

REGION OF OTTAWA-CARLETON
RÉGION D'OTTAWA-CARLETON

REPORT
RAPPORT

Our File/N/Réf. **50 41-99-0001**
Your File/V/Réf.

DATE 26 October 1999

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

FROM/EXP. Environment and Transportation Commissioner
Acting Regional Solicitor

SUBJECT/OBJET **ACCESS TO REGIONAL RIGHTS-OF-WAY BY UTILITY AND
TELECOMMUNICATION COMPANIES - STATUS REPORT**

DEPARTMENTAL RECOMMENDATIONS

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

- 1. That Council endorse the application of the FCM's five rights-of-way management principles for all private utility and telecommunications company uses of the Regional public rights-of-way;**
- 2. That the Region of Ottawa-Carleton contribute a total of \$7,500 to the Association of Municipalities of Ontario's Gas Franchise Defense Fund;**
- 3. That, in accordance with this report, Regional staff participate with the Association of Municipalities of Ontario in the Ontario Energy Board process with respect to the development of a new model franchise agreement for the gas industry.**

BACKGROUND

On 25 February 1998, Regional Council approved five management principles developed by the Federation of Canadian Municipalities (FCM) related to the use of public rights-of-way by telecommunications companies. Essentially these principles recognized that municipalities must have the authority to manage activities and uses on the public rights-of-way in order to protect the interests of the public, ensure public safety and protect the interests of all public rights-of-way users. They also called for municipalities to be able to recover all costs, including any liability

costs, incurred due to the presence of telecommunications companies in the public rights-of-way, and the receipt of fair and reasonable compensation in excess of costs in return for the use of the public rights-of-way, a public asset, by private companies for profit. It was noted that these rights-of-way management principles were equally suitable for application to utility companies such as Hydro and Gas.

TELECOMMUNICATIONS COMPANIES

Telecommunications and utility companies generally have a statutory right to access a municipal public right-of-way, but this is subject to the consent of the municipality. The process and terms and conditions for granting municipal consent to a utility company are embodied in a legal document called a Municipal Access Agreement (MAA). Council has directed staff to negotiate municipal access agreements with telecommunications companies on the basis of FCM's five principles.

Deregulation and the introduction of competition in the telecommunications industry throughout North America means that the days of the pseudo public and monopoly telephone company are over. Regional staff are in discussions with six telecommunications companies at this time with some feeling that the process has just begun. Some American Cities have more than 20 telecommunications companies using their public rights-of-way. The emphasis of the Canadian Radio-television and Telecommunications Commission (CRTC) on what it calls "facilities based competition" (whereby each company installs its own physical infrastructure) puts considerable pressure on the public rights-of-way, especially in the core of large urban centres. The installation of this duplicate infrastructure often requires companies to trench the streets and many public agency studies have shown that this trenching significantly reduces the life of municipal roads. Significant disruption to businesses, other users of the public rights-of-way, and the community in general also arises from the additional construction activity.

On 25 February 1998, Council also approved a financial contribution to a defense fund established by the FCM to take a test case to the CRTC with respect to the terms and conditions that municipalities may establish with respect to municipal consent. This test case (Vancouver/Ledcor) subsequently materialized and, on 09 June 1999, Council instructed staff to participate with FCM in the proceedings.

On 09 September 1998, Council established its "level playing field" policy with respect to telecommunications companies. Under this policy, all telecommunications companies, including the incumbent (Bell Canada) wishing to use the Regional rights-of-way are required to agree in writing to FCM's five principles, agree to disclose the names of third parties attaching to their equipment located in the rights-of-way and agree to negotiate a MAA with the Region. Regional staff were delegated interim authority to issue municipal consent to any companies agreeing with these three preconditions, pending the successful negotiation of a MAA within six months. In view of the Vancouver/Ledcor case, Council on 09 June 1999 modified its policy to permit telecommunications companies to make their acceptance of the FCM principles subject to any rulings by the CRTC. Council also decided to not pursue the matter of compensation in excess of

costs (FCM's fifth principle) pending a decision by the CRTC on this matter. Further, Council extended the deadline for having MAA's in place for an additional six months.

Negotiations with the telecommunications companies are continuing on the basis of Council's approved policy. The CRTC is expected to issue a Public Notice with respect to the Vancouver/Ledcor case in a few weeks, however, it will likely be 12 to 24 months before a decision is received. Because of the significance of the issues involved, there is a very real possibility that any CRTC decision will be appealed, thus prolonging the matter. The FCM has refined the wording of the principles since their approval by Regional Council. In view of this, it is proposed that the revised wording, as presented in Annex A, be approved by Committee and Council. There is no change in the meaning or scope of the principles.

