

# WiredWest/MBI Discussions about WW Operating/Governance Agreement

12/22/15 – 3/11/16

## ***Recent History***

Since December of 2015, MBI and WW have met to discuss various elements of its operating agreement. At the first meeting, held on December 22<sup>nd</sup>, MBI and WW decided to table the issue of town ownership of broadband assets at the request of WW. During this meeting, MBI and WW concluded a thorough analysis of the agreement, and several questions were raised for WW to answer. At the next meeting, held on January 6<sup>th</sup>, WW and MBI discussed the concerns MBI held concerning the need for towns to own the broadband assets which were paid for through state and municipal resources. MBI reiterated its concern about the potential for the alienation of town-purchased broadband assets when those assets are used to secure financing for WW. At the conclusion of the January 6<sup>th</sup> meeting, WW indicated that it would take the concerns back to its members and its board for discussion. While we remained in touch with WW's lead, we did not meet again as a group until March 11, 2016. During the weeks between the January 6<sup>th</sup> meeting and the March 11<sup>th</sup> meeting, MBI was under the impression that WW officials met on several occasions to discuss the developments and critiques provided by MBI during the discussions about both the operating agreement and business plan.

In the middle of February, WW provided an updated operating agreement for review along with an accompanying email from the then-chair of the Governance group of WW. The cover e-mail provided answers to the specific questions MBI had raised about the operating agreement.

On March 8, 2016, WW provided to MBI a memo with several attachments. One of those attachments provided three flow charts for proposed ownership structures. Because they appear as a chart, not many details of the two new proposals<sup>1</sup> are presented, but each of the three models continues to propose some type of shared ownership of network assets. The MBI has not fully analyzed the new proposed ownership structures because (1) no detailed documentation has been made available and (2) they continue to retain shared ownership through WW of significant assets that are paid for through municipal resources.

On March 11, 2016, WW provided a redlined version of three sections of the operating agreement with highlighting proposed changes. An initial analysis of these proposed changes are incorporated in the sections below which outline the key issues that remain with the operating agreement. Where applicable, the summaries below will also make note of any of the new proposed edits from the March 11<sup>th</sup> document.

## ***Organization of WiredWest and Initial Membership Issues***

### *Corporate structure*

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<sup>1</sup> One of the proposed plans is the existing ownership proposal presented in graphic form, presumably in order to facilitate comparison with the other two models.

The organization remains a cooperative of MLPs as authorized by G.L. c.164, §47C, and the Operating Agreement also states the Cooperative is formed under the Massachusetts Limited Liability Company Act (G.L. c.156C). Apart from the well documented ownership issue surrounding the organizational structure, MBI continues to have questions about whether the protections and security of the MLP statute still attaches to WW given its dual incorporation (i.e. does the applicability of the Massachusetts Torts Claim Act under Section 47C(g) of Chapter 164, and thus the cap on potential liability, still apply if the MLP cooperative is also an LLC?).

### *Ownership*

The current draft operating agreement still transfers all broadband assets to WiredWest, so WiredWest would still have ownership of all broadband assets, and the Operating Agreement is explicit that transfer of all those assets to WiredWest is a precondition for membership. (See definition of “Broadband Assets”, page 2, Section 1.1(f); page 5, Section 1.4(c)(“...the Cooperative will *own and operate* a regional fiber to the premises network...” (emphasis added); page 7, Section 1.9).

### *Alienation of Assets*

Repeatedly, MBI has raised concerns about the potential that WW could attempt to (or might need to) secure any financing agreement with the broadband assets it receives from each member town. Ultimately, were WW unable to make payments on any financing agreement, its lender could seek to takeover or foreclose on the assets that had been put up as collateral. WW has attempted to address this issue in its March 11<sup>th</sup> document. In that document, WW amends Section 7.1 to add a subsection (e). This new subsection reads: “No encumbrance may be placed on any contributed Broadband Assets by the Cooperative without the approval of the contributing town.” Putting aside the vagueness of this provision, this proposed amendment still allows for the potential for the alienation of town-financed assets, it just raises the level of consent required.

### *Requirements for Membership*

WiredWest has added new language to the Member Qualifications section, Section 2.1. The new language in this section of the agreement is highlighted:

“Notwithstanding having received the authorizations required pursuant to clauses 2.1(a) (i) and (ii) above, **which authorizations shall serve as qualifications for joining the Cooperative and without which the town shall be ineligible to join the Cooperative notwithstanding any statutory discretion with respect to such authorizations**, towns may fund the project through alternate funding mechanisms provided authorization for such funding mechanisms are also certified by the town clerk in the town where the Member is located.”

It appears that with the highlighted language WW is requiring towns to obtain town voting authorizations at both town meeting and through a town election as a precondition of membership.

### *Number of Towns Required to Make Agreement Operational*

At the time of the December 22<sup>nd</sup> meeting, the number of towns signing onto the agreement to make it operational did not seem to be a fully settled question. MBI had requested clarity on that issue. The first paragraph of the preamble of the current draft of the Operating Agreement stipulates that it will go into effect when signed by 13 MLPs. Of note, this is the same number that appeared in the original

draft from December. This number does not appear to be related to sustainability. The rationale explained to MBI for the use of thirteen was simply that there are 24 WiredWest towns (at least there were in December), and 13 was majority of those 24 towns.

