

Creating a Level Playing Field for Access to and Use of City Rights-of-Way by Telecom Organizations

(City Council on November 23, 24 and 25, 1999, adopted this Clause, without amendment.)

The Policy and Finance Committee recommends the adoption of the Recommendations of the Telecommunications Steering Committee embodied in the confidential communication (October 25, 1999) from the City Clerk, entitled “Creating a Level Playing Field for Access to and Use of City Rights-of-Way by Telecom Organizations”, which was forwarded to Members of Council under confidential cover.

(City Council on November 23, 24 and 25, 1999, had before it, during consideration of the foregoing Clause, the following confidential communication (October 25, 1999) from the City Clerk:

Recommendation:

The Telecommunications Steering Committee recommended to the Policy and Finance Committee the adoption of the confidential report (October 20, 1999) from the Chief Administrative Officer subject to:

- (i) amending Recommendations Nos. (1) and (2) by deleting therefrom the word “Encroachment/”; and*
- (ii) amending the first line of Recommendation No. (2) to read “until such time as a more formal structure is developed, current and new telecom users of the City ROW be notified by the Chair of the Telecommunications Steering Committee that no approvals or permits...”;*

so that said recommendations shall now read as follows:

- “(1) all telecom organizations currently using, and all telecom organizations requesting access to and use of, City rights-of-way (ROW) be requested to enter into either an approved form Municipal Access Agreement or Street Crossing Agreement as determined appropriate by the City;*
- (2) until such time as a more formal structure is developed, all current and new telecom users of the City ROW be notified by the Chair of the Telecommunications Steering Committee that no approvals or permits can be issued for the installation and/or use of plant until the City receives written notice of their intent to negotiate and enter into either an approved form Municipal Access Agreement or Street Crossing Agreement as determined appropriate by the City;”.*

Background:

The Telecommunications Steering Committee at its in-camera meeting on October 25, 1999, had before it a confidential report (October 20, 1999) from the Chief Administrative Officer recommending that:

- (1) all telecom organizations currently using, and all telecom organizations requesting access to and use of, City rights-of-way (ROW) be requested to enter into either an approved form Municipal Access Agreement or Encroachment/Street Crossing Agreement as determined appropriate by the City;*
- (2) current and new telecom users of the City ROW be notified that no approvals or permits can be issued for the installation and/or use of plant until the City receives written notice of their intent to negotiate and enter into either an approved form Municipal Access Agreement or Encroachment/Street Crossing Agreement as determined appropriate by the City;*
- (3) new telecom users of the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of six months from the date of Council approval of this report, may be given by the Telecommunications Steering Committee subject to receipt of the written requirement in recommendation two and on the terms and conditions determined appropriate by the City including the provision of detailed plans for review purposes;*
- (4) telecom organizations already occupying the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of twelve months from the date of Council approval of this report, may be given by the Telecommunications Steering Committee subject to receipt of the written requirement in recommendation two, and on the terms and conditions determined appropriate by the City including the provision of detailed plans for review purposes;*
- (5) if the appropriate Agreements are not in place and approved by City Council at the end of the specified timeframes, and in the absence of any extensions approved by the Council, the interim authority of the Telecommunications Steering Committee will expire and no further approvals will be issued for the installation and/or use of the plant by the organizations involved, unless individually reported to Council on an exception basis; and*
- (6) the appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.*

*(Report dated October 20, 1999 from the Chief Administrative Officer
addressed to the Policy and Finance Committee)*

Purpose:

The Telecommunications Steering Committee wishes to create a level-playing field for all telecom organizations now having or wishing access to and use of the public rights-of-way (ROW) or municipal property in the City of Toronto. Deregulation is placing existing telecom organizations such as Bell Canada and Rogers Cable Systems in competition with new players who do not have the former advantages of the previous monopolies. In order to treat all existing and future players equally, the Steering Committee is making a series of recommendations to codify processes and preserve the structural and operating integrity of the ROW, beginning with telecom organizations.