GAS INDUSTRY

Attached as Annex B is a communiqué from Michael Power, President of the Association of Municipalities of Ontario (AMO).

Two years ago the Region commenced working with the Area Municipalities to develop a uniform approach to a new franchise agreement with the gas companies. Several meetings were held and last year Regional staff prepared a new draft agreement based on the model approved by the Ontario Energy Board (OEB) in 1987. During this process, several participants suggested that it might be appropriate to go back to the OEB with respect to updating the old model agreement in view of changes in the technological, fiscal and regulatory environment that have occurred since 1987. Late last year, the Association of Municipalities of Ontario (AMO) decided to do just that and Regional staff have participated in this exercise as members of AMO's Gas Franchises Group.

The Gas Franchises Group has met with Ontario gas industry representatives in negotiation sessions several times. There are a number of relatively minor changes that both the municipal and gas industry representatives can agree upon. However, there are several substantive issues, including the issue of the payment of fees for the use of public rights-of-way, upon which there is no agreement. Currently, gas companies in Ontario do not pay any fees to municipalities for the use of public rights-of-way (all other utilities, including publicly owned utilities and subject to further clarification from the Province on Electric Utilities, are subject to the payment of at least municipal permit fees for cost recovery). As a minimum, AMO feels that gas companies should compensate municipalities for out-of-pocket costs incurred by municipalities due to the presence of gas equipment on municipal lands. AMO's position also is that the gas companies should pay municipalities fees over and above out-of-pocket costs in recognition of the value of the public rights-of-way and in recognition of the use of this scarce public asset by private companies for profit making purposes. This certainly matches Council's intent to treat all utilities in the same manner.

It must be highlighted that the failure of utilities or telecommunications companies to compensate municipalities for at least the costs of being present in the public rights-of-way results in rate supported utility services being subsidized by the general taxpayer. This public subsidization of

industry arising from free access and use of public property also leads to the inefficient use of this scarce resource and tends to inhibit the development of competing technologies.

The gas companies on the other hand argue that the property taxes they pay to municipalities (particularly the assessment on their linear plant in the public rights-of-way) is adequate compensation to municipalities for all costs incurred and for access to public rights-of-way. AMO's position is that the payment of taxes by entities of any kind is a different issue and does not grant the privilege of using public assets at public expense with no direct compensation. In fact, at the time of municipal restructuring, the Province amended the *Municipal Act* to specifically grant municipalities the power to charge fees for the use of municipal property (Section 220.1).

As outlined in the previous section on telecommunications companies, in 1998, Regional Council adopted five fundamental public rights-of-way management principles developed by the Federation of Canadian Municipalities (FCM) and approved a contribution to a municipal defense fund established by the FCM to take a test case with respect to the use of public rights-of-way by telecommunications companies to the CRTC. It was noted by staff at the time that the FCM principles are well suited for application to all utilities using public rights-of-way. As noted earlier, in essence, the principles recognize the need for municipalities to have the authority to manage the public rights-of-way for the safety and benefit of all users, that municipalities should not be out-of-pocket any costs due to the use of the public rights-of-way and that municipalities should receive compensation over and above costs in recognition of the use of a scarce and valuable public asset.

Staff believe that the various utility users of the public-rights-of-way should be treated as equitably as possible. The new realities of utility and telecommunications deregulation, competition, fiscal realignment and technological convergence is being resisted by the long established companies. The gas companies seem to be willing to entertain only very minor changes to their traditional relationship with municipalities.

Since there is no agreement on substantive issues between AMO and the gas industry, these matters will now be submitted to the OEB for resolution. In view of this, the AMO Board of Directors, at a meeting following the recent AMO conference, adopted a resolution establishing a Gas Franchise Defense Fund. The resolution calls for a voluntary, one time contribution from each AMO member municipality, based on one cent per capita for upper tier municipalities and two cents per capita for lower tier municipalities). The purpose of the fund is to prepare a defense of the municipal position on gas franchise agreements, to develop a model agreement, to intervene in OEB proceedings as necessary, and to fund legal expenses related thereto. It is proposed that Corporate Services and Economic Development Committee and Council, approve a contribution to this defense fund in the amount of \$7,500.00 (\$0.01 per capita times 750,000).

