



ECLEG NOV 29 '21 PM 2:59

COUNTY OF ERIE

MARK C. POLONCARZ

COUNTY EXECUTIVE

November 29, 2021

Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

RE: Proposed Resolution Authorizing the Establishment of ErieNet Local Development Corporation

Dear Honorable Members:

Please find attached a proposed resolution authorizing the establishment of ErieNet Local Development Corporation, a local development corporation that will be charged with constructing and operating an open access network of high-speed broadband infrastructure to benefit the County and local governments, educational facilities, public libraries, commercial and industrial businesses, residential properties, and other major employers and institutions.

Should your Honorable Body require further information, please contact Deputy Budget Director Benjamin Swanekamp and County Attorney Michael Siragusa. Thank you for your consideration on this matter.

Sincerely yours,

Mark C. Poloncarz, Esq.
Erie County Executive

MCP/rm
Enclosure

cc: Michael Siragusa, County Attorney

MEMORANDUM

To: Honorable Members of the Erie County Legislature
From: Department of Law
Re: Proposed Resolution Authorizing the Establishment of ErieNet Local Development Corporation
Date: November 29, 2021

SUMMARY

The attached resolution requests authorization for the establishment of ErieNet Local Development Corporation as a local development corporation pursuant to Section 1411 of the New York Not-for-Profit Corporation Law, for the purpose financing, building-out, controlling and maintaining an open access network of fiber broadband infrastructure.

FISCAL IMPLICATIONS

None for this resolution.

REASONS FOR RECOMMENDATION

Broadband infrastructure is an essential utility and critically needed asset to establish enhanced communication infrastructure among communities within the County and ErieNet will provide critical infrastructure benefitting the County and local governments, educational facilities, public libraries, commercial and industrial businesses, residential properties, and other major employers and institutions.

This action is recommended based on the Final Report issued by ECC Technologies, Inc. on March 31, 2017. ECC Technologies, Inc. was previously engaged by the Erie County Department of Environment and Planning to perform a broadband feasibility study to provide analysis and guidance for the planning and development of broadband improvement strategies to support economic development in Erie County. A copy of the ECC Final Report is available at the following link:
<http://www2.erie.gov/environment/sites/www2.erie.gov.environment/files/uploads/BroadbandFeasibilityStudy-FinalReport-05022017-MapsRedacted.pdf>

After detailed consultation with a team of experts including the operators of other Open Access Networks in New York State, it was determined that a Local Development Corporation is the ideal entity to oversee construction and operation of an Open Access Network based under New York State Law. The LDC will board of consist of key members of the ErieNet working group, and will oversee final design, construction, and management of the network.

CONSEQUENCES OF NEGATIVE ACTION

Failure to approve this resolution will delay the provision of fiber broadband infrastructure within the County.

STEPS FOLLOWING APPROVAL

The County Executive will submit the Certificate of Incorporation to be filed with the Department of State, Division of Corporations.

A RESOLUTION SUBMITTED BY:
THE DEPARTMENT OF LAW

RE: Authorizing the establishment of ErieNet Local Development Corporation

WHEREAS, the Erie County Department of Environment and Planning (“DEP”) previously engaged ECC Technologies, Inc. (“ECC”) to perform a broadband feasibility study to provide analysis and guidance for the planning and development of broadband improvement strategies to support economic development in Erie County (the “County”); and

WHEREAS, ECC issued a Final Report, dated March 31, 2017 (the “ECC Final Report”), which concluded that an open access network of high-speed broadband infrastructure (“OAN”) is an essential utility and critically needed asset to establish enhanced communication infrastructure among communities within the County; and

WHEREAS, the establishment of an OAN with dedicated fiber optic cabling installed throughout the County would provide critical infrastructure benefitting the County and local governments, educational facilities, public libraries, commercial and industrial businesses, residential properties, and other major employers and institutions; and

WHEREAS, this broadband network (hereinafter referred to as “ErieNet”) would establish a backbone of technology infrastructure to not only fulfill core governmental communication needs, but also serve as an invaluable economic development tool benefitting the entire region; and

