


Confidential Memorandum  
Privileged Lawyer-Client Communication

To Mayor Donna Olson  
Laurie Sullivan, Finance Director  
City of Stoughton

From Matt Dregne   
City Attorney

Date November 21, 2011

Re DaneCom Agreement

The City has asked me to review the draft agreement proposed to be made among Dane County and the municipalities located within the County, relating to a County-wide interoperable emergency radio system known as DaneCom. According to Dane County Board Resolution 88, 2010-2011, "Dane County must make choices soon on an alternative approach for an emergency radio system in order to meet federal requirements by January 2013."

It is beyond the scope of this memorandum to describe the federal requirements that may bear on the development of an emergency radio system. Yet, a complete evaluation of the proposed DaneCom agreement would likely require some understanding of the legal obligations that apply to the parties, the practical need for the communications technology, and the alternatives available to the parties.

It is also beyond the scope of this memorandum to address the extent to which the agreement would meet the parties' needs in the best manner. Instead, this memorandum discusses certain aspects of the agreement that are unclear, or that may cause problems for the parties in the future.

I have a number of big-picture concerns with the agreement: (1) the agreement is vague regarding what capabilities and services DaneCom would provide to municipalities; (2) the agreement is ambiguous regarding the ability of parties and non-parties to use the

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system; (3) the agreement includes incentives for parties to withdraw which could undermine the viability of the agreement and the system; and (4) rather than specifying how costs will be allocated, the agreement delegates broad discretionary authority, to an appointed “Governing Board,” to allocate costs. These concerns, and my other comments regarding the agreement, are discussed in greater detail, below.

1. SYSTEM SPECIFICATIONS ARE VAGUE AND UNCLEAR.

The agreement requires Dane County to contract for the design, construction and implementation of “the system.” The recitals say that the “system” will be “a trunked, digital, standards-based simulcast emergency radio system that features narrow-banding of the county’s VHF system.”

This description of the “system” appears insufficient to answer many questions you may have, now or in the future, about what the system will provide. One red-flag regarding this problem is the inclusion of language indicating that Fitchburg may be adding “to the basic infrastructure” of the system. I assume this language was added because Fitchburg anticipates a need to add to the system, to meet its needs. Based on the draft agreement, it is unclear how Fitchburg could have reached that conclusion. This is cause for concern about whether the agreement adequately defines “the system.”

At a minimum, it would be prudent to describe the minimum types and levels of technology, capabilities and services that the system would provide to municipalities.

2. ACCESS TO AND PARTICIPATION IN THE SYSTEM AND DISTRIBUTION OF BASE COSTS.

A. *Who May Use the System?* I have heard that all communities in Dane County will be allowed to use and/or benefit from the system, whether or not they are parties to the agreement, contributing to the costs, or choose to withdraw in the future. The agreement requires parties to pay the costs attributed to non-parties, suggesting that non-parties may use the system. However, some language in the agreement suggests that the system will only be available to parties to the agreement. Section 4 H. requires the County, to the extent practicable, to provide “full access to, and allocate capacity of, the system to all *parties to this Agreement* for all communications needs of *that party*.” Does that mean that communities that are not “parties to” the agreement would not have access to the system? If non-parties would have access, could that access be limited in any respects? How would a party’s withdrawal from the agreement affect access to the system? These are important issues to clarify.

B. *Threshold Level of Participation.* The agreement does not become effective unless, by December 22, 2011, it is signed by a number of cities, villages and towns that contain 70 percent of the Dane County population, excluding the City of Madison, and “80 percent, or 28” of the County’s 34 towns.<sup>1</sup> Including a threshold number of communities that must be reached is a good idea, given that the cost of serving non-parties is to be shared among the municipalities that are parties.

C. *Issues Regarding Withdrawal.* The agreement allows any party (other than Dane County) to withdraw, by giving 18 months notice prior to the beginning of the calendar year in which withdrawal takes place. No party may give notice of withdrawal before December 1, 2015. The withdrawal option presents the following issues:

- (1) The agreement is ambiguous regarding who, if anyone, is responsible for paying the share of operation and maintenance costs of a withdrawing party. Section 4. F. says that if a municipality “chooses not to join and pay its respective share of operating and maintenance costs, those costs will be redistributed ....” What if a municipality joins, pays its share of costs for a number of years, and then withdraws? If the intent is to redistribute a withdrawing member’s costs under Section 4. F., then the agreement should say so.
- (2) There appears to be no disincentive to withdraw, particularly if a withdrawing party may continue to receive the full benefits of the system. If parties begin to withdraw, there will be an increasing financial burden on remaining parties, and therefore an increasing incentive for remaining parties to withdraw. The County’s share of the non-party costs is limited to 30 percent, and the County’s share of the total operation and maintenance cost is limited to 50 percent. If and when participation begins to unravel, won’t that leave the County and municipalities with an agreement that is no longer viable? It would be prudent to structure the agreement to avoid this possibility. Effective disincentives to withdrawal would be one option, if feasible. Prohibiting withdrawal, perhaps for the anticipated useful life of the system, would be another option.

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<sup>1</sup> This should be revised to say 28 towns, rather than “80 percent, or 28.”

3. ALLOCATION OF OPERATIONS AND MAINTENANCE COSTS.

The primary purpose of the agreement is to allocate responsibility for paying the costs of operating and maintaining the DaneCom system. I have a number of concerns, questions and suggestions about the cost-sharing language in the agreement, as follows:

- A. *Operations and Maintenance Not Defined.* The agreement does not describe what costs are included in “operations and maintenance.”
- B. *Weak Language Governing Costs Through 2015.* The agreement provides for the appointment of a “Governing Board” to allocate costs among the parties. The agreement provides a formula for allocating costs through 2015. However, the language used in the agreement is very weak, in terms of binding the Governing Body to follow the given formula, even through 2015.

