

MINUTES

SIXTY FIRST MEETING

of the

BOARD OF DIRECTORS

of the

MASSACHUSETTS BROADBAND INSTITUTE

[OPEN SESSION]

December 11, 2018
Westborough, Massachusetts

The Sixty First Meeting of the Board of Directors of the Massachusetts Broadband Institute (“MBI”) was held on September 11, 2018, at the Massachusetts Technology Collaborative (“MassTech”), 75 North Drive, Westborough, Massachusetts, pursuant to notice duly given to the Directors and publicly posted on the MBI website with corresponding notice provided to the Office of the Secretary of State.

The following members of the MBI Board of Directors attended the meeting: Secretary of Housing and Economic Development Jay Ash (represented by Peter Larkin of the Executive Office of Housing and Economic Development), Don Dubendorf, Linda Dunlavy, Fred Keator, Massachusetts Technology Collaborative Interim Executive Director Carolyn Kirk, Secretary for Administration and Finance Michael Heffernan (represented by Sean Cronin of the Division of Local Services), Paul Nicolai and DTC Commissioner Karen Charles Peterson.

The following MassTech staff was present: Michael Baldino, Marybeth Dixon, Lisa Phil Holahan, Kelly Kleanthous and Brian Noyes.

The following individuals attended the meeting: John Blum, Town of Petersham; Chip Bull, Town of Petersham; Lindsay DeRoche, Department of Telecommunications and Cable; Bill Ennen, Executive Office of Housing and Economic Development; and Chris Lynch, Matrix Design Group.

Mr. Larkin observed the presence of a quorum of the MBI Board of Directors and called the meeting to order at 1:32 p.m.

Mr. Larkin reviewed the legal requirements governing public participation at an open meeting of a public body. He stated that: (1) After notifying the Chair, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the Chair

as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. At the beginning of the meeting the Chair shall inform other attendees of any recordings. (2) No person shall address a meeting of a public body without permission of the Chair, and all persons shall, at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the Chair, a person continues to disrupt the proceedings, the Chair may order the person to withdraw from the meeting and if the person does not withdraw, the Chair may authorize a constable or other officer to remove the person from the meeting.

Agenda Item I Approval of Minutes

Following a period of brief discussion, and upon a motion duly made and seconded, it was unanimously VOTED:

The Board of Directors of the Massachusetts Broadband Institute hereby adopts the Draft Minutes of the Sixtieth Meeting of the Board of Directors held on September 5, 2018, in Westborough, Massachusetts, as the formal Minutes thereof.

Agenda Item II Report of the MBI Board of Directors Chairperson

The report of the Chairperson was waived.

Agenda Item III Discussion and Action Items

Mr. Larkin and Mr. Ennen provided an update on the status of last mile projects being managed by MBI and the Executive Office of Housing and Economic Development (“EOHED”). Mr. Larkin reviewed the status of the unserved and partially served towns as presented on a color-coded map. He indicated that New Braintree is the only town remaining that is not pursuing a municipally-owned network and that has not been the subject of a proposal from a private provider. He noted that Charlemont and Middlefield are considering proposals from Comcast. Mr. Larkin also discussed the Crocker proposals that are being considered by Sandisfield and Tolland.

Mr. Ennen provided an updated on the projects being funded through EOHED’s Last Mile Infrastructure Grant Program. He noted that each of the towns is using Westfield Gas and Electric as its Owners Project Manager. Mr. Ennen mentioned that over \$5.7 million in state grant funds have been disbursed to cover make-ready work for municipally-owned broadband networks. He led a discussion about the challenges associated with getting make-ready work completed on a timely basis. Mr. Ennen discussed a multi-agency effort, involving MBI, EOHED and DTC, to engage with utilities on a regular basis, including weekly calls with representatives of the utilities, the private providers, and Westfield Gas and Electric. He noted that the prioritization of make-ready work generally follows a “first in, first out approach” based on the timing of the submission of make-ready applications.

Mr. Larkin and Mr. Baldino presented a recommendation to approve material modifications to the grant award to the Town of Petersham to support a fiber-to-the-home network that would be constructed, owned and operated by Matrix Design Group. Mr. Baldino explained that the MBI Board and the MassTech Executive Committee approved an \$880,000 grant award to Petersham in September that included certain provisions, in addition to the Payment in Arrears Guidelines, which were intended to address the downstream operation risk and protect the investment of public funds in the project. He emphasized that (1) MBI was deferring to the Town's judgement, (2) MBI would rely on certifications submitted by the Town, and (3) MBI did not perform legal, technical or financial due diligence on the project.