WHEREAS, the ECC Final Report recommended that a County-controlled provider be established to finance, build-out, control and maintain ErieNet to provide a not-for-profit broadband “dark fiber” infrastructure that is accessible by public and private organizations, including private providers which would light ErieNet with broadband service for customers of ErieNet; and

WHEREAS, given the inherent need for ErieNet to serve both public and private sector needs and customers, it has been determined that the best approach to accomplish the deployment of ErieNet is through the establishment of a local development corporation controlled by the County as a quasi-governmental entity to undertake the planning, design, engineering, right-of-way acquisition, construction, operation, facility leasing, fiber licensing and subscription administration, and maintenance of the overall project.

NOW THEREFORE BE IT

RESOLVED, that the Erie County Legislature hereby authorizes the incorporation of ErieNet Local Development Corporation (the “Corporation”) pursuant to and in accordance with Section 1411 of the New York Not-for-Profit Corporation Law (“N-PCL”) as a charitable not-for-profit local development corporation of the State of New York (the “State”) with purposes and powers included and as set forth within N-PCL Section 1411 (hereinafter, the “Act”), and pursuant to the form of Certificate of Incorporation (the “Certificate”) attached hereto as **Exhibit A**, which shall be filed with the Department of State, Division of Corporations; and be it further

RESOLVED, that the Corporation will be charged with undertaking the overall ErieNet Project in accordance with the purposes and powers vested with local development corporations pursuant to the Act; and be it further

RESOLVED, that the Corporation will be established with the County serving as sole member, acting by and through the County Executive, with an initial appointed board of directors (the "Board") consisting of the following persons, serving in their ex officio capacities as elected and appointed officials of the County: Erie County Legislature Majority Leader Timothy Meyers, Erie County Legislature Minority Leader Joseph Lorigo, Erie County Deputy Budget Director Benjamin Swanekamp; Erie County Chief Information Officer Michael Breeden; Erie County Attorney Michael Siragusa; Erie County Commissioner of Environment and Planning Daniel Castle; and the Director of the Buffalo and Erie County Public Library Jeannine M. Doyle; and be it further

RESOLVED, that pursuant to Section 2 of the Public Authorities Law ("PAL") of the State, the provisions of the Public Authorities Accountability Act of 2005, as amended by Chapter 506 of the Laws of 2009 of the State of New York ("PAAA"), the Corporation shall be deemed and considered a "local authority," and thereby comply with all applicable open government and accountability requirements, including PAAA, the Open Meetings Law ("OML") and Freedom of Information Law ("FOIL"); and be it further

RESOLVED, that following the filing of the Certificate, the Board is hereby authorized and directed to schedule, notice and conduct an organizational meeting of the Corporation, whereat the Board shall consider for adoption certain organizational matters, including but not limited to the adoption of By-laws and certain policies, standards and procedures to comply with the provisions of the PAAA, OML and FOIL; and be it further

RESOLVED, that the County Executive and the Board are hereby authorized and directed to take all such further actions as may be necessary and appropriate to effect the purposes of this Resolution; and be it further

RESOLVED, that certified copies of this Resolution shall be furnished to the Office of the County Executive, the County Attorney, the Deputy Budget Director, the Chief Information Officer, the Commissioner of Environment and Planning, and any other party deemed necessary and proper; and be it further

RESOLVED, that this Authorization take effect immediately.

Exhibit A

CERTIFICATE OF INCORPORATION

OF

ERIENET LOCAL DEVELOPMENT CORPORATION

A Not-For-Profit Local Development Corporation
under Section 1411 of the Not-For-Profit
Corporation Law of the State of New York

THE UNDERSIGNED, being over the age of eighteen years, for the purpose of forming a not-for-profit local development corporation pursuant to Section 1411 of the Not-For-Profit Corporation Law of the State of New York, hereby certifies as follows:

FIRST: The name of the corporation shall be "ErieNet Local Development Corporation" (hereinafter referred to as the "Corporation").