Section 6.A. of the agreement requires all parties to the agreement to pay “their proportionate share of the operating and maintenance cost of the system as determined by the Governing Board.” This language is a direct grant of authority to the Governing Board to decide how costs will be allocated. Section 7.A states that “it is *understood* that annual operating and maintenance costs for municipalities will be apportioned using a 50/50 (half equalized value, half per capita ...) through the year 2015.” Finally, section 7.D requires the County to pay 30 percent of the operations and maintenance costs through 2015.

If the parties intend for the Governing Board to be bound by the cost allocation suggested in the agreement, at least through 2015, I would modify the agreement to provide as follows:

“All parties to this Agreement shall pay their proportionate share of the operating and maintenance cost of the system on a semi-annual basis. Through 2015, 30 percent of the cost shall be paid by Dane County, and the remaining cost shall be allocated to all Cities, Villages and Towns in Dane County, excepting the City of Madison, using a 50/50 formula (half allocated on the basis of equalized value, half on the basis of population, adjusted annually by the Wisconsin Department of Revenue and Department of Administration). The costs allocated to Cities, Villages and Towns that are not parties to

this Agreement shall be re-allocated to the parties pursuant to Section 4.F. of this Agreement.

C. *Delegation of Authority to the Governing Board.*

Beginning in the year 2016, Section 7.B. authorizes the Governing Board to change the formula for allocating costs. Section 6. C. then obligates parties to the agreement to execute an amended agreement to reflect the changes.<sup>2</sup> The changes are to be “reasonably based on equalized value, population, actual or estimated usage *and/or other relevant and customary factors as established by the Governing Board if and when they are made.*” I have the following comments and concerns regarding authorizing the Governing Board to change the cost allocation formula:

- (1) *Vague Standards.* Section 6. A indicates “factors” that the Governing Board is supposed to use in changing the cost allocation. However, these factors do not allow for any meaningful determination of whether they have been followed. The inclusion of “other relevant and customary factors as established by the Governing Board,” as a standard for guiding the Governing Board’s determination, illustrates the extent to which the Governing Board would have very broad discretion.
- (2) *No Costs Allocated to County After 2015.* For years after 2015, it is unclear whether the parties intend to allow the Governing Board to allocate operations and maintenance costs to the County. Section 7.D. expressly states that 30 percent of the costs are to be allocated to the County through 2015. That section also states that after 2015, any reallocation to the County shall not exceed 50 percent of the total operating cost. It is unclear how the Governing Board would use the factors in Section 6.A. to allocate costs to the County. It is also unclear whether the 50% limit in section 7.D. is intended to recognize that the Governing Board may allocate costs to the County, or is intended only as a limit on non-party costs the County could be required to pay under Section 4.F. The agreement should make it clear, one way or the other.

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<sup>2</sup> It is unclear why the parties would need to execute an amendment to the agreement, given that the proposed agreement authorizes the Governing Board to change the formula.

- (3) *Political Process and Representation on Governing Board.* Section 8.B. of the agreement states that if the “percentage of the total contribution to operation and maintenance cost to be made by any of the three municipal groups having the right to appoint members to the Governing Board increases above its initial contribution percentage by fifteen (15) or more..., the appointing authority for that group shall have the right to appoint one additional member to the Governing Board for each 15% increase over the number of appointments provided in sub. A.”

This section appears to recognize that, ultimately, costs will not be allocated based on a clear formula or standards provided in the agreement, but rather by the Governing Board, through a political process. This device may not effectively protect individual municipalities. A particular municipality could see its costs raised by more than 15 percent, while the increased cost to all members of that municipality’s group remains below 15 percent, in which case the group’s representation on the Governing Board would remain unchanged. Furthermore, individual municipalities may have limited practical ability to influence the process through the Cities and Villages Association, or through Governing Board members appointed by the Association.

One risk resulting from allowing the Governing Board to allocate costs is an increased likelihood that parties will withdraw from the agreement, in reaction to a change they see as unfair. Given that there may be no penalty or disincentive for an individual party to withdraw, the agreement should be structured to avoid future conflicts over cost-sharing that could lead to a municipality’s withdrawal.

In my opinion, the parties would be served better by an agreement that allocates costs, rather than an agreement that empowers a separate political entity to allocate costs.

- (4) *Ambiguity Regarding Allocation of Non-Party Town Costs.* Section 4.F.b of the agreement is ambiguous regarding allocation of costs of non-party towns, if less than 28 towns are parties to the agreement. It states: “If the municipality is a town, and if 80 % (eighty percent, or 28) of the County’s towns have executed this agreement, 70 % of that non-participating town’s costs will be re-distributed to the remaining towns ....” Under section 3, however, the agreement will

not take effect unless 80 percent of the towns have executed the agreement. Therefore, it is unclear why a requirement that 80 percent of towns have executed the agreement is included in section 4. F. b. One possible interpretation is that towns are not responsible for paying non-party town costs unless 80 percent of the towns *remain* parties to the agreement. Under that interpretation if a sufficient number of towns withdraw, there is no mechanism for allocating their costs to remaining towns. This ambiguity should be addressed.

- (5) Section 4. F. of the agreement includes references to section 6. b., that should be references to section 7.a.

In conclusion, I recommend modifying the agreement to provide a fixed cost sharing approach, to better define the system, to clarify who may use the system, and to reduce the potential for withdrawal. I also recommend modifying some of the language that creates ambiguities regarding important issues.

I would be happy to discuss this matter with the City.