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BY ELECTRONIC MAIL

TO: Jim Drawe, WiredWest

FROM: Diedre Lawrence, Esq., Walter Foskett, Esq.

RE: Status of WiredWest Municipal Light Plant Cooperative as an LLC

DATE: May 6, 2016

You have asked us to provide you with an opinion regarding the reorganization of the WiredWest Municipal Light Plant Cooperative ("WiredWest") as a limited liability company ("LLC") given that it is a municipal light plant cooperative that was formed and authorized pursuant to the provisions of M.G.L. c. 164, § 47C. As we understand, questions have been raised by MBI's attorneys regarding the legality of restructuring of WiredWest as a limited liability company ("LLC") under Section 47C. In addition, WiredWest has been asked whether there is any precedent for a municipal light plant cooperative being organized under Section 47C operating as an LLC. These issues are addressed below.

1. History of the Coop Statute

M.G.L. c. 164, § 47C (the "Coop Statute") was adopted as part of the "Restructuring Act" of 1997, which brought significant changes to the retail electric industry in Massachusetts. Because the Restructuring Act would allow customers of investor-owned utilities to have choice regarding suppliers and access to generation services, municipal light plants, who were not subject to retail choice (*see* M.G.L. c. 164, § 47A) were looking for ways to remain competitive with regard to financing projects, working collectively with other light plants to increase efficiencies, and providing low-

cost energy and energy-related services to their customers.[1] Prior to passage of the Coop Statute, the only vehicles by which municipal light plants could act collectively with regard to generation projects (and financing for them) and energy-related services was through the Massachusetts Municipal Wholesale Electric Company ("MMWEC") (*see* St. 1975, c. 775, §§ 1-25, M.G.L. c. 164 App. §§1-14) or through facilities of certain descriptions as set out in the old New England Power Pool statute (M.G.L. c. 164A, §§1 *et seq*.).[2] As you are aware, municipal light departments are financially and operationally distinct from the cities and towns that own them, except in one area relevant to this analysis: borrowing funds to finance capital projects. *See e.g., Middleborough Gas & Elec. Dept. v. Middleborough*, 422 Mass. 583, 586-87 (1996). For example, under G.L. c. 44, § 8(8), municipal light plants can only issue bonds for capital projects pursuant to town meeting votes and the parameters set forth in the statute. The Coop Statute represented a new vehicle by which municipal light plants could access capital on a group basis, and to jointly plan and own energy facilities. Prior to the Coop Statute, there was no other mechanism by which municipal light plants could associate together in this way with all of the powers set forth in the statute.

Municipal light plants saw the Coop Statute as the means to offer energy and energy-related services on more equal footing with investor-owned utilities and even MMWEC. At the time the Coop Statute was passed, MMWEC was specifically excluded from participation in any cooperative formed thereunder.[3] In 1998, that specific exclusion was deleted from the statute. In 2000, M.G.L. c. 164, § 47E was added, which allowed a coop to "construct, purchase or lease, and maintain…a telecommunications system" and to "incur debt for such facilities pursuant to the provisions of Section 47C." In 2004, "cable television services" were added to the energy and energy-related services that cooperatives may provide, pursuant to the Coop Statute.

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1 Please note that the first author listed above was formerly a partner at Rubin and Rudman, LLP, when originally retained by WiredWest for the provision of legal services; and during her tenure there participated in the drafting of several pieces of legislation that are relevant to WiredWest's operations and mission, including bills that would become M.G.L. c. 164, § 47C. With the advent of restructuring, many light plants were concerned at that time with keeping large commercial and industrial customers in their service territories. Today, many municipal light plants are offering lower rates than neighboring investor-owned utilities.

2 "NEPOOL" has since been replaced by the Independent System Operator – New England and has assumed some new roles since the restructuring of the industry.

3 By way of background, there had been some history of disagreement among MMWEC members, along with litigation as well as the withdrawal of some light plants from the membership prior to the adoption of the Coop Statute. Some municipal light plants were looking for alternatives to the services provided by MMWEC, and sought a mechanism by which to provide such services to themselves and others.