SECOND: The Corporation will be a corporation as defined in subparagraph (a)(5) of Section 102 of the Not-For-Profit Corporation Law of the State of New York and, as provided in Section 1411 of the Not-For-Profit Corporation Law, will be a charitable corporation as defined in Section 201 of the Not-For-Profit Corporation Law. The Corporation shall serve as a public instrumentality of and supporting organization for, but separate and apart from, Erie County, New York (the "County"). There is no requirement under the New York Not-for-Profit Corporation Law or any other statute of the State of New York requiring any approval or consent before filing of this certificate of incorporation.

THIRD: The purposes for which the Corporation is to be formed and operated are exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, to relieve and reduce unemployment, promote and provide for additional and maximum employment, improve and maintain

job opportunities, and lessen the burden of government and act in the public interest. In furtherance of said purposes, the Corporation's powers shall include:

(a) To foster the creation, retention and expansion of jobs and economic opportunities for the benefit of the County, New York State and local economies; and

(b) To construct, acquire, rehabilitate and improve for use by others, facilities in the territory in which its operations are principally to be conducted, to assist financially in such construction, acquisition, rehabilitation and improvement, to maintain and/or lease such facilities on its behalf or for others in such territory; to disseminate information and furnish advice, technical assistance and liaison with federal, state and local authorities with respect thereto;

(c) To acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests therein;

(d) To apply for loans and borrow money without limit as to amount; to make, draw, accept, endorse, execute and issue negotiable bonds, debentures, notes and other obligations therefor;

(e) To sell, lease, mortgage or otherwise dispose of or encumber any such facilities or any of its real or personal property or any interest therein upon such terms as it may determine;

(f) To enter into covenants and agreements and to comply with all the terms, conditions and provisions thereof, and otherwise to carry out its corporate purposes and to foster and encourage the location or expansion of facilities and related businesses in the territory in which the operations of the Corporation are principally to be conducted;

(g) To apply for and make grants and loans and to execute any and all documents necessary in connection therewith;

(h) To do any other act or thing incidental to or connected with the foregoing purposes or in advancement thereof, but not for the pecuniary profit or financial gain of its members, directors, officers or any private person;

(i) In general, to perform any and all acts and things, and exercise any and all powers which may now or hereafter be lawful for the Corporation to do or exercise under and pursuant to the laws of the State of New York for the purpose of accomplishing any of the foregoing purposes of the Corporation.

FOURTH: The Corporation's mission and public objective, which the Corporation's purposes will achieve, include, but are not limited to, the lessening of the burdens of government by undertaking and promoting economic development projects and initiatives in the Erie County, New York area that will include real estate leasing, acquisition, development and management, real estate project finance, infrastructure development, operation and maintenance, along with other community-based economic development activities permissible under the Not-For-Profit Corporation Law.

FIFTH: The operations of the Corporation will be principally conducted within the territory of Erie County, New York and surrounding communities.

SIXTH: Pursuant to the requirements of Section 1411(e) of the Not-For-Profit Corporation Law:

(a) All income and earnings of the Corporation shall be used exclusively for its corporate purposes with the intent being that all income and earnings will be expended or deposited in appropriate reserves for corporate purposes; to the extent not so used, the income and earnings will accrue and be paid to the Job

Development Authority to the extent required by Section 1411 of the Not-for-Profit Corporation Law.

(b) The property of the Corporation is irrevocably dedicated to its corporate purposes. No part of the income or earnings of the Corporation shall inure to the benefit or profit of, nor shall any distribution of its property or assets be made to, any member, director or officer of the Corporation, or private person, corporate or individual, or to any other private interest, except that the Corporation may repay loans made to it and may repay contributions (other than dues) made to it to the extent that any such contribution may not be allowable as a deduction in computing taxable income under the Internal Revenue Code of 1986, as amended.

(c) If the Corporation accepts a mortgage loan or loans from the New York Job Development Authority, the Corporation shall be dissolved in accordance with the provisions of paragraph (g) of Section 1411 of the Not-For-Profit Corporation Law upon the repayment or other discharge in full by the Corporation of all such loans.