It is further proposed that Regional staff participate with AMO in the Ontario Energy Board process with respect to the development of a new model franchise agreement for the natural gas industry in the Province of Ontario and that the funding set aside previously (in the Capital Account, Road Access Agreements- CRTC Hearings) be utilized to support as necessary (legal

and technical advice etc). The management issues involved with the use of public rights-of-way by the gas industry and the telecommunications industry are essentially the same and much of the work carried out on one initiative would assist the other.

MODEL MUNICIPAL ACCESS AGREEMENT

Based on the experience gained to date on this subject and in reference to similar documents prepared by many other municipalities throughout North America, staff have developed a generic model municipal access agreement. The principle features of this document are outlined in Annex C. The Region is actively co-ordinating and participating with many others on these matters, including the Area Municipalities, municipalities in the Greater Toronto Area, the FCM, the Ontario Good Roads Association, the American Public Works Association (APWA) and AMO. Although, the model agreement is used as a starting point for negotiations with telecommunications companies, the ultimate wording of a specific agreement with a telecommunications company will depend on the outcome of negotiations with that company and is subject to approval by Committee and Council. A copy of the current model municipal access agreement is available to share with other municipalities via APWA's web site.

PUBLIC CONSULTATION

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

FINANCIAL STATEMENT

	\$
Approved Budget To Date	100,000
Total Paid and Committed	<u>(10,617)</u>
Balance Available	89,383
THIS REQUEST	<u>(7,500)</u>
Balance Remaining	<u>81,883</u>

Funds have been provided in the 1999 Capital Budget, (Order No. 900390), Road Access Agreements - CRTC Hearings (Reference Corporate Services and Economic Development Report #42, 01 June 1999), Purchase Requisition No. 10027364

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

*Approved by
E. A. Johnston*

LAR/ms

Attach. (3)

FINANCE DEPARTMENT COMMENT

Funds are available as indicated.

*Approved by T. Fedec
on behalf of the Finance Commissioner*

REVISED FCM RIGHTS-OF-WAY PRINCIPLES

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 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 other parties.
3. Municipal governments must not be responsible for the costs of relocating facilities situated along municipal rights-of-way if relocation is required for bona fide municipal purposes.
4. Municipal governments must not be liable for losses associated with the disruption of services or with damage to property as a result of usual municipal activities or the activities of other parties along municipal rights-of-way.
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 other parties.

August 30, 1999

Urgent Matter

To All Heads of Council:

I am taking this opportunity to update you on AMO's ongoing work in the development of a new model natural gas franchise agreement, *and to ask for your support*. As you are aware, the model franchise agreement serves as the standard operating agreement between municipalities and gas utilities that sets out the terms and conditions under which gas utilities may distribute natural gas within a municipality.

AMO, with the support of its members, developed the original Model Gas Franchise Agreement in consultation with the gas industry in 1987, which was subsequently sanctioned by the Ontario Energy Board (OEB). As many of the current franchise agreements are coming up for renewal, AMO and the gas industry have been working on changes to the model agreement to bring it up to date and reflect current conditions.

While the AMO/Industry group have made progress in a number of areas of the agreement, there are several major unresolved issues on the municipal side, including permit fees, duration of renewals, and compensation for the use of municipal rights of way. It appears that these issues will not be resolved to our satisfaction without intervention by AMO at the Ontario Energy Board. AMO must therefore be prepared to defend its positions and provide evidence on these issues before the OEB. We expect the process will be complex and costly, and will require extensive research, specialized expertise, and external legal counsel. This is why we are asking for your immediate and urgent help.

What You Can Do:

We need your help to protect your interests. AMO's Board of Directors recently adopted a resolution calling for the establishment of a "Gas Franchise Defense Fund". The Board is asking that all AMO member municipalities voluntarily contribute to this fund, on a one time basis, as follows:

- a) *two cents per capita for lower-tier municipalities;*
- b) *one cent per capita for upper-tier municipalities; and*
- c) *three cents per capita for single-tier municipalities.*

The Gas Franchise Defense Fund (see attached Backgrounder for details) will be used to prepare a defense of the municipal position on natural gas franchise agreements, and to develop legal provisions for a revised model agreement, as well as to intervene in OEB proceedings and take appropriate legal action as required. We will be seeking to allow all municipalities to take advantage of changes resulting from the negotiation of a new model agreement, whether they have recently renewed their franchise agreements or not.

In January, AMO requested information from its members on the timing of upcoming renewals of existing franchise agreements. If you haven't already sent this information in, we are requesting that you do so now to assist us in our efforts. The gas industry is seeking 15 and 20 year renewal terms for existing franchises - it is extremely important that municipalities not undertake to renew franchises for more than 15 years. The OEB, in decision EBO 125 (the precursor to the Model Agreement), stated that it was of the opinion that in the case of renewals a ten to fifteen year term seems to be adequate. Longer terms may affect the possible benefits achievable from a new agreement or any future changes in legislation.

