WiredWest
Life in the Fiber Lane™

October 3, 2017

Sean R. Cronin
Senior Deputy Commissioner
Division of Local Services
MA Department of Revenue
100 Cambridge St.,
Boston, MA 02114

Dear Mr. Cronin,

Your guidance document titled "Last Mile Broadband Project Financial Guidance" issued September 2017 has caused much confusion among our member towns and we are therefore writing you in hopes of your issuance of a clarification, as requested below.

You state in your document that *"...the Department of Public Utilities (DPU) has concluded that it does not have regulatory oversight of broadband-only MLPs and therefore, there is uncertainty about what extent, if any, G.L. c. 164, which governs the manufacture and sale of gas and electricity generally, applies to a broadband-only MLP."* First, we note that the DPU exercises no regulatory oversight over any broadband entities, regardless of whether they are owned by private or public entities.[1] And, while it is true that neither the DPU nor the Department of Telecommunications and Cable ("DTC") has any regulatory authority over a MLP whose only business is broadband telecommunications, it is also true that neither the DPU nor the DTC have any oversight of the telecommunications business of a MLP that is also providing gas and or electric service to their customers. Further, the DPU does not regulate the rates of any MLP providing gas and/or electricity (the way it does with regard to investor-owned utilities, or "IOUs"), and has limited jurisdiction over them except in matters such as claims of rate discrimination (see e.g., Holyoke Water Power Co. v. Holyoke, 349 Mass. 442 (1965)), setting depreciation rates at a level different than specified by statute (G.L. c. 164, § 57), and refusals of service (G.L. c. 164, § 60). And, while a "Uniform System of Accounts" (based on the Federal Energy Regulatory Commission's system) is utilized for accounting for IOUs, it does not apply to MLPs. 220 CMR 51.02(2). Thus, the DPU has never demonstrated significant oversight of MLPs.

G.L c. 164 , § 47E provides, in relevant part, that

"[a] municipal lighting plant or a cooperative public corporation and any municipal lighting plant member thereof, established pursuant to this chapter or any general or special law may construct, purchase or lease, and maintain such facilities as may be necessary for the distribution or the operation of a

[1] G.L. c. 25C, § 6A clearly prohibits regulation of internet and VoIP services:
"(b) Except as set forth in subsections (c) to (f), inclusive, and notwithstanding any other general or special law to the contrary, no department, agency, commission or political subdivision of the commonwealth, shall enact, adopt or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order or other provision having the force or effect of law that regulates or has the effect of regulating, the entry, rates, terms or conditions of VoIP Service or IP enabled service."

telecommunications system for municipal use or for the use of its customers…. Wherever apt, the provisions of this chapter and chapter 44, which apply to the operation and maintenance of a municipal lighting plant, shall apply also to the operation and maintenance of such telecommunications system."

It is clear from G.L. c. 164, § 47E that a cooperative (like WiredWest) and any municipal lighting plant ("MLP") member established under G.L. c. 164 may construct, purchase or lease and maintain facilities for a telecommunications system, and "[w]herever apt," the provisions of Chapter 164 and Chapter 44 that "apply to the operation and maintenance" of MLPs, will "apply also to the operation and maintenance of such telecommunications system.". G.L. c. 164, § 47E. Thus, the Legislature appears to have contemplated that a cooperative and its MLP members might operate a cooperative and MLPs solely for the purpose of providing a telecommunications system and service including broadband service. All of the towns in Western Massachusetts that are building their own telecommunications systems with the exception of Mount Washington took the necessary town meeting votes under G.L. c. 164, § 36 to form MLPs several years ago. It is pursuant to the provisions of G.L. c. 164 then, that such MLPs must operate, regardless of the purpose behind their formation. The SJC has recognized G.L. c. 164 as the primary and, in most instances, exclusive statutory authority governing MLP operations. See, e.g., Municipal Light Comm'n. of Taunton v. City of Taunton, 323 Mass. 79, 84 (1948); MacRae v. Concord, 296 Mass. 394, 397 (1934). It is well-settled that MLPs are "quasi-commercial" entities created by special act; municipalities themselves have no inherent rights to own and operate a business in the absence of special legislation and the enabling statutes, found at G.L. c. 164, §§ 34 *et. seq*. See, e.g., MacRae, supra at 396; Spaulding v. Peabody, 153 Mass. 129, 137 (1891).

Your guidance documents states that *"[a]ll bills must be processed using the same process as other town bills. Unless otherwise provided by the town's charter, the bills would be approved by the board or officer in charge of the project and authorized to spend appropriated, borrowed or other funds available to pay project expenses."* However, there is already a procedure for the payment of MLP bills, and given the clear "wherever apt" language of G.L. c. 164, § 47E, the MLPs should be managed and their bills should be paid in accordance with the provisions of G.L. c. 164, § 56.