Mr. Baldino highlighted the provisions that have received significant push back from the Town: (1) the requirement for a parental guaranty or posting of a performance of financial guaranty bond in the event of an assignment of the agreement by Matrix; and (2) the requirement for Matrix to provide the Town with a security interest in the network equipment and fiber. He also discussed the context for these contractual requirements, including the refusal of Matrix to provide financial statements unless MassTech signed a nondisclosure agreement, Matrix's plan to assign their responsibilities to a special purpose LLC that will own the network assets, and restrictions on the Town's contractual rights to purchase the network assets from Matrix. Mr. Baldino clarified that the proposed requirements are in line with other similarly situated broadband projects being supported by MBI and are not prohibited by the Payment in Arrears Guidelines. He also explained the Town's most recent counterproposals and noted the concerns raised by the Town about having to renegotiate the agreement that the Town executed with Matrix last year.

The following key points emerged during the ensuing discussion: (1) the Town did not attempt to negotiate with Matrix on the provisions requested by MBI; (2) the Town believes that their counterproposals adequately protect their interests and that the provisions requested by MBI are unnecessary since the grant funds will be expended directly by the Town, primarily on make-ready work for the project; (3) Mr. Bull, the Chair of the Petersham Broadband MLP Board, referenced the assets that will be owned by the Town, including pole licenses and some conduit along the network route; (4) Mr. Bull also emphasized that the project would halt if the grant agreement is not executed due to impending deadlines to pay make-ready invoices; (5) it was the sense of the MBI Board that the conditions being imposed by MBI are reasonable and appropriate and not onerous and therefore some members of the MBI Board expressed that they would support the proposed motion reluctantly and with a common sentiment that "Matrix seems to have the Town over a barrel"; (6) it was the Board's collective assessment that the judgments of local officials were entitled to a degree of deference, particularly where the Town is assuming a significant degree of risk, and that the final decisions on operational matters related to agreement terms and conditions should be made by MassTech/MBI management; and (7) it is the expectation of the MBI Board that material grant terms and conditions will normally have been vetted with the grantee before the award is brought to the MBI Board for approval.

Following a period of brief discussion, and upon a motion duly made and seconded, it was unanimously VOTED:

The Board of Directors of the Massachusetts Broadband Institute (the “MBI”) does hereby recommend that the Executive Committee of the Board of Directors of the Massachusetts Technology Park Corporation (“MassTech”) delegate to the Executive Director the authority to take the following actions relative to the grant award to the Town of Petersham (“Town”) under the Flexible Grant Program Notice of Funding Availability for Innovative Approaches to Provide Broadband Service to Unserved Towns in Western Massachusetts (NOFA No. 2018-MBI-01) that was approved by the MBI Board of Directors on September 5, 2018 and the Executive Committee of the MassTech Board of Directors on September 11, 2018:

- 1. Waive or otherwise modify the material grant provision requiring that the Town obtain a security interest from the Matrix Design Group (“Matrix”) in the broadband network fiber, equipment and other assets;**
- 2. Waive or otherwise modify the material grant provision requiring the Town to obtain either a parental guaranty from Matrix or a performance or financial guaranty bond from Matrix that is subject to MassTech’s review and approval in the event that Matrix assigns its obligations and duties under its agreement with the Town to another entity, including but not limited to, a limited liability corporation or other special purpose entity.**

Furthermore, the MBI Board of Directors does hereby clarify, that Payment In Arrears Guidelines, as previously approved on September 5, 2018 shall not require the following certifications as a condition of receiving grant funds under the Flexible Grant Program when the grantee is a municipality or municipal light plan (“MLP”) that is utilizing the grant funds to reimburse eligible expenditures that have been incurred by said municipality or MLPI:

- 1. There is no pending or contemplated litigation between the town and the provider; and**
- 2. There is not pending or contemplated arbitration between the town and the provider.**

Mr. Larkin and Mr. Baldino presented a recommendation to approve a grant award to WiValley under the Flexible Grant Program. The grant award would support the buildout of a wireless network that would provide internet access for the residents of the Towns of Florida, Hawley, Monroe and Savoy. Mr. Baldino explained that the four towns have joined together to cooperate and pool their individual MBI allocations into one fund to support this project. He noted that the wireless network would provide 96% coverage across the four towns, although broadband speeds would be available to at least 75% of the households, with the remaining households getting internet access with at least 12 Mbps download and 2 Mbps upload speeds.

