MTS Allstream Lease of Decommissioned Underground Pipe System – End of Term Action Plan

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<td>Public Works and Infrastructure</td>
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<td>General Manager, Transportation Services</td>
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**SUMMARY**

The term of a 15-year lease agreement with the telecommunications firm MTS Allstream Inc. for use of a City-owned decommissioned pipe system in the City’s downtown core to house its fibre optics networking infrastructure is expiring in August 2012. Under the provisions of the Agreement, it is contemplated that the City and the company shall enter into negotiations for a 5-year renewal on such terms and conditions as may be agreed to by the parties.

Staff therefore recommend that negotiations with MTS Allstream leading to the previously contemplated renewal, be commenced and the terms and conditions be submitted to Committee and Council for approval.

**RECOMMENDATION**

The General Manager of Transportation Services recommends that:

1. City Council direct the General Manager of Transportation Services and the City Solicitor to engage in negotiations with MTS Allstream for the renewal of the "Lease of City Decommissioned Underground Pipe System and Licence of the Use of the City Right of Way", and report back to the Public Works and Infrastructure Committee on the proposed terms and conditions of renewal.

**Financial Impact**

The financial implications of a lease renewal for the decommissioned pipe system will be provided when staff report back on the terms and conditions of an Agreement.
ISSUE BACKGROUND
In 1997, the City of Toronto entered into a 15 year Agreement with what is now the telecommunications firm MTS Allstream, for the "Lease of City Decommissioned Underground Pipe System and Licence of the Use of the City Rights-of-Way", for the purpose of deploying, maintaining and operating a fibre optics-based, competitive telecommunications network. The Agreement term expires in August 2012, and given the potential complexities in negotiating an extension (there are provisions for a five year renewal if mutually agreed), or pursuing an alternate course, it is imperative that steps be taken as soon as possible to determine the City's approach and negotiate the continued use of the pipe system by Allstream and/or other disposition.

COMMENTS
Through the early and mid-1990s, the Government of Canada was engaged in an extensive revamp of the framework for provision of telecommunications service in Canada to open up competition in long distance and local phone service. At the same time, new digital technologies were introduced and an emerging demand for bandwidth was increasing exponentially. The Canadian Radio and Television/Telecommunications Commission (CRTC), pursuant to its authority, under the Telecommunications Act, adopted a model of "facilities-based competition". In other words, competitive carriers were encouraged to build their own networks as an alternative to using the facilities of the traditional incumbent carriers.

Around this time, City staff recognized that a decommissioned high-pressure water pipe system in the downtown core may have potential to be adapted for reuse as a conduit network to carry fibre optic cable and facilitate the roll-out of telecommunications networks. This was also seen as a key economic development initiative for the City. Thus, although dormant for decades, an opportunity was seized to convert the system into a potentially valuable City asset.

An agreement for the lease of the decommissioned water pipe and a license for the use of public highways beyond the pipe system was signed in 1997 (subsequently amended in 1998 to allow expanded coverage throughout the amalgamated City of Toronto) with the firm called Metronet Communications Group, now MTS Allstream. This was the culmination of an extensive RFP process. The agreement has a 15 year term, with expiry at the end of August, 2012. In addition to the leaseholder, Allstream, deploying its own network within the pipes, it was also originally envisaged that the pipes would be managed by Allstream for use by other carriers on a sublease basis. However, for a variety of reasons, the most significant being economic, this element of the agreement did not develop as originally planned.

DESCRIPTION OF THE SYSTEM
The decommissioned high pressure water pipe system, comprising about 17 km in total length, was originally installed in the downtown core area as fire-fighting system, generally in the area bounded by Front Street, Bathurst Street, Queen Street West and Jarvis Street, with a northward extension as far as Dundas Street in the vicinity of City Hall/Eaton Centre. It had fallen into disuse years earlier. Although initial sections date
back to the mid-1800's, the system, comprised of large cast iron pipe, with associated valves and connections, was generally intact and in reasonably good condition. Inside diameter of the pipes varied generally from 200mm (8 inch) to 500mm (20 inch), enabling the placement of a number of "innerducts" to accommodate several fibre optic lines. The pipes are somewhat deeper than typical telecom installations, at 1.8m to 2.2m. There were no lateral connections into buildings.

As the system was leased on an "as-is" basis, under the terms of the Agreement the successful proponent was responsible for all work and associated costs to refurbish the pipe system and facilitate its conversion to a viable telecom duct network. This included removal of rust build-up in the pipes, replacement of cut and missing sections, connection of laterals into buildings, removal of water valves and chambers, placement of innerduct, and construction of access chambers and ancillary plant for telecom network use. The advantage, of course, was that an extensive fibre optic network was rolled-out minimizing trenching in the downtown streets.

**KEY TERMS AND CONDITIONS**

- 15 year term, with additional 5 year renewal option subject to mutually agreeable terms;
- proponent responsible for administration, management and all costs related to refurbishment, maintenance and ongoing operation of the pipe system (no cost to City);
- provision of 4-pairs of dark fibre strands to City for municipal use and preferred service rates to City;
- performance requirements to encourage establishment of a viable telecom network;
- provisions to accommodate third party use through sub-lease provisions for "inner-ducts" (i.e. other telecom providers);
- construction, permitting, financing, insurance, indemnity, arbitration, default, expiry, assignment, and other standard commercial contract provisions; and
- compensation package to City, including certain revenue guarantees.

**AGREEMENT PROVISIONS AT EXPIRY OF TERM**

The agreement contains provisions which require that the parties engage in negotiations for a further five year renewal term on such terms and conditions as may be agreed.

