other binding mechanism requiring additional funds to be contributed. Percentage Interests will be adjusted to reflect additional contributions, so they are necessary to the extent a Member wants to preserve its Percentage Interest. Unless by means of an agreement among the Coop, the towns and the MLPs we have not seen yet, *there is nothing in place upfront assuring any further funding* to address future Coop capital or operating needs. In the absence of funding from Members, the Coop would presumably borrow from commercial lenders which are likely to require security in the form of liens on assets.

Participating Interests. It appears that these are set entirely on the basis of Capital Contributions (subject to Super Majority vote to amend the documents), rather than to any degree on the basis of any factors reflecting contributions to operational results which might change over time, such as numbers of subscribers in a town or the revenues associated with those subscribers. This could mean that the “higher cost to build” towns end up indefinitely with a higher share of any net revenues than those in which population or usage grow disproportionately, even after the initial Capital Contributions are paid back.

Distributions. A priority is given to making distributions, after expenses, taxes (including the PILOTs contemplated by MGL 164:47C) and reserves, to offset town debt service incurred to fund Contributions. Not clear if this will reflect actual debt costs or representative assumed costs. Not clear that it would apply to cash contributions made by towns from non-debt sources other than MBI grants, such as town surplus funds or current appropriations. After this stated preferential distribution, the Directors control distributions.

Compensation to Directors and Officers; Conflict of Interest. The draft uses somewhat permissive provisions. Subject to approval of the Board, it appears that compensation beyond expense reimbursement is allowed for Directors on the Executive Committee and for Officers, and that conflicts can be resolved by simple disclosure if two-thirds of the disinterested Board members voting find the terms of a deal are “fair and reasonable.” The draft document does not appear to address MGL 268A (on conflicts) expressly. It is possible that actions permitted by these provisions, if taken, could result in violations of c. 268A by persons found to be special or regular public employees.

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Governance. There is a unique, multi-tier governance structure. Certain major actions are reserved to the Members (the MLPs which “own” the Coop), each acting through a person appointed by the Member to serve as its “Representative.” For some of the more important actions a Super Majority vote of the Representatives is required. Actions not reserved expressly to the Members fall to the Board of Directors. Each Director is nominated by a Member, but then elected by the Members as a whole. Each Member will have a Director unless it waives that right or cannot get one elected. It appears one person can be both the Representative and the Director for a particular Member. Beyond these two governing bodies, there is also an Executive Committee of the Board. Below that, the usual Officers. The senior paid full time staff job is “General Manager,” with some other positions expressly contemplated.

Public Records and Open Meeting law. It appears from the drafting that the expectation is that the exemption in C.164 for “those instances when necessary for protecting trade secrets, confidential, competitively sensitive or other proprietary information” will be applicable to a significant part of the LLC’s records and activities.

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