SEVENTH: (a) The Corporation shall not attempt to influence legislation by propaganda or otherwise, or participate in or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

(b) The Corporation shall not engage in any activities not permitted to be carried on by an organization exempt from federal income taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

EIGHTH: Upon the dissolution of the Corporation no member or private person, corporate or individual, or other private interest, shall be entitled to any distribution or division of its remaining funds and other property and rights and interests in property, and the balance thereof, after the payment of all debts and liabilities of the

Corporation of whatsoever kind and nature, (including the payment of loans and contributions the repayment of which has been authorized in the certificate of incorporation) shall be distributed to Erie County, New York for furtherance of the purposes set forth in paragraph (a) of Section 1411 of the Not-for-Profit Corporation Law of the State of New York. Any of such assets not so disposed of shall be disposed of by order of the Supreme Court of the State of New York pursuant to Section 1008 of the Not-For-Profit Corporation Law.

NINTH: The offices of the Corporation shall be located in Erie County, New York.

TENTH: The offices of the Corporation shall be functionally separate from those of Erie County or any of its affiliated entities (collectively, the "County Entities") (although such office may be in a facility leased from the County or any of its affiliates on arms-length terms). The Corporation at all times shall:

(a) maintain separate accounting records and other corporate records from those of the County Entities;

(b) not divert the Corporation's funds to any other person or for other than the use of the Corporation and not commingle any of the Corporation's assets with those of the County Entities;

(c) pay any employee, consultant or agent of the Corporation, or any other operating expense incurred by the Corporation, from the assets of the Corporation and not from the assets of any of the County Entities;

(d) maintain its own deposit account or accounts, separate from those of the County Entities, with commercial banking institutions and/or trust companies;

(e) to the extent that the Corporation contracts or does business with vendors or service providers where the goods and services provided are partially for the benefit of any other person, the costs incurred in so doing shall be fairly allocated to or among the Corporation and such persons for whose benefit the goods and services are provided, and the Corporation and each such person shall bear its fair share of such costs;

(f) conduct its business in its own name and conduct all material transactions between the Corporation and the County Entities only on an arm's-length basis;

(g) observe all necessary, appropriate and customary corporate formalities, including, but not limited to, holding all regular and special members' and directors' meetings appropriate to authorize all corporate action, keeping separate and accurate minutes of such meetings, passing all resolutions or consents necessary to authorize actions taken or to be taken, and maintaining accurate and separate books, records, and accounts, including, but not limited to, intercompany transaction accounts. Regular members' and directors' meetings shall be held at least annually;

(h) ensure that decisions with respect to its business and daily operations shall be independently made by the Corporation (although the officer making any particular decision also may be an employee, officer or director of the County Entities);

(i) act solely in its own corporate name and through its own authorized officers and agents, and use its own stationery;

(j) other than as expressly provided herein, pay all expenses, indebtedness and other obligations incurred by it;

(k) not enter into any guaranty, or otherwise become liable, with respect to any obligation of the County Entities;

(l) cause any financial reports required of the Corporation to be prepared in accordance with generally accepted accounting principles and be audited annually and be issued separately from, although they may be consolidated with, any reports prepared for any member of the County Entities; and

(m) ensure that at all times it is adequately capitalized to engage in the transactions contemplated herein.

ELEVENTH: The types or classes of Membership in the Corporation and the number of Members of the Corporation shall be described in the Corporation's By-laws.

TWELFTH: The Corporation shall be managed by a Board of Directors, who are to be comprised of those persons named in paragraph THIRTEENTH hereof (the "Directors"). Each of the Directors will serve at the pleasure of the Member and continue to hold office until his or her successor is appointed by the Member. Any subsequent increase or decrease in the size of the Board of Directors will require the unanimous approval of the Member(s) and the affirmative vote of a majority of the Directors.