2. "Corporations" and Cooperatives

As we understand, concern has been expressed that WiredWest has chosen an LLC structure (pursuant to M.G.L. c. 156C) under which to conduct its business as opposed to a corporation under M.G.L. c. 156B. However, there is nothing in the intent or specific language of M.G.L. c. 164, § 47C that restricts WiredWest or any other municipal light plant cooperative to operate under a specific corporate or business structure. Further, the fact that a municipal light plant cooperative may be a corporation under the laws of the Commonwealth, or a partnership, or an LLC, does not alter its "municipal coop" nature or its status as a "public instrumentality."

Section 47C states that municipal light plants are permitted to "form cooperative public corporations" and that a cooperative established pursuant to that section "shall constitute a body politic and corporate and is constituted a public instrumentality." M.G.L. c. 164, § 47C (b). The phrase "body politic and corporate" is a term of art and speaks to the entity's purpose rather than actual operating structure, typically "used by the Legislature when it creates a legal entity to perform specified tasks deemed to be essential public functions. Such entities are "hybrid," possessing attributes of both private corporations and governmental agencies [citations omitted]." *Kargman v. Boston Water & Sewer Comm'n.*, 18 Mass.App.Ct 51, 55 (1984). The terms "corporate" and "corporations" as used in these contexts refer to the "body" of the entity as a whole rather than the actual operating structure of the entity; it is not intended to restrict the formation of municipal light plant cooperatives specifically to Chapter 156B corporations under Massachusetts law. The quote from *Kargman* above would have no different meaning if the term "private companies" were substituted for "private corporations."

Further, it is clearly the intention of Section 47C that coops possess certain powers typically reserved for "natural persons" as expressed in the provisions of Section 47C (statutes passed for the regulation of rights and liabilities of corporations are applied only to private or moneyed corporations and not to public or municipal or quasi corporations.) *See e.g., New Bedford v. New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 329 Mass. 243, 247 (1939). *Id*. at 250. While a municipal light plant is not a "person" within the meaning of Massachusetts law (*Howard v. Chicopee*, 299 Mass. 115, 122 (1937)), it is possible for a municipal light plant cooperative to possess the same powers as one by virtue of the special laws that apply to it, *i.e*., Section 47C. "A municipal lighting plant cooperative shall have all the powers of a natural person, **including the power to participate with others in any partnership, joint venture or other association, transaction or arrangement of any kind** [emphasis added]." M.G.L. c. 164, § 47C(d).

Thus, while Section 47C gives municipal light plant cooperatives all the powers of a "natural person" that a municipal light plant acting alone would not otherwise possess, it does not purport to dictate the actual operating structure or form that the cooperative must assume in order to conduct its business. The only prescription for formation is contained in Section 47C(c) which provides that "[a]ny number of municipal light plants **may associate themselves together** and with other public corporations, established under the laws of the commonwealth or any other state or federal government, **as a municipal lighting plant cooperative**, with or without capital stock, for the transaction of any lawful business…." The phrase "associate themselves together" gives a municipal light plant cooperative the broadest possible authority to assume whatever operating structure it desires. There is nothing in Section 47C that requires a municipal light plant cooperative to organize as a corporation under M.G.L. c. 156B.

If the Legislature had wanted to limit cooperatives to a certain structure such as that provided for in M.G.L. c. 156B, then it could have done so in Section 47C or elsewhere in Chapter 164 by specifically referencing municipal light plant cooperatives. It did not. The Legislature did so specify with regard to gas and electric companies. M.G.L. c. 164, §§3-33. A municipal light plant cooperative is a "body politic and corporate" and a "public instrumentality"; it is most certainly not a "gas and electric company." M.G.L. c. 164, § 3; *see also Board of Gas & Elec. Comm'rs.. v. Dept. of Pub. Utils.*, 363 Mass. 433 (1973). The term "electric company" does not include "municipal lighting plant cooperatives" or even "municipal light plants" organized under Sections 47C and 34, respectively (and it certainly does not include cable television or telecommunications companies, which are covered in Chapters 166 and 166A). M.G.L. c. 164, § 1. There are dozens of sections of Chapter 164 that have no application whatsoever to municipal light plants, and the only section of Chapter 164 that purports to apply to municipal light plant cooperatives is Section 47C. No other sections apply unless they specifically reference Section 47C cooperatives, such as M.G.L. c. 164, § 47E.