Financial Implications and Impact Statement:

The Council of the City of Toronto has approved five principles developed by the Federation of Canadian Municipalities (FCM) concerning public rights-of-way (ROW). The principles include that municipalities must receive fair compensation associated with right of access, occupancy and use of the ROW by telecom providers and broadcasting undertakings. Accordingly, the City is continuing to require this in its Municipal Access Agreements and other Agreements. The nature and type of compensation to municipalities in this regard is one of the matters subject to a future Hearing at the CRTC. The recommendations in this report have future financial implications respecting City Agreements with all current and new telecom users of the ROW and, subsequently, with other users of City ROW. The Chief Financial Officer and Treasurer has reviewed this report and concurs with the financial impact statement.

Recommendations:

It is recommended that:

- (1) all telecom organizations currently using, and all telecom organizations requesting access to and use of, City rights-of-way (ROW) be requested to enter into either an approved form Municipal Access Agreement or Encroachment/Street Crossing Agreement as determined appropriate by the City;*
- (2) current and new telecom users of the City ROW be notified that no approvals or permits can be issued for the installation and/or use of plant until the City receives written notice of their intent to negotiate and enter into either an approved form Municipal Access Agreement or Encroachment/Street Crossing Agreement as determined appropriate by the City;*
- (3) new telecom users of the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of six months from the date of Council approval of this report, may be given by the Telecommunications Steering Committee subject to receipt of the written requirement in*

recommendation two and on the terms and conditions determined appropriate by the City including the provision of detailed plans for review purposes;

- (4) telecom organizations already occupying the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of twelve months from the date of Council approval of this report, may be given by the Telecommunications Steering Committee subject to receipt of the written requirement in recommendation two, and on the terms and conditions determined appropriate by the City including the provision of detailed plans for review purposes;*
- (5) if the appropriate Agreements are not in place and approved by City Council at the end of the specified timeframes, and in the absence of any extensions approved by the Council, the interim authority of the Telecommunications Steering Committee will expire and no further approvals will be issued for the installation and/or use of the plant by the organizations involved, unless individually reported to Council on an exception basis; and*
- (6) the appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.*

Background:

Council established the Telecommunications Steering Committee in February 1999, to develop a corporate-wide and strategic City approach and plan for telecom issues. At its meeting of July 27, 28, 29 and 30, 1999, the Council approved Clause No. 14 contained in Report No. 4 of the Policy and Finance Committee, headed "Coordination of Telecommunications Matters: First Report from the Council-Established Telecommunications Steering Committee". That report outlined a number of activities to ensure City-wide coordination and the development of a comprehensive policy respecting the use of the public rights-of-way managed by the City.

At its meeting of September 28 and 29, 1999, the Council adopted, as amended, Clause No. 17 contained in Report No. 7 of the Policy and Finance Committee, headed "Reporting on Time-Critical Telecommunications Matters". That report included recommendations on applications for access to the public rights-of-way, an initial standard form Municipal Access Agreement for City use, the adoption of ROW principles developed by the FCM, and financial approvals to aid in telecommunications development and strategy.

Comments:

This report addresses several significant policy issues related to implementing Agreements for access to and use of the public ROW and recommends the creation of a level playing field for telecom organizations in their dealings with the City.

(a) *The Deregulation Context:*

Technological developments and deregulation of the telecommunications industry by the federal government during the 1990's, has created the boom in infrastructure development and activity that was expected. Concurrently, there has been a convergence of many technologies that has introduced competition for the traditional monopolies providing cable television, telephone, electric and gas services.

There has been a resultant proliferation of players including those formerly heavily regulated monopolies as well as private organizations, both large and small. For example, gas companies are buying electric companies; telephone companies are offering Internet services; cable television companies are being challenged by satellite program services; and cellular telephone service is increasingly going "wireless" using digital technology. Existing telecom organizations are replacing and developing their analog infrastructure with digital transmission and storage as the first step in taking advantage of deregulation and, increasingly, utility organizations are laying fibre optic cable and have developed technology to transmit signals on their wires.

Telecommunications traffic, fuelled by explosive use of Internet services, is projected to grow more than eleven-fold by the year 2002, according to researchers Ryan Hankin Kent Inc., as cited in a Washington Post article in July of 1999. Designed to achieve several goals such as to promote competition and to reduce regulation to secure lower prices, higher quality services, and more consumer choice, deregulation has also had some unintended results from the municipal perspective.

