

**DERBYSHIRE COUNTY COUNCIL**

**CABINET**

**24 April 2012**

**Joint Report of the Strategic Director for Children and Younger Adults  
and the Director of Legal Services**

**SCHOOLS BROADBAND**  
(EDUCATION)

**1. Purpose of the Report**

To note an urgent decision taken by the Chief Executive consenting to emPSN Infrastructure Co (ICo) entering into an Infrastructure Agreement with Kcom Limited (Kcom) and to seek approval for decisions in respect of the County Council exercising its rights as a Member of the emPSN Infrastructure Company and the emPSN Services Company (SCo) to be delegated to the Strategic Director – Children and Younger Adults in consultation with the Cabinet Member for Education.

**2. Information and Analysis**

Reports to Cabinet on 20<sup>th</sup> September 2011, 22<sup>nd</sup> November 2011 and 13<sup>th</sup> December 2011 provided updates and recommendations for the replacement of the current schools broadband service provision delivered by embc-pl through a regional procurement under the East Midlands Public Sector Network (emPSN).

The County Council became members of both emPSN companies, ICo and SCo. The purpose of ICo is the management of the emPSN core network and the connectivity from the core to school or corporate buildings. Kcom was awarded the contract to supply these services.

SCo's role is the management of services through framework agreements with service providers for schools and other public sector bodies to call-off from. These services are provided on top of the base connectivity provided through ICo and Kcom, and include web filtering, email and website hosting. BT, Kcom, Updata and Virgin were awarded entry onto all of the framework agreements. Capita will be on all except for the framework for access circuits.

## **2.1 Urgent Decision**

It was necessary for ICo to enter into the Infrastructure Agreement with Kcom before 31<sup>st</sup> March 2012 in order to secure continuity of service for all schools connected to the embc network when the current contract expires on 31<sup>st</sup> October 2012. The Infrastructure Agreement ensures that the emPSN will be built and supplied by Kcom ready for the transfer of services on 1<sup>st</sup> November 2012, and the operation, maintenance, management and development of the emPSN thereafter. The Agreement also enables SCo to proceed to enter into the framework agreements with the selected providers to ensure continuity of services, such as web filtering, email and website hosting.

To have delayed taking the decision to consent to ICo entering into the Infrastructure Agreement until this meeting of Cabinet would have therefore placed at risk the security of service of those schools currently connected to the embc network. The effect of this would have been that emPSN would have been unable to ensure continuity of connectivity and services to Derbyshire schools when the existing contract comes to an end on 31<sup>st</sup> October 2012. This would also be contrary to the County Council's approach, including the Cabinet decision on 10<sup>th</sup> January 2012 to spend up to £756,000 on a one-off investment from earmarked central Dedicated Schools Grant underspend in the core network to support access for Derbyshire schools.

The Chief Executive, therefore, in exercise of his powers under the Council's Constitution, approved the County Council's consent to ICo entering into an Infrastructure Agreement with Kcom following discussions. A copy of the Strategic Director's report to the Chief Executive is attached.

## **2.2 Proposed delegation of powers**

The business of both emPSN ICo and SCo provide for the Board of Directors to be the decision-making body, subject to the respective corporate governance rules.

### **emPSN ICo**

The governance arrangements of emPSN ICo are set out in its Members' Deed of Agreement and Articles of Association. As a Public Good Member, the County Council is able to provide input and guidance on the longer term strategy decisions of the company. Andy Callow, Head of CAYA ICT, was appointed by Cabinet on 13<sup>th</sup> December 2011 to be a director of emPSN ICo. As a director appointed by a Public Good Member, he is entitled to vote on all matters before the Board, except for those matters which affect only contracting members, being those councils which are signing long-term services contracts with Kcom under the Infrastructure Agreement, which shall be determined only by those directors appointed by contracting members.

### emPSN SCo

The governance arrangements of emPSN SCo are set out in its Membership Rules and Articles of Association. As a local authority member, the County Council will be able to be an active member for the benefit of Derbyshire schools. Andy Callow, was appointed by Cabinet on 22<sup>nd</sup> December 2011 to also be a director of SCo.