THIRTEENTH: The Corporation will consist of not less than seven (7) nor more than fifteen (15) Directors. The Directors will be appointed by the Member and will include (a) Erie County Legislature Majority Leader, ex officio, (b) Erie County Legislature Minority Leader, ex officio (c) Erie County Deputy Budget Director, ex officio, (d) Erie County Chief Information Officer, ex officio, (e) Erie County Attorney, ex officio, (f) Erie County Commissioner of Environment and Planning, ex officio, (g) Buffalo and Erie County Public Library Director, ex officio, and (h) any additional person(s) as so appointed by the Member.

The names and addresses of the initial Directors of the Corporation are as follows:

Timothy Meyers
Erie County Legislature Majority Leader

95 Franklin Street, 4th Floor, Buffalo, New York 14202

Joseph Lorigo
Erie County Legislature Minority Leader
95 Franklin Street, 4th Floor, Buffalo, New York 14202

Benjamin Swanekamp
Deputy Director, Erie County Division of Budget and Management
95 Franklin Street, 16th Floor, Buffalo, New York 14202

Michael C. Breeden
Chief Information Officer
95 Franklin Street, Room 1500A, Buffalo, New York 14202

Michael Siragusa, Esq.,
Erie County Attorney
95 Franklin Street, Room 1634, Buffalo, New York 14202

Daniel Castle
Commissioner
Erie County Department of Environment and Planning
95 Franklin Street, 10th Floor, Buffalo, New York 14202

Jeannine M. Doyle
Director
Buffalo and Erie County Public Library
1 Lafayette Square, Buffalo, NY 14203

FOURTEENTH: The duration of the Corporation shall be perpetual.

FIFTEENTH: The Corporation shall indemnify each Member, each Director, each officer, and, to the extent authorized by the Board of Directors, each other person authorized to act for the Corporation or on its behalf, to the full extent to which indemnification is permitted under the Not-For-Profit Corporation Law.

SIXTEENTH: The Secretary of State of the State of New York is designated as agent of the Corporation upon whom process against it may be served. The post office address to which the Secretary of State shall mail a copy of any process against the Corporation served upon him is as follows: ErieNet Local Development Corporation, 95 Franklin Street, 16th Floor, Buffalo, New York 14202.

SEVENTEENTH: The By-laws of the Corporation may be adopted, amended or repealed by a majority of the Directors of the Corporation or by majority vote of the Member(s).

EIGHTEENTH: The Corporation will not do any of the following:

(a) Without the affirmative vote of all Members of the Corporation and the affirmative vote of a majority of the Directors, increase or decrease the number of Members of the Corporation or increase or decrease the number of Directors of the Corporation.

(b) Without the affirmative vote of a majority of the Directors of the Corporation (i) dissolve or liquidate, in whole or in part, or institute proceedings to be adjudicated bankrupt or insolvent, (ii) consent to the institution of bankruptcy or insolvency proceedings against it, (iii) file a petition seeking or consenting to reorganization or relief under any applicable federal or state law relating to bankruptcy or insolvency, (iv) consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator or other similar official of the Corporation or a substantial part of its property, (v) make a general assignment for the benefit of creditors, (vi) admit in writing its inability to pay its debts generally as they become due or (vii) take any corporate action in furtherance of the actions set forth in clauses (i) through (vi) of this paragraph.

(c) Without the affirmative vote of all of the Directors of the Corporation and all of the Corporation's members, merge or consolidate with any other corporation, company or entity or, except to the extent contemplated by paragraph THIRD hereof, sell all or substantially all of its assets or acquire all or substantially all of the assets or capital stock or other ownership interest of any other corporation, company or entity,

IN WITNESS WHEREOF, this certificate has been subscribed this ____ day of _____, 2021.

Robert G. Murray, Esq., Incorporator
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, New York 14210

CERTIFICATE OF INCORPORATION
OF
ERIENET LOCAL DEVELOPMENT CORPORATION

(Under Section 1411 of the Not-For-Profit Corporation Law of the State of New York)

Filed by: Robert G. Murray, Esq.
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, New York 14210