Why the Defense Fund is Needed:

The OEB has not yet determined the process that they will use to approve a new model franchise agreement, but have made it clear that they would like to see a revised agreement in use by January 2000. The need to establish a defense fund is therefore pressing. We anticipate that AMO will make representation to the OEB in the Fall, and we want to have well-prepared arguments to advance our position, to counter the extensive financial and legal resources available to the gas industry lobby.

AMO's defense fund will allow us to intervene on behalf of the municipal sector in a generic hearing, or on behalf of individual municipalities seeking approval of their franchise renewals.

Your contribution to this fund is extremely important, as the costs involved in preparing and defending a case before the OEB are considerable, and represent an unbudgeted activity for AMO, requiring special assistance for research and legal representation.

When AMO launched its defense of the original model franchise agreement before the OEB in 1987, these costs were covered through a similar member-supported fund. The results of AMO's involvement then helped to secure for all municipalities the ability of municipal engineers to grant approvals and to specify the location and depth of buried facilities; special requirements or the right to refuse gas facilities on bridges; beneficial cost-sharing arrangements for relocation of gas pipelines; and guidelines for the length of initial and renewal terms.

AMO's Position on the Issues:

In current discussions with the gas industry, AMO has argued that private utilities using municipal property to earn profits should compensate municipalities and their property taxpayers on an annual basis for the economic benefit received from the use of the municipal resource. Increased operating costs related to ROW management should be borne by customers of a particular utility, and not unfairly passed on to property taxpayers.

AMO also maintains that municipalities must have the authority to collect permit fees for right of way access to offset municipal costs related to ROW administration and reduced pavement life. Discussion has also focussed on the duration of franchise agreements and the duration of franchise renewals, where AMO is proposing that renewal agreements be no longer than 10-15 years as was originally suggested by the OEB. AMO is also seeking to clarify issues surrounding the expiry and/or termination of franchise agreements. These and other issues are more fully detailed in the Backgrounder.

AMO remains committed to developing a new model gas franchise agreement that protects the interests of municipalities, and one that establishes fairness for property taxpayers. We need your help, and your financial contribution, to ensure that this objective is met. AMO's success in this initiative will have profound impacts on municipal right of way management across all energy sectors well into the future.

As always, our staff are available to answer any questions you may have. Please contact Pat Vanini, Director of Policy and Government Relations, at 416-971-9856, extension 316 or Casey Brendon, AMO Policy Advisor at extension 341.

I look forward to your prompt support of this important effort.

Yours truly,

Michael Power
AMO President

Attachment



Association of
Municipalities
of Ontario

BACKGROUND

August 30, 1999

AMO's Model Natural Gas Franchise Agreement & the Gas Franchise Defense Fund

AMO is establishing a legal defense fund to be used to support the municipal position on natural gas franchise agreements, and to develop a revised model agreement between municipalities and gas utilities. The gas franchise defense fund will also be used to allow AMO to intervene in Ontario Energy Board (OEB) proceedings, including legal representation.

The defense fund came as a result of a resolution adopted by the AMO Board of Directors on August 25, 1999. The resolution provides:

WHEREAS *gas franchise agreements across Ontario are coming up for renewal; and*

WHEREAS *the Association of Municipalities of Ontario (AMO) developed the original Model Gas Franchise Agreement with the gas industry in 1987; and*

WHEREAS *AMO, through its Working Group, is currently negotiating a new model gas franchise agreement with the gas industry; and*

WHEREAS *the negotiation process is long, complex, costly and will likely involve access to the courts and the Ontario Energy Board; and*

WHEREAS *there are major, unresolved issues concerning, among others, permit fees, duration of renewals, and compensation for the use of municipal rights-of-way; and*

WHEREAS *this matter is of vital importance to Ontario municipalities; and*

WHEREAS *this exercise involves extraordinary expenses for AMO;*

THEREFORE BE IT RESOLVED THAT *the Association of Municipalities of Ontario establish a "Gas Franchise Defense Fund"; and*

FURTHER BE IT RESOLVED THAT *municipalities be requested to voluntarily contribute, on a one-time basis, to this fund based on:*

- a) two cents per capita for lower-tier municipalities;*
- b) one cent per capita for upper-tier municipalities;*
- c) three cents per capita for single-tier municipalities; and*

FURTHER THAT *the terms of reference for the fund be as follows:*

- a) to prepare a defense of the municipal position with respect to natural gas franchise agreements;*
- b) to develop a model agreement;*
- c) to intervene in Ontario Energy Board proceedings as necessary;*
- d) to take legal action as may be necessary.*

Why the Defense Fund is Needed:

As many current franchise agreements are coming up for renewal, AMO and representatives of the gas industry (Union Gas, Enbridge-Consumers, and Natural Resources Gas (NRG) Ltd.) have been working to propose changes to the model agreement to reflect current conditions. While the AMO/Industry group have made progress in a number of areas of the agreement, there are several major unresolved issues.