The constitutions of the respective companies provide for significant decisions to be reserved matters, for ICo requiring the consent of all members, and for SCo the majority of members.

In its capacity as a member of both companies, the County Council will be asked to give its consent to further matters as they arise. For example, in the foreseeable future, the Board of SCo may seek its members' formal consent for SCo to enter into framework agreements with Kcom and the other service providers for the supply of access and application services that will be available to schools.

In order to provide an efficient and proportionate approach to managing the County Council's responsibilities as a member of both emPSN companies it is proposed that authority is delegated to the Strategic Director – Children and Younger Adults, in consultation with the Cabinet Member for Education, to make decisions in respect of the County Council exercising its rights as a member of both companies.

It is proposed that decisions which either directly affect the County Council's membership of either company or which have a significant impact upon the County Council's membership would remain decisions to be taken by Cabinet. For example, this would include decisions in respect of any material changes to company governance rules or any decision in respect of the County Council terminating its membership of either company. Approval of the companies' five year plans or any material changes which are outside the Children and Younger Adults' Department Service Plan would also remain Cabinet decisions.

Those decisions which would be subject to the proposed delegation to the Strategic Director – Children and Younger Adults are those which either only indirectly impact the County Council or which have a less significant impact upon the County Council. Examples could include decisions in respect of ICo which are special reserved matters requiring the consent of 75 per cent or more of members, or which relate to the company entering or terminating a contract, or buying or selling assets, at a total price exceeding £5,000 but which are not in the ordinary course of the business of emPSN or provided for in the five year plan.

Further, it is proposed that scope should remain for the Strategic Director, after consultation with the Cabinet Member for Education, to decide that a decision which would ordinarily be within this specific delegation should be taken by Cabinet in circumstances where this is considered to be more appropriate.

This proposal would also have the benefit of ensuring that there is a clear distinction between the decision-making process of the County Council as a member of both companies and that of Andy Callow as the director of both companies appointed by the County Council. As a director, Andy Callow's responsibilities include exercising independent judgement in order to promote the success of the companies rather than acting as a mere conduit for the County Council's viewpoint.

### **3. Financial Considerations**

The current cost of the broadband contract for access, services and contract management is around £4m p.a. Over a four year period, the new arrangements are anticipated to reduce access costs by £4m in total through investment in the core network and subsequent changes to design.

### **4. Legal Considerations**

The Chief Executive's decision was taken in accordance with the Scheme of Delegation contained in the County Council's Constitution which provides that "Notwithstanding any other provision of this Constitution, the Chief Executive shall have power, after discussion, if practicable, with the Leader of the Council or the relevant Cabinet Member or Chairman, to take such action deemed to be necessary and expedient in matters requiring urgent consideration and which, because of the timescale involved, or the need to safeguard the interests of the County Council, cannot be dealt with by submission to the next following meeting of the Council, Cabinet, Cabinet Member or Committee."

### **5. Other Considerations**

In preparing this report the relevance of the following factors has been considered; prevention of crime and disorder, equality, environmental, HR, health, property and transport considerations.

### **6. Key Decision**

No.

**7. Call-in**

Is it required that call-in be waived in respect of the decisions proposed in the report? No.

**8. Background Papers**

Held by Andy Callow in CAYA ICT.

**9. OFFICERS' RECOMMENDATIONS**

That Cabinet:

1. notes the urgent decision taken by the Chief Executive to approve the County Council's consent to emPSN ICo entering into an Infrastructure Agreement with Kcom Limited; and
2. delegates to the Strategic Director – Children and Younger Adults, in consultation with the Cabinet Members for Education and Technology and Recycling, decisions in respect of the County Council exercising its rights as a member of emPSN Infrastructure Company and emPSN Services Company on the basis set out in this report.

**Ian Thomas**  
**Strategic Director for Children & Younger Adults**

**John McElvaney**  
**Director of Legal Services**

**DERBYSHIRE COUNTY COUNCIL**

**DECISION DELEGATED TO THE CHIEF EXECUTIVE**

**27 March 2012**

**Report of the Strategic Director for Children & Younger Adults**

**SCHOOLS BROADBAND**  
(EDUCATION)

**1. Purpose of the Report**

To seek approval for the County Council to exercise its rights as a member of emPSN Infrastructure Co (ICo) to consent to the Company entering into an Infrastructure Agreement with Kcom Limited for the supply and build of the East Midlands Public Sector Network (emPSN).