(b) *The Municipal Context:*

(i) *Municipal Authority:*

Within the climate of telecommunications privatization, deregulation and the emergence of new technologies, applications to install equipment or to upgrade or expand infrastructure in public rights-of way (ROW) have exploded. The municipal sector has a role of trustee respecting access to and use of ROW. Municipal consent under the federal Telecommunications Act, 1993 is required for access to and installation/construction in the ROW on such conditions and terms, including cost-recovery, as agreed to by the parties. In this role, the municipality has the responsibility to maintain the ROW structural and manage the numerous uses of ROW over time to serve taxpayers and various users alike, and to do this recognizing the limited physical capacity of the ROW, especially in the utility congested urban core.

(ii) *Description of Rights-of-Way:*

ROW's consist of above and below ground (surface and subsurface) spaces that are essential to the health, safety, transportation, communications and economic development of a community. Examples of typical ROW areas include bridges, viaducts, tunnels, sidewalks and highways, roadways, lanes and other streets. In cases of municipal ROW, the lands and associated city facilities and structures were acquired with public funds usually drawn from the property

tax-base. A city's ROW's are, therefore, assets belonging to the general public and managed on behalf of the public by the local government.

Above-ground ROW accommodate pedestrian and vehicular traffic, shade trees and beautification elements, traffic signals and signs, street lights, sidewalk cafes, poles, aerial wires, cellular towers, antennas and water towers, for example. Underground, the ROW accommodate telephone and television cables, sanitary sewers, storm sewers, water mains, gas lines, transmitters, high-pressure steam ducts, heating and cooling distribution systems, and various other conduits, ducts, poles, pipes, utility vaults, maintenance hole chambers, power lines and storage tanks.

(iii) City Management of ROW Access and Use:

Management of the ROW requires balancing essential and competing demands on the same property in order to protect the public interest. Efficient use of ROW through the development of policies and practices designed to protect the health and safety of communities, the existing facilities of local government, and other ROW users, is an issue of high priority to municipalities within the current climate.

ROW are typically used for the installation of phone, cable television, electric, gas water and waste treatment services. The nature of most installations, equipment and infrastructure is that once in place, they cannot easily be removed, repaired, or relocated. While the increased activity in ROW by telecommunications organizations will result in benefits to the economy once the services are offered, there are also direct and indirect ongoing costs to municipalities resulting from this activity. The costs to municipalities include a shortened street life from repeated cuts, traffic and/or pedestrian disruption, increased administration, inspection and maintenance activities, ongoing management costs, and the real threat of lost ROW space for local and other future uses due to increasing congestion. Achieving the necessary balance between the benefits and costs of telecom activities in ROW, is a priority for the City of Toronto, as is attempting to ensure that new entrants are, to the extent possible, given sufficient opportunity to access the ROW.

(c) The Municipal Access Agreement:

The FCM recently amended its series of principles for ROW access and use by telecom organizations. On September 28 and 29, 1999, the Council of the City of Toronto adopted those principles as follows:

- 1. In pursuance of bona fide municipal purposes, municipal governments must have the ability to manage the occupancy and uses of rights-of-way, including the establishment of the number, type and location of telecommunications and broadcasting facilities, while taking into account applicable technical constraints;*
- 2. Municipal governments must recover all costs associated with occupancy and use of rights-of-way by telecommunications service providers and broadcasting undertakings;*

3. *Municipal governments must not be responsible for the costs of relocating telecommunications and broadcasting facilities if relocation is required for bona fide municipal purposes;*
4. *Municipal governments must not be liable for losses associated with the disruption of telecommunications or broadcasting services or with damage to the property of telecommunications service providers or broadcasting undertakings as a result of usual municipal activities or the activities of other parties; and*
5. *Recognizing that rights-of-way have value, municipal governments must receive full compensation for the occupancy and use of municipal rights-of-way by telecommunications service providers and broadcasting undertakings.*

The FCM first proposed a model Municipal Access Agreement (MAA) to establish the respective responsibilities and rights of the City and telecom organizations (and their affiliates and third parties) in accessing and using municipal rights-of-way, in the mid nineteen-nineties. In 1997, in the former City of Toronto and two months later in the former Municipality of Metropolitan Toronto, a Municipal Access Agreement (MAA) was finalized with MetroNet Communications Inc. This agreement was as a result of a Request for Proposal process to enter/ access public street allowances for the purposes of installing, maintaining and operating a high-speed, fibre-optic telecom network. Since that time, MAA's have become common in many North American municipalities.