3. Cooperative Operating as LLC

In our opinion, there is nothing in the Coop Statute that purports to dictate the type of structure that must be assumed by a municipal light plant cooperative. As set forth above, all a number of municipal light plants need do to form a cooperative is "associate themselves together."

The rules of statutory construction dictate that we interpret the language of Section 47C "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the…imperfection to be remedied and the main object to

be accomplished, to the end that the purpose of its framers may be effectuated [citations omitted.]" *Garrity v. Conservation Comm'n. of Hingham,* 462 Mass. 779, 784 (2012). The ordinary and approved usage of "associate themselves together" evidences clear Legislative intent to give municipal light plants very broad authority to accomplish the purposes of Section 47C. We cannot read into Section 47C a requirement that a municipal light plant cooperative must assume the form of a Chapter 156B corporation when the language to support this does not exist. Given the history behind its enactment, and the main goal to be accomplished, a cooperative need not be a Chapter 156B corporation to accomplish that goal.

Section 47C gives municipal light plant cooperatives very broad powers to "conduct business, carry on operations, have offices…within or without this commonwealth"; "to contract with natural persons, firms, corporations, business trusts, partnerships, public and private agencies, non-profit organization and corporations, other cooperatives, and local municipalities to accomplish any purpose of the cooperative"; and to "**exercise and perform all or part of its power and functions through one or more wholly-owned or partly-owned corporations or other business entities** [emphasis added.]" M.G.L. c. 164, § 47C(d). A Chapter 156C LLC would be encompassed by "other business entity." A cooperative may enact bylaws "not inconsistent with its articles of incorporation or with the laws of this commonwealth for the administration and regulation of the affairs of the cooperative." M.G.L. c. 164, § 47C(d). This is exactly what WiredWest is doing in the form of an LLC operating agreement under Chapter 156C. If a Chapter 156B corporation was the only form a municipal light plant cooperative could take under the Coop Statute, then this would have been the place to so state, but the Legislature did not (nor did the municipal light plants seek to do so when they proposed the legislation originally.)

While we are not personally familiar with other cooperatives that may have been formed by MMWEC and some of its members, we note that MMWEC itself is governed by an entirely different cooperative structure; for example, its bonds are subject to Department of Public Utilities approval; it possesses the power of eminent domain; and a majority vote of a city or town is required for a light plant to join. And, while municipal light plants who are also MMWEC members may form cooperatives with MMWEC for other purposes under Section 47C (since the light plants can associate with any other "public corporations")-- whether they have chosen to do so under M.G.L. c. 156B or some other statute relative to business structures is irrelevant to what WiredWest has decided, since we have established that the Coop Statute does not purport to prescribe a particular corporate structure for cooperatives. We are personally familiar with the operations of another cooperative formed under the Coop Statute in 1998, Energy New England, LLC ("ENE"), which has been operating as an LLC under M.G.L. c. 156C. To our knowledge, there has been no question raised with regard to ENE's status as a cooperative under Section 47C and an LLC under Chapter 156C.

Finally, regardless of the form or "association" that a group of municipal light plants takes when operating as a cooperative, cooperatives are still exempt from taxation, and still subject to the Massachusetts Tort Claims Act and Public Records and Open Meeting laws (with certain exceptions), given that whatever corporate or non-corporate form they assume, they still constitute a "public instrumentality." M.G.L. c 164, § 47C (g),(j) and (k). The form they choose for operation has no effect on the applicability of these provisions under the Coop Statute.

If you have additional questions regarding this matter, please do not hesitate to contact us.