**2. Information and Analysis**

On 13th December 2011, Cabinet agreed for the County Council to become a Public Good Member of ICo. ICo was incorporated on 23<sup>rd</sup> February 2012 with five members, namely Derbyshire, Lincolnshire, Leicestershire, Leicester City and Northamptonshire. The Board members, including Andy Callow of Derbyshire, approved and recommended to the Members that the Company enters into an Infrastructure Agreement ('IA') with Kcom, as the successful bidder, to supply and build the emPSN from 1 November 2012 and to operate, maintain, manage and develop the emPSN for a minimum of 7 years, and to provide certain access and application services to so-called 'anchor tenants', being Lincolnshire County Council and Leicester City Council, who will sign 7 year contracts for these services at the outset.

As a Public Good Member, Derbyshire will not sign a contract for services with ICo, nor receive services directly from Kcom, but will be able to provide input and guidance on the longer term strategic decisions of the Company. As approved by Cabinet, the County Council is recommending to Derbyshire schools that they contract directly for broadband services through emPSN Services Company (SCo), the sister company of ICo, of which the County Council is also a member.

The completion of the IA is being led by Eversheds, who have been the legal advisors to embc-pl and now ICo and SCo throughout the procurement and

company restructure. Eversheds has advised that the IA cannot be completed until all five members have signed a resolution confirming their consent to ICo entering into it. This is in accordance with the ICo Members Deed of Agreement which determines the decision to be an Unanimous Reserved Matter requiring the consent of all Members.

Eversheds has advised that consent from all 5 members is required this week in order to enable the IA to be completed by Friday 30<sup>th</sup> March. In the absence of the IA, security of service for the existing schools connected to the current embc network will be at risk as it will not be possible to sign the framework agreements that depend on the IA to provide the core network. Derbyshire would then be unable to ensure continuity of connectivity and services when the existing contract comes to an end on 31<sup>st</sup> October 2012. This would also be contrary to the County Council's approach, including that of the Cabinet decision on 10<sup>th</sup> January 2012 to spend up to £756,000 as a one-off investment, from earmarked central Dedicated Schools Grant underspend, in the core network to support access for Derbyshire schools.

As well as notifying Cabinet of this decision at the next opportunity, it is proposed to seek approval for a specific delegation, in line with Part 3 of the Council's Constitution, to the Strategic Director – Children and Young Adults, in consultation with the Cabinet Member for Education, to make decisions in respect of the Council exercising its rights as a Member of both emPSN Companies in order to deal more appropriately with requests such as that being made of the Council at this time.

### **3. Financial Considerations**

As set out in previous reports, the savings for Derbyshire schools obtaining connectivity and services through emPSN is predicted to save approximately £4M over 4 years.

### **4. Legal Considerations**

The Chief Executive has the power, in accordance with Part 3 of the Constitution (Responsibility for Functions), after discussion, if practicable, with the Leader of the Council or relevant Cabinet Member or Chairman, to take such action deemed to be necessary and expedient in matters requiring urgent consideration and which, because of the timescale involved, cannot be dealt with by submission to the next following meeting of the Council, Cabinet, Cabinet Member or Committee.

The Director of Legal Services considers it appropriate for the Chief Executive to use this power given that the security of schools' broadband connectivity within the East Midlands region is at risk if the decision is delayed until the next meeting of Cabinet on 24<sup>th</sup> April 2012.

## **5. Other Considerations**

In preparing this report the relevance of the following factors has been considered; prevention of crime and disorder, equality, environmental, HR, health, property and transport considerations.

## **6. Key Decision**

No.

## **7. OFFICERS' RECOMMENDATIONS**

That the Chief Executive approves the County Council's consent to ICo entering into an Infrastructure Agreement with Kcom Limited.

**Ian Thomas**  
**Strategic Director for Children & Younger Adults**

**Approved:**

\_\_\_\_\_  
Mr N Hodgson, Chief Executive  
Date:\_\_\_\_\_