

MINUTES
FINGER LAKES REGIONAL TELECOMMUNICATIONS DEVELOPMENT CORPORATION
dba AXCESS ONTARIO
BOARD OF DIRECTORS MEETING
May 26, 2016

Members Present:

Don Culeton
John Dorak (by phone)
Mary Krause
Doug Mossbrook
Bob Seem
John Sheppard
Camille Sorensen
Mark Tolbert
Johnny Walker
Andrew (Drew) Wickham

Members Absent:

Michael Manikowski
David Smith

Others Present:

Sean Barry, CEO
Andy Lukasiewicz, ECC Technologies
Helen Zamboni, Underberg & Kessler
Terry Phillips, The Bonadio Group

The May 26, 2016 meeting of the Board of Directors of the Finger Lakes Regional Telecommunications Development Corporation, dba AxcCESS Ontario, was called to order in the Ontario County Economic Development Conference Room, Mezzanine Level, County Municipal Building, 20 Ontario Street, Canandaigua, NY at 3:30 p.m. by Chairman Mark Tolbert.

APPROVAL OF THE MINUTES:

Approval of the minutes of the March 24, 2016 meeting was moved by John Sheppard, seconded by Johnny Walker. Motion carried.

FINANCIAL UPDATE:

The financial statements as of March 31, 2016 were briefly reviewed. The construction of the Yates County connector should be completed in June. The D&D Power receivable was written off, as it is not collectible. In general, we are on budget.

PROPERTY TAX REPORT:

General Counsel Helen Zamboni reported that she had an extended conversation with counsel at ORPTS. For the benefit of the full board, what follows is a summary of that conversation, with the results of further research based on that conversation.

First, ORPTS counsel confirmed that, notwithstanding what Sam Papa had hinted at, there is no comprehensive review going on of the issue of whether LDCs are subject to real property taxes on their special franchises – which is what our property is, for assessment purposes.

The opinion issued to Ontario County's Director of Real Property Tax Services in response to an inquiry from her whether AO's fiber optic cable was eligible for exemption under Real Property Tax Law section 420-a. This is the section that addresses exemption from real property taxes for real property owned by qualifying not-for-profits (NFP) and used exclusively for qualifying non-profit purposes. The writer concludes that AO, as an LDC, is not a qualifying NFP and therefore 420-a does not apply. Counsel was clear that this is still the operative interpretation.

The position of ORPTS is that AO's taxation arises because the network is a "special franchise". The term "special franchise" as defined in section 102, subdivision 17 of the RPTL does not include "...property of a municipal corporation, public benefit corporation or special district...". Clearly AO's network is not owned by a special district (this would be like a water or sewer district). AO itself is not municipal corporation, nor is it a public benefit corporation, defined in the General Construction Law as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." An example of a "public benefit corporation" is the Thruway Authority, and any other public authority.

The General Construction Law says that there are certain kinds of corporations only, and as AO was formed under the Not-for-Profit Corporation Law, it is a not-for-profit corporation and not something other than that.

It would be hard to change the structure of AO to make it a "public benefit corporation", because it's questionable whether the AO network could be deemed a "public improvement". There are several definitions in different statutes of the term "public improvement" but the one most relevant to AO is that found in the County Law. Under section 850, "public improvement" is defined to include but not limited to "...a courthouse, an archives and records center, a museum, a laboratory, a park, a garden, a recreation area, restaurants, shops, the installation of trees, shrubs and other landscaping, a monument, fountain, sculpture, a plaza, substructure and parts thereof, mechanical, pedestrian or vehicular accessways, a parking garage, a parking lot, a pedestrian walkway or overpass or underpass, an arterial highway or connection, a crossroad or access road, a transportation terminal or shelter, a meeting hall, a civil defense shelter against radioactive fallout or blast, and other public structures and facilities intended for the use of state or municipal employees and the public at large."

Furthermore, ORPTS has taken the position since the early 2000s that IRUs are like leases for real property tax purposes; they are not conveyances of ownership. In fact, our IRU contracts

explicitly state that AO retains ownership to the fibers IRU'd. ORPTS counsel said that if AO were to transfer title to any of the cable to the County or Marcus Whitman (Wayne-Finger Lakes BOCES), that cable would come off the tax rolls. FLCC is technically not within the definition of "municipal corporation" as defined in the RPTL. Transferring any cable to Thompson Health would simply move AO's tax liability to Thompson, so that wouldn't be of any value.

In the past, Mike Manikowski has suggested transferring the network to OCIDA, but that would only work if OCIDA qualifies as a public benefit corporation for RPTL purposes.

Helen and Terry told the board that they had had a call with STN's CEO about STN's position on this issue. STN's CEO was fine with us contacting JK Hage (STN's counsel) but JK will not share with AO the results of his legal research without STN's approval.

Chairman Tolbert told the board that he contacted JK about him acting as special counsel to AO to "undo" AO's current tax status. JK indicated that he thought an approach to each taxing authority might need to be made to accomplish this. Helen and Sean Barry reminded the board that only ORPTS has authority under the law to change the taxable status of special franchise tangible property, not the individual assessors in the municipalities.

However, given the effect on the financial status of AO, the board felt that other options should be explored and Helen was directed to liaise with JK to get his recommendations and keep the board informed, so that the board can determine whether spending time and money to pursue these is worthwhile.

Helen suggested that the avenue most likely to be fruitful is a change in legislation that would include local development corporation within the definition of "municipal corporation". At Chairman Tolbert's request, Mary Krause agreed to have conversations with the local legislators about their willingness to support such an approach.

SALES AND OPERATIONS:

At 3:41 p.m., a motion was offered by Doug Mossbrook, seconded by Don Culeton, to go into executive session for the discussion of the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by the Corporation as publicity would substantially affect the value thereof. Motion carried. At 4:48 p.m., a motion was offered by John Sheppard, seconded by Johnny Walker, to leave executive session. Motion carried.

Helen, Terry and Andy were directed to look into the legal, regulatory, tax and operational issues that would arise for AO becoming a "broker" for lit services.

Chairman Tolbert thanked Johnny Walker and Andy and the ECC team for the work done on developing the market analysis that Andy presented to the board.

Chairman Tolbert asked John Sheppard to dust off his notes and other materials in connection with a possible connection to a carrier hotel, and asked Doug Mossbrook, Terry and Andy to assist in presenting more current options for this to the board at a future meeting.

As David Smith was not present, an update on the RFP status was postponed to a future meeting.

At 5:27 p.m., a motion was made by John Sheppard, seconded by Johnny Walker, to adjourn. The motion passed.

REMINDER: NEXT BOARD MEETING IS JUNE 23 AT 3:30 P.M.

Distribution:

All Board Members, present and absent
Ontario County Board of Supervisors
Clerk's Office, Board of Supervisors
Mary Krause, County Administrator
Mary Gates, Deputy County Administrator
Gary L. Curtiss, County Attorney
Cathy Bentzoni, County Finance Officer
Michael Wojcik, Economic Development