

REGIONAL MUNICIPALITY OF OTTAWA-CARLETON
MUNICIPALITÉ RÉGIONALE D'OTTAWA-CARLETON

REPORT
RAPPORT

Our File/N/Réf. R.2.6.0
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DATE 7 January 1998

TO/DEST. Co-ordinator
Corporate Services and Economic Development Committee

FROM/EXP. Environment and Transportation Commissioner
Regional Solicitor

SUBJECT/OBJET **ROADS: UTILITIES ON REGIONAL ROADS
TELECOMMUNICATIONS - ACCESS TO REGIONAL
RIGHTS-OF-WAY**

DEPARTMENTAL RECOMMENDATIONS

That the Corporate Services and Economic Development Committee and Council approve the following:

1. That the Federation of Canadian Municipalities (FCM) action plan on telecommunications as detailed in Annex A to this report be received.
2. That the Regional Municipality of Ottawa-Carleton endorse the following five principles, which are outlined in, and form the basis of, a draft FCM Municipal Telecommunications Access Agreement;
 - a) Municipal governments must have the ability to control the number and types of above-ground telecommunication pedestals, kiosks, etc., and the location of underground infrastructure;
 - b) The use of municipal rights-of-way by telecommunication companies must not impose financial costs on municipal governments and taxpayers;
 - c) Municipal governments must not be responsible for the costs of relocating telecommunications infrastructure if relocation is required for planning or other reasons deemed necessary by the Municipal Government;

- d) **Municipal governments must not be liable for any economic loss, legal costs, or physical restoration costs resulting from the disruption of telecommunication services arising out of the actions of a municipal government unless grossly negligent;**
 - e) **Municipal governments must receive revenues over and above their direct costs in providing access to rights-of-way as proper compensation for the use of Municipal property for profit;**
3. **That access to municipal rights-of-way be denied to any telecommunication company that does not agree in writing to the five principles as set out above;**
 4. **That the Regional Municipality of Ottawa-Carleton contribute a total of \$6,781.00 to the FCM “Municipal Right-of-Way Defense Fund”;**
 5. **That the Environment and Transportation Commissioner be authorized to appoint a staff member to represent the Regional Municipality of Ottawa-Carleton on the FCM sub-committee on telecommunications.**

BACKGROUND

The Regional Municipality of Ottawa-Carleton has received a request from the FCM to forward the above recommendations to Regional Council for approval. These FCM recommendations are in response firstly, to the deregulation of telecommunication companies; and secondly, to the 1993 *Federal Telecommunications Act*, which allows telecommunication companies to use municipal roads for their plant, with the municipality’s consent. There is no guidance given anywhere as to whether or not “consent” includes the right to regulate, impose conditions, or to charge a fee for the use of the right-of-way.

Accordingly, the FCM has developed a Model Agreement, which includes the five guiding principles outlined in Recommendation No. 2 to be used by municipalities in negotiating access to their rights-of-way by telecommunication companies.

The FCM recommendations were endorsed by the FCM Big City Mayors’ Caucus in Quebec City in May 1997.

DISCUSSION

The Regional Municipality of Ottawa-Carleton has an agreement with Rogers Cablevision, which was negotiated with its predecessors in the early 1970’s. That Agreement imposes no fee, which was standard practice for what was considered to be a public utility’s use of the road allowance. Staff believes that the recent deregulation of the telecommunication industry and the resultant increase in the number of companies applying to use the limited space within the road allowance warrants the termination of this old Agreement and a re-negotiation of the conditions of use. Other

telecommunication companies have approached the Region for consent to use its roads. Staff will be providing future reports to Committee and Council to address the Rogers Agreement, and recent application(s) for use of the road allowance.

Approval by Committee and Council of the FCM guidelines will provide staff with direction as to the negotiation of those Agreements.