An accompanying In Camera report from the City Solicitor has also been prepared in order to provide Committee and Council with an assessment of the legal obligations of the City under this section of the Agreement and the current legal framework surrounding the use of municipal property by telecommunications carriers, which is expected to have an impact on negotiations.
FINANCIAL PROVISIONS AND CHANGING TELECOM LANDSCAPE

The Agreement calls for the City to receive revenues from 3 basic components during the term (all figures subject to annual CPI increase):

- annual amount comprised of the greater of $1 Million (amended to $1.150M in 1998) or 3% of company gross revenue generated in Toronto and attributable to the network (there was also a one time lump sum payment to the City upon signing the Agreement);
- annual per-metre fee for company-owned fibre optic cable at rate of $17.50 per metre of installed cable, including minimum payment amounts for the first 5 years of the term; and
- annual per-metre fee for third party-owned fibre optic cable at rate of $17.50 plus $40.00 (later amended by Council to $20.00) per metre of installed cable to City, and $4.50 per metre to the company, including guaranteed amounts for first 2 years of the term.

These financial lease arrangements stipulated in the Agreement were quite lucrative for the City. However over the years, the entire telecom landscape changed from the wildly optimistic "goldrush" mentality at the beginning, through the tech bubble burst in the early '00s, and ultimately the bankruptcy of most of the start-ups, including Metronet's successor AT&T Canada (MTS Allstream ultimately absorbed its assets).

Throughout this period, the CRTC issued a series of landmark rulings fundamentally altering the dynamic between the carrier companies and Canadian municipalities, particularly in respect of payments and fees to municipalities that would be permitted. A number of these rulings were challenged all the way to the Supreme Court of Canada. The body of decisions during this period essentially established the framework for the relationship between the telecom carriers and municipalities. It also clearly established Federal jurisdiction of this arena and in general, with the exception of a couple of rulings, has not been to the advantage of municipalities. Through these decisions, the following general principles have been established:

- Canadian telecommunications carriers and distribution undertakings (i.e. cable TV companies) have the right, subject to the consent of the owner, to enter upon and break up highways and other "public places" for the purposes of constructing, maintaining or operating their networks and may remain there as long as necessary for that purpose.

- Where companies cannot obtain consent on terms acceptable to them, the CRTC has jurisdiction to determine disputes between companies and municipalities having jurisdiction over highways and public places to grant permission on any conditions it determines.

- While municipalities are entitled to recover all costs incurred as a result of the companies' use and occupation of municipal property, the CRTC has determined
that it is "inappropriate" that companies be charged "rent" or any other fee in the
nature of land-based occupation charge.

PREVIOUS EXPLORATION OF A MUNICIPAL TELECOM DUCT SYSTEM

At the height of the competitive telecom roll-out in the early 2000's, a wide range of
options as to how the City should participate were looked at. Some options that were
considered in significant depth (a few actually reached a 'pilot' stage) ranged
from feasibility of establishing a municipal telecom authority, an open-access/public
sector/municipal-owned dark fibre network, use of abandoned gas and active sewer mains
as conduit structure involving installation of fibre optic cable by robotic methods, and
development of a municipal duct structure network.

The latter initiative involved the concept of retrofitting a managed common
telecommunications support structure (duct system), which if proven feasible and
economically viable, was seen as one approach in accommodating the growth in
telecommunications infrastructure of multiple carriers, thereby reducing the frequency of
road cuts and accordingly reduce costs to the general public, telecom carriers and other
utilities. It was thought that such a system could ultimately absorb and encompass the
decommissioned water pipe network.

A 2-year process was conducted in 2000 and 2001 leading to issuance of a "Request for
Expressions of Interest (July 2000)" followed by "Requests for Proposals (February
2001)" to "Design/Build/Maintain/Operate/Manage a Common Support Structure System
for Multiple Telecommunications Networks". Ultimately, 3 consortiums were short-listed
to submit full proposals, however, none ended up submitting, citing a number of
regulatory and economic barriers to establishing an economically viable municipal
system of ducts.

Staff are of the view that this previous exploration of the marketplace, among other
factors, has a significant bearing on how we proceed with the end of term disposition of
the Agreement. If anything, the parameters that saw the previous attempt at a municipal-
owned infrastructure fail have been clarified and strengthened by the intervening
regulatory and court decisions. There is certainly no change in the fact that the
incumbent carriers, and now the larger competitive rivals, have already established the
bulk of their own networks. Further, there is little indication that a carrier could be
legally compelled to install lines within the City's decommissioned pipes.

MOVING FORWARD

MTS Allstream has expressed its strong desire to retain its plant within the
decommissioned pipe system. It has also indicated that it will work with the City to
continue managing the system and explore ways to encourage third party use. In view of
all the considerations set out in this report, staff is therefore recommending that the
appropriate course of action is to engage in negotiations for the renewal as contemplated
in the Agreement. Staff would report back to Committee and Council for authority to
enter into the renewal on such terms and conditions as may be negotiated.
Should Allstream and the City not be successful in negotiating a renewal as contemplated under the Agreement, there are varying approaches that could be considered for moving forward at the end of term of the current Agreement. These approaches would need to be further assessed based on legal and economic viability. Staff are therefore recommending that they be authorized to attempt to negotiate an extension, as contemplated, with Allstream continuing as manager and maintaining their own network within the pipe system, recognizing the substantive change in the regulatory and economic landscape, but also seeking means to encourage broader use of the system.

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