### ***Withdrawal of Members***

The terms of withdrawal remain an issue for MBI in the current draft. The then-chair of WW's Governance Committee wrote: *"WW is in the process of reviewing alternative approaches to the 10-year requirement to create more flexible withdrawal options and discussing these with our member towns. They have expressed concerns that the desire of a town to be able to withdraw under different terms must be balanced against the interests of the non-withdrawing towns, particularly in terms of the operational and financial stability of the network."*

However, the current Operating Agreement allows for withdrawal after ten years beginning after the date of execution of the agreement. The previous draft allowed for withdrawal "5 years after the date the cooperative starts providing broadband services to the members." While the old language begged the question of what "starts providing broadband services to the members" actually meant, the new language is clearer but seems to be at least as restrictive as the previous draft.

The new Operating Agreement retains the previous language calling for the cooperative to pay to redeem the withdrawing member within two years after the effective withdrawal date. The consequences if the cooperative does not have sufficient funds to make this payment remain the same (i.e. promissory note calculated with prime interest rate, as defined in agreement).

However, WW's March 11<sup>th</sup> document includes amendments to the withdrawal procedure section. Specifically, WW's operating agreement now allows a member to withdraw and receive its broadband assets. However, the withdrawing town must negotiate with WW to purchase back some or all of the broadband assets physically located in the town. According to the revised agreement, the purchase price "shall represent the value of these Broadband Assets, less the Outstanding Balance, plus additional modifications, if any, of network design and construction to allow the Cooperative to continue to fully serve its remaining customers and a recognition of the loss of income for the Cooperative from the residents of the Withdrawn Member's town." These considerations in determining price could cause substantial delay and might well result in prohibitive cost.

### ***Conflict of Interest***

The new operating agreement adds a new section 10.1, which provides: "The Cooperative, its Members, Directors, Representatives and employees shall comply with the provisions of G.L. c.268A..., as applicable." However, the next section of the Operating Agreement provides that a contract between the Cooperative and any interested member, director, alternate or family members of any of those individuals is neither void nor voidable if certain conditions are met.

The then-chair of WW's Governance Committee provided a partial explanation of this issue, and it is somewhat perplexing adding. However, the explanation likely explains why "as applicable" was added to this provision. WiredWest appears to say in its Operating Agreement that Chapter 268A should govern the behavior of its employees, members, directors, etc. However, his response seems to indicate the law may not apply, and WW is in no hurry to make this determination. His full response is

reproduced below (see highlighted section below for portions of answer that seem to contradict the Operating Agreement):

*We have agreed to incorporate 268A by reference in the OA (see Section 1o), so we recognize the applicability of 268A to all representatives of towns, appointed or nominated under the OA. The only question is whether 268A would apply to employees (such as the General Manager) not otherwise representing towns, but no such employees are anticipated to be engaged until a year or less before service to customers commences.<sup>2</sup> We will inquire with the Ethics Commission at an appropriate time and intend to be fully compliant with 268A, but we feel there is no urgency to do so at this time.*

### **Depreciation Issue**

Pursuant to G.L. c.164, §57, MLPs must account for and budget for the costs of running the plant, including a set amount for the depreciation of the plant on an annual basis. In recent conversations, representatives from Leverett have indicated that the requirements of this section are incredibly important and burdensome, and could be problematic for a regionalization effort. The current WiredWest Operating Agreement is silent as to how these depreciation reserves would be accounted for at the municipal level, and does not mention this requirement at all.

### **Miscellaneous Questions/Issues**

After the December 22<sup>nd</sup> meeting, MBI raised two other issues that were not directly addressed in the Operating Agreement. The questions and answers (as provided by the then-chair of WW's Governance Committee on behalf of WiredWest) are reproduced below.

WiredWest was to determine which entities/bodies it anticipates will regulate the Cooperative.

*We anticipate this includes the Federal Communications Commission and the Mass. Department of Telecommunications and Cable.*

WiredWest was to inquire about PILOT issue.

*An MLP Coop is subject to a PILOT on the property it owns within a town, as if "such property were the property of a domestic corporation." A domestic corporation can negotiate*

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<sup>2</sup> This type of perspective on the status of the Cooperative employees would seem to indicate that the employees of the Cooperative are not public employees, thus calling into question the nature of the Cooperative itself. If the Cooperative is not a public employer, it would reason that the Cooperative would lose the protection of the Tort Claims Act, and would also seem to trigger a number of concerns around bonding. Loss of the protection of the Tort Claims Act would remove a cap of \$250,000 for damages caused by negligence of the Cooperative or its agents (e.g. One of WiredWest's bucket trucks is in a bad accident. If a lawsuit ensues, and the Tort Claims Act does not apply, the Cooperative could be liable for hundreds of thousands of dollars, or potentially millions, in damages. This issue seems to go to the risk and sustainability issues as well.) During a conversation at the March 11<sup>th</sup> meeting, Jim Drawe indicated that the varying levels of tort claims exposure that WW could face depending on the applicability of the statute was not something his risk committee had analyzed, as the committee did not include an attorney or any members familiar with the statute.

*abatements on taxes with a municipality for purposes such as economic development, so an MLP Coop could presumably negotiate such abatements as well.*<sup>3</sup>

These questions and answers were not substantially discussed at the March 11<sup>th</sup> meeting, and no members of WW raised objection to the then-chair of WW's Governance Committee's answers.

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<sup>3</sup> In this case, the Cooperative appears to want to be treated as a public instrumentality, or MLP cooperative specifically, for purposes of paying taxes. It is not clear how a municipality would justify taxing assets of one communications company and not another.