The FCM action plan is attached for information and outlines the reasons for the FCM action, its concerns, and why municipalities must address the increase in demands on limited road allowance space and the short and long term costs to the taxpayer of accommodating these demands.

In essence, all users should be afforded access to the road allowance on an equitable basis, but only if they are willing to carry the additional costs and liabilities which the municipality and its taxpayers incur as a result of that use.

The presence of telecommunication company plant in the road allowance results in additional construction and maintenance costs for the municipality due to:

- acquisition of sufficient rights-of-way;
- difficult alignments due to alternate space occupied by duct banks;
- locating, hand digging and supporting ducts to avoid damaging them;
- precautions required to avoid employee injury;
- reduced pavement utility and life cycle due to utility/telecommunication cuts; and
- administration of rights-of-way, including plan review, approval and inspection.

Relocation of telecommunication facilities is routinely required as part of road reconstruction or improvement. The cost of such relocations should not be at the taxpayer's expense.

All costs arising from the use of the road allowance should be borne by the user, including any economic loss, legal costs, physical restoration costs and costs resulting from any disruption in service that might arise from the municipality's actions.

The question of whether revenue over and above the out-of-pocket expenses should be recoverable has not been pursued in the past because telecommunication companies were viewed as being similar to public non-profit utilities such as water or sewage. Deregulation has changed that. Private profit making companies using the road allowance should share some of the revenues generated with the taxpayer as a result of the use of a public asset in this fashion. This concept has support now in recent changes to the *Municipal Act* which permit municipalities to charge fees for the use of their property.

The model FCM Agreement prohibits any transfer or assignment of rights without the municipality's consent, which ensures that all telecommunication companies using the road allowance enter into an Agreement with the municipality, and that compensation is fairly dealt with.

The FCM's request that municipalities deny access to all companies which do not agree with the principles described in Recommendation No. 2 is a fair interpretation of the "consent" provision in the

Telecommunications Act, and it also ensures solidarity across Canada in negotiations with the telecommunication companies.

DEFENSE FUND

In response to interest expressed by municipal governments across the country to see national concerted action in defence of municipal rights in the matter of right-of-way access by telecommunication companies, the FCM has established a "Municipal Right-of Way Defense Fund". As part of the fundraising campaign, the FCM is asking municipalities to contribute three cents per capita based on the 1991 census. In areas where both a regional municipality and a constituent municipality are responsible for rights-of-way, the regional municipality is asked to contribute one cent per capita and its constituent municipality two cents per capita. All funds will be dedicated to the telecommunications issue for outside costs relating to necessary research, legal and other costs for interventions before the CRTC and the Courts. With sufficient funding in place, the FCM will then undertake research, using outside expertise when necessary, to prepare a strong legal position favouring municipal authority over rights-of-way and to establish sound principles for the evaluation of municipal rights-of-way in Canada. It is felt that the costs and difficulties associated with defending municipal rights before the multi-million dollar telecommunications industry and the CRTC would be prohibitive for the Regional Municipality of Ottawa-Carleton. Accordingly, the Region's share of the fund appears to be a reasonable amount considering the potential revenues which may result.

CONCLUSION

Approval of the five principals established by the FCM in its Model Agreement will provide guidance and direction to staff in negotiating access rights with current and future telecommunication companies. With recent changes to federal legislation, which deregulate the telecommunication industry and which allow technical convergence among services offered by telephone and cable television companies, the Region expects to be faced with more and more competing demands for access to its rights-of-way. There is a need to ensure that taxpayers are protected from the additional costs and liabilities which will arise from the use of rights-of-way by telecommunication companies. It is believed that working through and with the FCM is an effective and economical way to protect the Region's fundamental rights respecting control of the rights-of-way, to recover substantial costs arising from the use of Regional rights-of-way and to secure potential new sources of revenue.

It should be noted that, if approved, the five principles outlined in the FCM Model Agreement will also serve to guide franchise negotiations with other underground utilities.