G.L. c. 164, § 56 provides, in relevant part, that: *"[t]he mayor of a city, or the selectmen or municipal light board, if any…shall appoint a manager of municipal lighting who shall, under the direction and control of the mayor, selectmen or municipal light board, if any, and subject to this chapter, have full charge of the operation and management of the plant,…".* That statute also provides that "[a]ll moneys payable to or received by the city, town, manager or municipal light board in connection with the operation of the plant, for the sale of gas or electricity or otherwise, shall be paid to the city or town treasurer…the selectmen in towns, shall approve the payment of all bills or payrolls of such plants before they are paid by the treasurer…[t]his section shall not abridge the powers conferred on town accountants by sections fifty-five to sixty-one, inclusive, of chapter forty-one." Thus, there is already a process in place under c. 164 for the management of MLP funds, and it certainly appears "apt" for Section 56 to apply to MLPs solely operating broadband facilities and services. The town accountants already have a role under Section 56, and there is already a process aside from "Enterprise Funds" to pay MLP bills.

However, your guidance document states as follows:

*"**Accounting for Operation of Broadband System***

This section explains how the town is to budget and account for the operating expenses and revenues of the broadband system. The town must use one of the following two funds to account for those expenses and revenues:
- *Enterprise Fund*
- *General Fund. "*

"In order to utilize an enterprise fund, the town's legislative body must accept G.L. c. 44, § 53F½."

Yet G.L. c. 164 and precedent regarding MLPs makes clear that the town's legislative body need not accept G.L. c. 44, § 53F in order to operate a MLP. The fact that the DPU does not regulate MLP broadband rates is irrelevant as set forth above. The Massachusetts Supreme Judicial Court ("SJC") has held that with regard to the MLP manager's authority under G.L. c. 164, § 56, subject to the direction and control of the selectmen or light board, if any, *"[t]his in terms is an unrestricted power in the manager and the commission. There is in this section an implication that their determination as to what should be expended for the efficient operation of the business is not subject to change by other public officers or the legislative department.."* Municipal Light Comm'n. of Peabody v. Peabody, 348 Mass. 266, 268 (1964). Under G.L. c. 164, § 57, the appropriations necessary to authorize a town treasurer to use MLP funds for the "expense of plant," as defined in G.L. c. 164, §57, are made by vote of the selectmen acting as the light board upon the budget submitted by the MLP manager, and not by town meeting vote pursuant to the provisions of G.L. c. 44. Id. at 273.

Significantly, the SJC also held that *"the budget of the light department is to be determined in accordance with c. 164 and not by the procedures of c. 44*; any appropriations under the procedures of c. 44 if less in amount than the budget the light department requires shall not limit the expenditures of the department ." Id. In fact, no MLP is dependent upon a town for appropriations necessary to operate the plant, regardless of what service the plant provides. See id., at 272. The provisions of G.L. c. 164 therefore make the establishment of an "Enterprise Fund" under G.L. c. 44, § 53F1/2 unnecessary for the MLP members of WiredWest.

Undoubtedly, there is a difference between a statutory "Enterprise Fund" and accounting for an enterprise. The Peabody case simply underscores how the provisions of G.L. c. 44, § 53F1/2 governing the operation of a statutory "Enterprise Fund" are inherently incompatible and conflict directly with the provisions of G.L. c. 164, §§ 56 and 57. For example, with statutory Enterprise Funds, town meeting votes on the Enterprise's budget. Further, G.L. c. 164, § 57 already provides for a budget process for MLPs: it permits MLPs to collect a depreciation rate of 3%, and to provide for the repayment of debt and interest; the MLP may also maintain a separate depreciation fund in which interest is retained by the MLP for MLP purposes (as opposed to interest earned on deposits of money to the general fund, which is retained by the town). In contrast, G.L. c. 44, § 53F1/2 provides for a different, conflicting process:

"The city or town shall include in its tax levy for the fiscal year the amount appropriated for the total expenses of the enterprise and an estimate of the income to be derived by the operations of the enterprise. If the estimated income is less than the total appropriation, the difference shall be added to the tax levy and raised by taxation. If the estimated income is more than the total appropriation, the excess shall be appropriated to a separate reserve fund and used for capital expenditures of the enterprise, subject to appropriation, or to reduce user charges if authorized by the appropriate entity responsible for operations of the enterprise. If during a fiscal year the enterprise incurs a loss, such loss shall be included in the succeeding fiscal year's budget."

The document published by DLS titled *Enterprise Fund Manual*, Informational Guideline Release 08-101, states on page 34 in response to frequently asked questions:

"1. Can a community establish a gas or electric enterprise fund under G.L. c. 44, § 53F½?
No. A gas and/or electric department would be established under G.L. c. 164.

Under GASB-20 and GASB-34 (Governmental Accounting Standards Board statement No. 34 and No. 20) a municipal light plant is a Proprietary Fund **category** and Enterprise Fund **Type** but not an actual G.L. c. 44, § 53F1/2 "Enterprise Fund." G.L. c. 164, §§ 36 and 47E are used to establish an enterprise known as a municipal lighting plant, and G.L. c. 44, 53F1/2 is used to establish an "Enterprise Fund."

Accordingly, we believe that it is clear that in those communities that have a MLP established pursuant to G.L. c. 164, §§ 36 and 47E, the MLP will be operated in accordance with the provisions of G.L. c. 164, "wherever apt,"; that they need not establish, as a matter of law, a separate "Enterprise Fund" under G.L. c. 44, § 53F1/2 since G.L. c. 164, §§ 56 and 57 describe the financial and budgetary procedures to be followed by MLPs; and that managing the finances of the MLP in accordance with G.L. c. 164 cannot be the basis for DLS taking negative actions against broadband-only MLPs. A clarification from DLS in light of these points would be appreciated.

Respectfully,

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