Mr. Baldino discussed how the risk for project cost overruns will be shared among the parties. He indicated that MBI would bear the full cost associated with a change order for the installation on Borden Mountain based on the fact that WiValley was unable to access the existing police facility. It is also unclear whether WiValley will have access to an existing DCR tower. In response to a question from Commissioner Peterson, Mr. Baldino clarified that all other change orders will be reviewed and approved by MBI and the towns with MBI covering 50% of the change order value, the towns covering 25% of the change order value and WiValley absorbing the remaining 25% of the change order value. He explained that the exposure of MBI and the towns for additional change orders is capped at \$200,000.

An extensive discussion ensued about whether it was prudent to allow any of the four towns to drop out of the project. Some MBI Board members expressed concerns and shared their perspective that each town should be locked in after construction starts. Mr. Baldino discussed the consequences if a town drops out – (1) the town’s MBI allocation will be reduced proportionately based on the amount of MBI funding expended at the time that the town withdraws; and (2) all network assets will remain available to the network operator to support operations in the remaining towns. There were also concerns about the ability of a town to secure a broadband solution if the town withdraws and is left with a reduced MBI allocation. It was the sense of the MBI Board that the motion should be revised to reflect the policy perspective of the MBI Board that the towns should be urged to incorporate a provision into their agreement that establishes a point where a town’s participation is irrevocable.

Following a period of brief discussion, and upon a revised motion duly made and seconded, it was unanimously VOTED:

The Board of Directors of the Massachusetts Broadband Institute (the “MBI”) does hereby recommend that the Executive Committee of the Board of Directors of the Massachusetts Technology Park Corporation (“MassTech”) authorize the MassTech Executive Director to execute a grant agreement with WiValley, Inc. for an award under the Flexible Grant Program Notice of Funding Availability for Innovative Approaches to Provide Broadband Service to Unserved Towns in Western Massachusetts (NOFA No. 2018-MBI-01) and to expend funds in accordance with the following conditions and parameters:

- 1. The grant award to WiValley shall not exceed \$2,315,461 for a regional wireless broadband network that shall provide access to broadband service to the Towns of Florida, Hawley, Savoy and Monroe (collectively, the “Towns”). The grant amount shall include a contingency fund of up to \$200,000 to cover the cost of change orders approved by the Towns and MBI that are associated with unforeseen project costs incurred by WiValley.**
- 2. The final amount of the grant award shall be subject to the review and approval of the Secretary of the Executive Office of Housing and Economic Development.**

- 3. The grant agreement with WiValley shall comport with the summary of material terms and conditions, including the grant payment structure provisions, as presented.**
- 4. The Towns shall be required to execute an Action Plan in a form and with terms approved by the MassTech Executive Director and which shall include a commitment of the Towns to aggregate their respective MBI allocations for the purpose of financing the grant to WiValley.**
- 5. MBI staff shall inform the Towns that the MBI Board of Directors strongly urges the Towns to establish an appropriate point in the project where each Town's participation becomes irrevocable.**

The MBI Board of Directors acknowledges that the Executive Director has previously approved a professional services grant of up to \$116,000 to Hawley, the Lead Town designated in writing by the Towns, to be held and expended by the Lead Town for the purpose of engaging technical and legal support to address technical, business and legal issues related to the Town's involvement in the development and implementation of the WiValley project.

Mr. Larkin presented the next two items on the agenda – grant awards to Comcast under the Flexible Grant Program for broadband service in the towns of Charlemont and Middlefield. Mr. Larkin noted that fewer than ten percent of registered voters attended a recent Town Meeting in Charlemont and narrowly voted in favor of pursuing a municipally-owned network. It was clarified that the final decision on which pathway to choose rests with the Selectboard. However, there are indications that the Selectboard will elect to proceed with a municipally-owned broadband network. Therefore, the motion authorizing a grant award to Comcast to serve Charlemont was tabled.

Mr. Larkin informed the MBI Board that Middlefield will hold a Town Meeting on December 20, which will include a warrant for funding of a municipally-owned broadband network as well as a warrant to accept the proposal from Comcast. It was the sense of the MBI Board that it should refrain taking action on the proposed motion to authorize a grant to Comcast to serve Middlefield prior to the Town Meeting in Middlefield. Therefore, the motion relative to Comcast serving Middlefield was tabled.