In the new City of Toronto, the Council adopted an interim standard Municipal Access Agreement at its meeting of September 28 and 29, 1999. The City MAA is consistent with the five principles above and contains provisions, terms and conditions that are fair and beneficial to both the City and a telecom provider(s).

(d) Summary of ROW Compensation Issues:

Changing fiscal realities and the high-demand from competitive telecom organizations have caused local municipalities to re-think what constitutes good management of the ROW's and to identify what access, management and other fees are fair and justifiable in terms of municipal compensation. Through adoption of the five FCM principles, the City of Toronto supports the principle that municipalities have the right to receive fair compensation associated with the access to and use of, public rights-of-way (ROW) and the value of the rights granted.

For example, municipalities cite the initial costs in acquiring ROW lands, as well as ongoing municipal costs to fix road deterioration caused by repeated cuts for ROW access, for example. The (U.S.A.) National Research Council found that utility cuts can reduce roadway life by up to 60% based on more than 30 studies of the matter. Several jurisdictions such as Sacramento, California and Surrey, British Columbia impose a Pavement Damage Fee, and other jurisdictions impose a Traffic Disruption Fee and/or a License Fee and/or a Rental Fee, in order to protect the integrity and availability of public property for future use. Still others have estimated that up to 20% of municipal operating costs in ROW are due specifically to working around telecom and utility plant.

FCM has planned for some time to appear before the CRTC to ask for a determination of the rights of municipalities under the Telecommunications Act, but needed the right issue and time to do so. In this regard, a test case has arisen involving Leducor and the City of Vancouver applying to the CRTC to resolve their impasse over negotiating a ROW agreement. As explained in the report at the July 20 Policy and Finance Committee from the City Solicitor and the Commissioner of Works and Emergency Services, the CRTC has responded to the applications by opening the hearing to a Public Notice process. This is done when an issue is considered to have national implications that may affect parties other than those immediately involved in the dispute.

Rationale for Establishing a Level-Playing Field:

Respecting access to and use of ROW, past municipal franchise agreement models treated telecom organizations the same as (formerly) non-profit public utility monopolies. Deregulation has changed the motivation and nature of operations, and has rendered visible the policy issues surrounding the ROW as discussed earlier in this report. The property taxpayer is no longer the same as the utility or telecom ratepayer; i.e., there are specific users, for specific services, offered by different organizations, in the newly deregulated environment. Municipalities have generally concluded that it is not the taxpayers' role to subsidize the shareholders of profit-making organizations. This is the case, however, if the costs to municipalities for the access to and use of public assets by such organizations are not fully recovered.

Until a final decision is rendered by the CRTC with respect to these matters, the Telecommunications Steering Committee wishes to establish a level-playing field for all telecom organizations now having or wishing access to and use of the ROW in the City of Toronto. Deregulation is placing existing telecom organizations such as Bell Canada and Rogers Cable Systems in competition with new players who do not have the former advantages of the previous monopolies. The City wishes to support the principle of fair and open competition among all the telecom organizations that approach it and wants to avoid giving unfair advantage to any entity over another.

A number of inter-related activities are necessary to create the correct environment for establishing a coordinated, fair and level playing field. The Telecommunications Steering Committee is taking action as approved by Council, both internal to the departments, agencies, boards and commissions of the City, and with external telecom organizations including:

- ensuring a Corporate-wide approach in coordinating and considering applications for the use of public ROW and related matters;*
- on an interim basis, receiving submissions from departments, agencies, boards, commissions and special purpose bodies of the City for telecom approvals or agreements not previously approved by the Council;*
- participating at FCM in developing ROW principles and policy statements, full cost-recovery models, and providing input for the upcoming CRTC Hearing;*
- gathering an inventory of current agreements within the City, maps/lists of sites by type of above or below ground installation and ROW use; and*