Because the FCM's Executive Committee has designated the telecommunications issue a policy priority for 1997/98, it is felt that the Region would benefit from having a representative attend the FCM sub-committee meetings on telecommunications.

PUBLIC CONSULTATION

There was no public involvement in the preparation of this report.

FINANCIAL STATEMENT

Funds in the amount of \$6,781.00 have been provided in the 1998 Draft Operating Budget Estimates, Account No. 012-32311-2392, Maintenance Branch Administration.

*Approved by
M.J.E. Sheflin, P. Eng.*

*Approved by E.A. Johnston, Deputy Regional Solicitor
on behalf of J. Douglas Cameron, Regional Solicitor*

FINANCE DEPARTMENT COMMENT

The contribution of \$6,781 to the F.C.M. "Municipal Right-of-Way Defense Fund" represents a pre-committment against the 1998 Operating Budget.
Subject to Council Approval.

*Approved by C. Colaiacovo
on behalf of the Finance Commissioner*

LAR/ELM/wcm

Attach (1)

(May 1997)

FCM ACTION PLAN ON TELECOMMUNICATIONS
ACCESS TO MUNICIPAL RIGHTS-OF-WAY

Working together through FCM is the most effective and economical means for Canadian municipal governments to protect their fundamental rights respecting control of municipal rights-of-way, to recover substantial costs being imposed on them by telecommunications firms using rights-of-way, and to secure new sources of revenue worth potentially tens of millions annually.

1. Awareness and Solidarity:

FCM will advise all member municipalities of the financial and liability implications of the rights-of-way issue and request municipal councils to endorse the five principles contained in the FCM Model Agreement and commit to reject any agreements with telecommunications firms which do not respect these principles.

2. Fundraising:

FCM will start to raise funds from member municipalities. Member municipalities will be asked to contribute 3 cents per capita based on the 1991 census. In areas where both a regional municipality and its constituent municipalities are responsible for rights-of-way, the regional municipality will be asked to contribute 1 cent per capita and its constituent municipalities 2 cents per capita. All funds will be dedicated to the telecommunications issue for outside costs relating to necessary research, legal and other costs regarding interventions before the CRTC and the courts. FCM will continue to provide in-kind support through staff salaries and supplies.

3. Research on Legal Position and Valuation Principles:

Once sufficient funds have been acquired, FCM will undertake research, using outside expertise where necessary, to prepare a strong legal position favouring municipal authority over rights-of-way and to establish sound principles for the valuation of municipal rights-of-way in Canada.

4. Negotiations with Stentor, the CCTA and the Federal Government:

Once the research is complete, FCM, in consultation with members, will launch a new round of negotiations with Stentor Telecom Policy and the Canadian Cable Television Association (CCTA) to try to reach agreement on the principles of the FCM Model Agreement. If a satisfactory agreement is reached, it would be presented jointly to the CRTC and Industry Canada as the basis upon which the Telecommunications Act should be interpreted. If a guarantee could be provided that the Act would, indeed, be interpreted in conformity with the agreement, the FCM campaign would end. Otherwise, a case would have to be brought to the CRTC either by FCM or the industry.

5. Hearings of the CRTC:

Through its Subcommittee on Telecommunications, FCM will identify a dispute between a municipality and a telecommunications firm which would best serve as a precedent case for all municipalities if brought before the CRTC. With the support of FCM, the member municipality in question will bring the dispute to the CRTC. Alternatively, FCM may be forced to defend a municipality in a dispute which the industry may bring to the CRTC. Depending on the length and complexity of the hearings, legal and other costs could range from \$100,000 to \$400,000.

6. Constitutional Court Challenge

Stentor has suggested that it is prepared to mount a constitutional law challenge to the municipal consent provisions of the Telecommunications Act should matters not unfold to its satisfaction. Defending municipal rights in such a case could well cost more than intervening before the CRTC. Further fundraising as necessary would be undertaken should a constitutional court challenge be mounted.