Ms. Kirk and Mr. Ennen explained MBI's involvement in securing a commitment letter for a standby letter of credit in connection with Westfield Gas and Electric's winning bid in the Connect America Fund ("CAF") II reverse auction. Mr. Ennen explained that Westfield Gas and Electric participated in the CAF II reverse auction on behalf of twenty towns that are receiving grants under the EOHED Last Mile Infrastructure Grant Program. The CAF II funding would total approximately \$10 million and would be used by the participating towns to lower their debt service obligations for municipally-owned broadband networks. Mr. Ennen noted that Westfield indicated that they are legally prohibited from securing the letter of credit. EOHED has brought in MBI to assist in complying with the CAF II requirement for an irrevocable, standby letter of credit. MBI's most significant role is to deposit approximately \$1 million in to an account to serve as the initial cash collateral for the letter of credit. MBI and Westfield have submitted a waiver petition to the Federal

Communications Commission seeking approval for our proposed method of compliance with the letter of credit requirement.

Following a period of brief discussion, and upon a motion duly made and seconded, it was unanimously VOTED:

The Board of Directors of the Massachusetts Broadband Institute (the “MBI”) does hereby recommend that the Executive Committee of the Board of Directors of the Massachusetts Technology Park Corporation (“MassTech”) authorize the MassTech Executive Director to take all necessary steps and actions, including, but not limited to, the execution of requires agreements and instruments and the expenditure of funds, associated with the issuance and maintenance of a standby letter of credit (“LOC”) to be issued by Berkshire Bank in a maximum amount of \$8,000,000 for the benefit of the Federal Communications Commission or its designee, the Universal Service Administrative Company, in connection with the award of Connect America Phase II funds by the FCC to Westfield Gas and Electric (“WG&E”) to support the deployment of broadband infrastructure.

The actions authorized herein shall include, without limitation:

- 1. Executing the LOC in a form that complies with FCC requirements and related documents required by Berkshire Bank in connection with the issuance of the LOC, including a Pledge Agreement and a Reimbursement Agreement (collectively referred to as “Associated LOC Documents”);**
- 2. Establishing a collateral account in amount equal to 100% of the initial face amount of the LOC at the time of issuance plus an excess deposit of 5% of the initial face amount of the LOC, such aggregate amount currently estimated to be approximately \$1,085,000;**
- 3. Payment of costs and fees assigned to MassTech pursuant to the terms of the LOC and Associated LOC Documents;**
- 4. Fulfilling all obligations and responsibilities in order to maintain the LOC for the required time period, including, but not limited to, matters associated with renewing the LOC and/or amending the LOC, as may be necessary from time to time; and**
- 5. Executing an agreement with WG&E that sets forth the relative rights, responsibilities and obligations of each party relative to the LOC.**

Mr. Larkin, in his capacity as Chairperson, stated that he would call for a roll call vote of the MBI Board of Directors to go into executive session to discuss strategy with respect to the ongoing litigation with G4S Technology and KCST USA/Asia NetMedia. Mr. Larkin indicated that the purpose for meeting in executive session to discuss these matters is that discussion of MassTech’s strategy with respect to these matters in an open meeting may have a detrimental effect on MassTech’s litigating position.

A roll call vote was taken to go into executive session. Mr. Larkin, Mr. Cronin, Mr. Dubendorf, Ms. Dunlavy, Mr. Keator, Ms. Kirk, Mr. Nicolai and Commissioner Peterson voted in the affirmative to enter into executive session. All staff that were not needed for the litigation strategy discussion and members of the public left the room. The meeting proceeded in executive session at 3:31 p.m. and continued in executive session until 4:09 p.m. After the conclusion of the executive session the meeting proceeded in open session. The proceedings that occurred in executive session are addressed in a separate set of meeting minutes.

There being no other business to discuss and upon a motion duly made and seconded, it was unanimously and without abstention voted to adjourn the meeting at 4:10 p.m.

A TRUE COPY
ATTEST: (Secretary)

DATE:

Materials and Exhibits Used at this Meeting:

1. Draft Minutes – Open Session of the September 5, 2018 MBI Board of Directors meeting
2. Presentation – MBI Status Report
3. Presentation – MBI Approval Items
 - a. Material Modification of Grant Award Terms and Conditions – Town of Petersham / Matrix Broadband Project
 - b. Flexible Grant Program Award – WiValley – Wireless Network for Florida, Hawley, Monroe and Savoy
 - c. Flexible Grant Program Award – Comcast – Town of Charlemont
 - d. Flexible Grant Program Award – Comcast – Town of Middlefield
 - e. Letter of Credit – Westfield Gas and Electric – Connect America Fund II