


William H. Solomon
Attorney at Law
2 Old Petersham Road
New Salem, MA 01355
(781) 367-7500

To: Bob Espindola, Chair
Broadband Study Committee
Town of Fairhaven

From: Attorney William H. Solomon



Date: September 16, 2020

Subject: Legal Authority For Municipal Broadband

Introduction

This memorandum addressed the issue of the legal authority for a Massachusetts municipality (the Town of Fairhaven) to provide broadband (Internet) (hereinafter “broadband”) service to Town residents (dwelling units). In preparing this memorandum, I was able to call on my earlier familiarity with municipal broadband projects, particularly in the Town of Leverett, Massachusetts and I have done further inquiry regarding the creation of municipal light plants in the Towns of New Salem, Wendell and Shutesbury, as well as the Town of Concord and City of Westfield (Westfield Gas+Electric). I was provided as part of the request for this legal opinion with a copy of a legal memorandum, with attached “legal findings” written by the Office of City Solicitor in the City of Quincy for the Mayor’s in the City Office of Quincy, dated January 15, 2020. That memorandum is accurate and well written, and as such I have referenced it in this memorandum.

While this memorandum references broadband service to residents, please note that municipal broadband service may be, and generally is, also provided to businesses. For instance, in the Town of Concord, current service plans and rates, are as follows:

Residential & Small Office/Home Office Plans & Pricing

| Service Level | Download / Upload Speed | Prices |
|----------------------|--------------------------------|---------------|
| Entry | 35 Mbps | \$49.95 |
| Basic | 70 Mbps | \$64.95 |
| Hi-Speed | 150 Mbps | \$74.95 |
| Ultra | 300 Mbps | \$89.95 |

Business Service Plans & Pricing

| Service Level | Download / Upload Speed | Prices | Hardware Replacement |
|----------------------|--------------------------------|---------------|-----------------------------|
| Entry | 70 Mbps | \$74.95 | 4 hours |
| Basic | 150 Mbps | \$89.95 | 4 hours |
| Hi-Speed | 275 Mbps | \$149.95 | 4 hours |
| Ultra | 400 Mbps | \$199.95 | 2 hours |
| Business | Designed for your specific | Call for | As low as 1 hour |
| Enterprise | needs; up to 1 Gbps | quote | |

In the City of Westfield (Westfield Gas+Electric/Whip City Fiber), broadband service and rates are as follows:

Residential Internet (Up to 1,000 Mbps) - \$69.95 per month (Telephone - \$12.95 per month)
Small Business, Up to 5 Users - \$84.95 per month. (Static IP Address - \$12.95 per month.)
Medium Business, Up to 25 Users - \$149.95 per month. (Static IP Address - \$12.95 per month.)
Large Business, Up to 50 Users - \$399.95 per month. (Static IP Address - \$12.95 per month.)
High Bandwidth Users - \$799.95 per month. (Static IP Address - \$12.95 per month.)

By contrast, in a number of Western Massachusetts towns which have limited or no larger businesses, the service offered to small and home-based businesses is the same as offered to residential homes.

Legal Authority for Municipal Broadband

1. No Federal Restriction On The Provision of Municipal Broadband

There is no restriction in federal law (statutes) or regulations (FCC) on the provision of broadband service by a municipality to residents. (By contrast a few states (mostly in the southern portion of the country) have prohibited municipalities and counties from providing broadband services. Massachusetts is not one of those states.)

2. Massachusetts Authority For The Provision of Municipal Broadband

A municipality may establish a municipal light plant and may do so for the purpose (including the sole purpose) of establishing a telecommunications system to provide telecommunications services, more specifically broadband and related telephone services. M.G.L. c. 164, § 47E. (A copy of which is attached hereto.)

As accurately set out in the Quincy memorandum:

Massachusetts has not expressly authorized the operation of municipal broadband outside the statutory authority granted to municipalities under the Massachusetts Municipal Light Plant Law (the "MLP Law") set forth in M.G.L c. 164 §§ 1, et. seq. M.G.L c. 164, § 35 authorizes a municipality to create a "Municipal Light Plant" (an "MLP"), M.G.L c. 164, § 47E, passed into law in 2000, authorizes a [municipal light plant] (once created) to operate a telecommunication system, providing in pertinent 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 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 M.G.L. c. 164, § 47E that any MLP established under M.G.L. c. 164 may construct, purchase or lease and maintain facilities for a telecommunications system, and "wherever 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.". M.G.L. c. 164, § 47E. Thus, the Legislature appears to have contemplated that an MLP might operate a MLP solely for the purposes of providing a telecommunications system and service, including municipal broadband service. Several towns in Western Massachusetts have built their own telecommunications systems by taking the necessary town meeting votes under. M.G.L. c. 164, § 36 to form MLPs. It is pursuant to the provisions of M.G.L. c. 164 then, that such MLPs must operate, regardless of the purpose behind their formation. The Supreme Judicial Court (the "SJC") has recognized M.G.L. c. 164 as the primary and, in most instances, exclusive statutory authority governing MLP operations. See, *Municipal Light Commission 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 M.G.L. c. 164, §§ 34 et. seq. See, *MacRae* at 396; *Spaulding v. Peabody*, 153 Mass. 129, 137 (1891).

Municipal Light Plant Board of Directors – Appointed or Elected

Massachusetts General Law, Chapter 164, sec. 55 provides for the election of a municipal light plant board. Section 55E of Chapter 164, however, references removal of light board members appointed "pursuant to the provisions of any general or special law. Most municipal light boards are elected, but some are appointed (see below). If the Town of Fairhaven is considering the appointment of a light board, I would be happy to address this specific issue in a separate memorandum as a courtesy to the Town.

- Town of Concord – Appointed by the Town Manager.
- Town of Leverett - Appointed by the Select Board.
- Town of New Salem – Elected.
- Town of Shutesbury – Elected.
- Town of Wendell – Currently the Select Board, voting in October on elected or appointed.
- City of Peabody (Does not provide Broadband) – elected.
- City of Westfield – both appointed and elected.

There are, of course, many aspects of this matter that have been and are being addressed by and for the Committee and Town. Please feel free to let me know if there are any aspects of this memorandum or the overall matter that I can provide assistance with, if only as a second opinion. That would include, the issue of pole attachment rights of the municipal light plant to utility poles (also referenced in the Quincy memorandum), which I also understand are the same as that of a private utility.

General Law - Part I, Title XXII, Chapter 164, Section 47E

Section 47E. 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 telecommunications system for municipal use or for the use of its customers. Such municipal lighting plant may incur debt for such facilities by a vote taken in the manner prescribed pursuant to section 8 of chapter 44. Such cooperative may incur debt for such facilities pursuant to the provisions of section 47C. Such facilities may include suitable land, structure, machinery, other apparatus and appliances for operating a telecommunications system. Such cooperative or municipal lighting plant, which is engaged in the business of operating a telecommunications system, may, as a part of such business, if an appropriation is made therefor, rent, lease, or sell for cash or credit at prevailing retail prices, install and service, within the territory served by such business, merchandise, equipment, utensils and chattels of any description which are incidental or auxiliary to the operation of said telecommunications system or the use of its customers or are necessary or expedient in the protection or management of its property used in such business. 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.