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VIA HAND DELIVERY

August 10, 2017

Mr. Joseph Aiello, Chairman
MBTA Fiscal and Management Control Board
Massachusetts Department of Transportation
10 Park Plaza, Suite 3910
Boston, MA 02116

Re: Proposed MBTA Wi-Fi Monopole Project

Dear Chairman Aiello,

On behalf of the Towns of Andover, Hamilton, Ipswich, Gloucester, Manchester-by-the-Sea, Newburyport and Rockport ("the Towns") we applaud the MBTA and the Fiscal and Management and Control Board ("Control Board") for listening to constituent concerns and rejecting the proposed plan to install 74-foot monopoles along MBTA commuter rail lines in their communities. We understand that there is a need to improve Wi-Fi and cellular service for MBTA users and the Towns stand ready to work with the MBTA, and, where appropriate, lend their IT expertise to accomplish that objective without the erection of towers jutting through the landscape of their neighborhoods and destroying the unique historic and cultural character that attracts visitors and maintains residents' property values.

Beyond the damaging and unnecessary impacts the project would have inflicted on our client communities, we also have several serious concerns about the legitimacy and the process (or lack thereof) that led up to the MBTA's 2014 award of the Wi-Fi project contract in the first instance, as well as its amendment in February 2017. Those concerns include (1) the lack of public process surrounding the consideration of and entry into the Wi-Fi upgrade contract; (2) the apparent failure to lawfully execute the contract with inMOTION Wireless, Inc.; and (3) whether the laws governing public private agreements of this type have been properly adhered to.

The Towns' substantive concerns about the project design and impacts could and should have been addressed at the outset of the project when the MBTA was exploring upgrades to the Wi-Fi and cellular service on its commuter rail lines. Indeed, Subsection 5(k) of Massachusetts General Laws Chapter 161A directs the MBTA to issue regulations "necessary and appropriate to provide [affected] parties the timely opportunity to participate in the development of major transportation projects." Later in the subsection, the General Court defined "timely opportunity to participate" as "sufficiently early in the design process so as to permit comments to be considered prior to the final development of or commitment to any specific design for such

project." Courts have interpreted subsection 5(k) as requiring that affected parties be given the chance to comment on and have meetings about the proposed project with the MBTA before the design plans are finalized. *See Neighborhood Ass'n Of The Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 68 (1st Cir. 2006).

The obvious legislative intent and purpose of this provision was to prevent precisely the problems of poorly considered impacts such as presented in this case, and there is little question that the WiFi project qualifies as a "major transportation project". According to the June 26, 2017 briefing on the project presented by the MBTA to the Control Board, the estimated construction and operating cost for installing hundreds of monopoles along the railways and for the benefit of MBTA commuter rail passengers is $140 million. The MBTA was therefore required to afford the effected communities the opportunity to comment on the project and meet with the MBTA about it before the design was finalized. However, there is no evidence that the Towns had any such opportunity before the MBTA accepted inMOTION's design for the project and entered into its contract with inMOTION in July 2014.

Next, it appears that the contract with inMOTION may not have been lawfully executed. On June 18, 2014, the Board of Directors of the Massachusetts Department of Transportation unanimously voted to "restat[e] and reaffirm" that it has delegated authority to the Secretary/CEO of MassDOT "to execute in the name and on behalf of the Massachusetts Department of Transportation, as well as the Massachusetts Bay Transportation Authority, all contracts, instruments, and other agreements with a value less than $15,000,000.00, including" licenses and construction contracts. The Board expressly "retain[ed] for itself the duty and responsibility to authorize the execution and/or issuance of all contracts valued at $15,000,000.00 or more[.]"

Given the 22-year license to install, operate, and maintain the commuter rail Wi-Fi network at a cost estimated to be $140 million (with expected revenue of $20-40 million at stake for the MBTA), it seems apparent that Board approval was required to approve the July 2014 contract with inMOTION. Yet there is no indication in the minutes of any public meeting of the Board of Directors that the Board even considered let alone voted to authorize the MBTA's contract with inMOTION. The execution of that contract by the General Manager thus appears to us to be an ultra vires act.

Finally, Section 63 of Massachusetts General Laws Chapter 6C governs contracts for public-private agreements for design-build-finance-operate-maintain or design-build-operate-maintain services. We believe inMOTION's contract, requiring it to build the Wi-Fi network according to the design it submitted in response to the November 2013 RFP and to operate and maintain the network for 22 years (extended to 24 years by amendment in February 2017) by license, and then to transfer operating control back to the MBTA at the end of that period, is the paradigmatic example of an agreement covered by Section 63. Indeed, at the June 18, 2014 Board meeting, the Board expressly noted that it did not delegate its authority to enter into public-private partnerships.

Yet because there is no trace of any public Board discussion of either the WiFi RFP or the contract with inMOTION, the Towns cannot evaluate whether the MBTA complied with Section 63 requirements in awarding the contract, including the requirement that adequate notice of the RFP be given, as required by subsection 63(b)(3). If the Towns had notice of the RFP, they could have contacted MBTA at the time to make their concerns known and in order to mitigate their concerns with respect to the significant impacts resulting from the project.

Thus, while my clients are very pleased with the announcement that the proposal for 320 74 foot monopoles has been rejected, simply asking the vendor for a scaled back version does not correct the very serious concerns noted above. The Towns urge the MBTA to fully comply with the statutes cited above and engage anew in a fully transparent and participatory process as the Wi-Fi project is reconfigured. We are confident that doing so will allow municipal expertise and citizen engagement to lead to a successful outcome.

Sincerely,

Robert J. Cordy

cc: Governor Charles Baker, Stephanie Pollack, Secretary of Transportation, Senator Edward J. Markey, Senator Elizabeth Warren, Congresswoman Niki Tsongas, Congressman Richard E. Neal, Congressman James P. McGovern, Congressman Joseph P. Kennedy III, Congresswoman Katherine M. Clark, Congressman Seth Moulton, Congressman Michael E. Capuano, Congressman Stephen F. Lynch, Congressman William R. Keating, Senate Minority Leader Bruce E. Tarr, Senator Jason M. Lewis, Senator James B. Eldridge, Senator Barbara A. L'Italien, Senator Patricia D. Jehlen, Senator Thomas M. McGee, Senator Kathleen O'Connor Ives, House Assistant Minority Leader Brad Hill, Representative James J. Dwyer, Representative Cory Atkins, Representative Ann-Margaret Ferrante, Representative James J. Lyons Jr., Representative Frank Moran, Representative Jennifer Benson