- *planning for potential City uses of ROW, as well as other uses and assessing future availability to develop City-wide telecom policy and strategy for Council approval.*

Recommended Actions to Establish a Level-Playing Field:

Under the direction of the Telecom Steering Committee, staff from Works and Legal refined the Municipal Access Agreement (MAA) from the former City, that was approved by Council on September 28 and 29, 1999. A standard form Encroachment/Street Crossing Agreement for ROW is also under development. Approval of the agreements by Council is one part of a plan to ensure that no unfair advantage is applied to one company over another due to past agreements, or traditional arrangements whereby some incumbent carriers (e.g. Bell Canada) were not subject to such agreements.

Recently, four new telecom organizations have contacted the City seeking permits for access to and the use of the public ROW, to varying degrees and for varying types of systems/installations. Municipal consent is required for such access on such conditions and terms as agreed to by the parties and as are necessary to protect both the public interest and the integrity of the ever-decreasing available space in the ROW. Each of these organizations is being notified that until they enter into a MAA with the City, permit approvals cannot be issued.

In order to treat all existing and future players equally, the Steering Committee is making a series of recommendations to codify processes and preserve the structural and operating integrity of the ROW for the public and all ROW users. For those telecom organizations having a long-standing, but relatively informal arrangement with the City for above or below ground installations, equipment, or infrastructure on ROW, negotiating a MAA is only a matter of formalizing those relationships.

First, it is recommended that all telecom organizations currently using, and all telecom organizations requesting access to and use of, the City rights-of-way be requested to enter into either an approved form Municipal Access Agreement, or Encroachment/Street Crossing Agreement as determined appropriate by the City.

Second, it is recommended that current and new telecom users of the City ROW, be notified that no approvals or permits can be issued for the installation and/or use of plant until the City receives written notice of their intent to negotiate and enter into either an approved form Municipal Access Agreement, or Encroachment/Crossing Agreement as determined appropriate by the City.

Third, it is recommended that new telecom users of the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of six months from the date of Council approval of this report, may be given by the Steering Committee subject to receipt of the written requirement in recommendation two and on the terms and conditions determined appropriate by the City including the provision of detailed plans for review purposes.

Fourth, it is recommended that telecom organizations already occupying the City ROW be notified that pending the successful negotiation of the appropriate Agreement, interim approval to install and/or use plant on the ROW for a period of twelve months from the date of Council approval of this report, may be given by the Steering Committee subject to receipt of the written requirement in recommendation two, and on the terms and conditions determined appropriate, including the provision of detailed plans for review and circulation purposes.

Fifth, it is recommended that if the appropriate Agreements are not in place and approved by City Council at the end of the specified timeframes, and in the absence of any extensions approved by the Council, the interim authority of the Telecommunications Steering Committee will expire and no further approvals will be issued for the installation and use of the plant by the organizations involved, unless individually reported to Council on an exception basis.

Conclusion:

This report deals with several major policy issues including management of the public ROW, ensuring fair and reasonable recovery of all costs associated with access to, occupancy, degradation of, and use of, the limited public ROW. It also recommends the establishment of a level-playing field for telecom organizations wishing access to and use of the public ROW by requiring them to enter into approved form Municipal Access Agreements before the issuance of permits, and places limits on plant installation or use until such Agreements are in place.

There are implications in the principles discussed herein for other types of organizations also, and for services and businesses and users other than telecom organizations. While the current demand and legislative obligations of municipalities requires that immediate attention be given to the high demands and matters arising from telecom organizations, they are only one of many groups occupying and using public ROW.

In the coming months, analysis to extend and apply the principles and approaches recommended in this report to other ROW users shall be undertaken by staff under the direction of the Chief Administrative Officer. An important part of that approach shall be to ascertain the value of the ROW by the type of space, use, occupancy and prevention of other use, for example, associated with the activity carried out. In this manner, establishment of a level-playing field for the access and use of public ROW and determining the needs and plans of the City itself, is the ultimate goal, beginning with telecom organizations and the work of the Telecom Steering Committee.

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