AMO must be prepared to defend its position on these issues before the Ontario Energy Board (OEB), in a process which we expect will be long, complex and costly, and which will require extensive research, specialized expertise, and external legal counsel. The OEB has indicated that they would like to see a revised agreement in use by January 2000.

AMO's Position on the Issues

■ ***The duration of new and renewal franchise agreements, particularly given the extent of municipal restructuring and the rapidly changing municipal scene.***

AMO is proposing that renewal agreements be no longer than 10-15 years, to allow changes in the utility industry and municipal operations to be revisited and appropriately reflected in franchise agreements. AMO is also seeking to clarify issues surrounding the expiry and/or termination of franchise agreements.

■ ***The inability of municipalities to charge permit fees***

AMO maintains that municipalities must have the authority to collect permit fees for right of way access by utility operators, to offset municipal costs related to ROW administration and reduced pavement life, relying on Section 220.1 of the Municipal Act.

■ ***The inability of municipalities to obtain compensation for use of Municipal rights-of-way***

AMO has argued that private utilities using public property to earn profits should compensate municipalities on an annual basis for the economic benefit received from the use of the municipal resource. This recognizes that increased operating costs related to ROW management should be borne by customers of a particular utility, and not unfairly passed on to property taxpayers.

■ ***AMO has proposed a number of "typical municipal clauses" relating to use of highway at its own risk, insurance coverage, legislative change and remedies concerning franchise termination in the event of default on terms of the agreement or bankruptcy.***

Progress to Date

As a result of discussions to date, AMO and the gas industry have reached agreement on some areas of the Franchise agreement. We expect that areas of agreement will be forwarded to the OEB for review in a joint AMO/Industry submission. Included among these matters are:

- *Agreement has been reached on a number of minor wording changes which help to clarify the intentions of the parties and which result in a Model Agreement which is more in tune with the 21st Century.*
- *Agreement has been reached on wording to clarify the situation when a third party (usually a telecommunications provider) uses a decommissioned gas line for other purposes.*
- *It is anticipated that agreement will be reached on clauses relating to insurance requirements, the need for geodetic information as technology and practice evolves, and that permission to use the municipal right of way does not provide a warranty as to the environmental condition of the roadway.*

Please send your contribution to: AMO's Gas Franchises Defense Fund
Association of Municipalities of Ontario
393 University Avenue - Suite 1701
Toronto ON M5G 1E6 **Attention: Reena Feliciano**
For more information, contact: Pat Vanini, Director of Policy and
Government Relations, AMO
416-971-9856 ext. 316 or e-mail: pvanini@amo.municom.com or
Casey Brendon, Policy Advisor, AMO
416-971-9856 ext. 341 or e-mail: cbrendon@amo.municom.com

Municipal Access Agreements - Principle Elements

General provisions common to most comprehensive agreements

- Consent of the municipality is required
- Description of the equipment that may be installed
- Non-interference with other rights-of-way users
- Must follow by-laws, statutes etc.
- Not to use the rights-of-way for other than specified purposes
- A term and termination date
- Requirements for submission of plans
- Work must be to the satisfaction of the municipality (restoration etc.)
- Stop work provision
- Protection of trees
- No lien of the rights-of-way
- Continuation of key terms upon termination
- As-built drawings
- Membership in a utility co-ordinating committee
- Provision of future work plans
- 24 hour contacts
- Relocation of plant at utility's cost
- Binding on successors
- Worker's Compensation
- Insurance/liability
- Notice
- Amendment process
- Indemnification
- Fee
- Reporting provisions
- Third party access/attachments to plant
- Dispute mechanism
- Assignment of the agreement

Additional elements in Ottawa-Carleton's model municipal access agreement

- dark and lit fibre "in kind" compensation
- excess capacity requirement to reduce future trenching and pavement damage
- environmental responsibility
- abandoned plant disposition
- Potential for geodetic location references
- encourage use of existing plant
- provision for reopening the agreement to reflect significant regulatory body decisions (e.g. fees)