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USE OF MUNICIPAL RIGHTS-OF-WAY - REVENUE OPPORTUNITIES  
OR COST RECOVERY FEES?

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# **USE OF MUNICIPAL RIGHTS-OF-WAY - REVENUE OPPORTUNITIES OR COST RECOVERY FEES?**

by

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## **Abstract**

Municipal rights-of-way are essential to the health, safety, transportation, communications and economic development of a community. They accommodate pedestrian and vehicular traffic, shade trees and other beautification, traffic signals and signs, street lights, electric wires, telephone, cable television, sanitary sewers, storm sewers, water mains, gas lines and pipelines. Management of the municipal rights-of-way is therefore a process of balancing essential and competing demands on the same property.

To protect the health and safety of our communities, as well as to protect the existing facilities of local government and other rights-of-way users, municipal governments must have the ability to ensure the efficient use of municipal rights-of-way through the development of effective policies and management practices, including the ability to levy fees to recovery costs and receive fair and reasonable compensation for the use of these municipal rights-of-way by utility and telecommunication companies.

## **Introduction**

Historically, utility and telecommunications companies have had free access to municipal rights-of-way. However, deregulation of some of these industries, the resulting competition that is arising from this, the convergence of many technologies, the increased awareness of municipalities with respect to good public asset management, and changing fiscal realities have caused many municipalities to rethink their approach and practices with respect to many aspects of rights-of-way management, including the matter of cost recovery and rights-of-way access fees.

Technological convergence on comparable and compatible technologies is creating more competition in the traditional monopoly services such as cable television and telephone. Convergence allows all the different kinds of telecommunications service providers to begin to offer services that compete with the offerings of other kinds of providers. Even the gas company and electric companies are joining in. Gas companies are buying electric companies and Hydro companies are laying fibre optic cable and have developed technologies to transmit signals on their wires.

There is a proliferation of players (one North American City is dealing with 18 different telephone companies) competing for the limited space available in the municipal rights-of-way. A consultant has advised that in the next few years there could be up to six new telecommunication companies competing for underground street space in Ottawa-Carleton.

This increased pressure on public rights-of-way will impose increased costs on municipal government in terms of shortening street life, increasing road maintenance costs, increasing traffic disruption and increasing management costs.

### **The issue**

Utility and telecommunication companies generally have the statutory authority to install their pipes and wires on municipal rights-of-way subject to the consent of the municipal council. Generally, municipalities may establish reasonable terms and condition for providing this consent and, subject to a few qualifications, these terms may include some financial compensation.

The title of this session is “use of Municipal rights-of-way - revenue opportunities or cost recovery fees?” This is posed as a question and, in the author’s opinion, the answer is **both**.

Municipalities should be able to recover all their direct costs associated with having utilities encumber their rights-of-way **and** municipalities should receive fair and reasonable compensation above these direct costs for the use of a public asset (i.e. the municipal rights-of-way) by private profit-seeking corporations.

If your municipality is not recovering all costs incurred as a result of the presence of a utility or telecommunications company in your rights-of-way, your property taxpayers are effectively subsidizing the shareholders of private companies.

If your municipality is not receiving compensation in excess of its costs for the use of the municipal rights-of-way, a valuable public asset, your property taxpayers are subsidizing the shareholders of private profit-seeking companies.

Some utility and telecommunications companies want taxpayers to provide them with free access to the municipal rights-of-way. Interestingly, these same companies expect to charge the same taxpayers a fee, with allowance for profit, for the very service made feasible by the free access provided. Perhaps the economic benefit should be shared in recognition of the contribution of both parties.

With deregulation, technological convergence and privatization, the “utility or telecommunication ratepayer” is no longer synonymous with the “property taxpayer”. Users/ customers of a particular service should bear the costs of providing that service, not the general taxpayer.

Wireless telecommunication carriers do not damage roads. Why should customers of wireline services not pay the full costs of the service received? Some people may have no interest in new services such as internet or video on demand so why should they bear the costs of the service provider’s presence in the municipal rights-of-way through their property taxes? Why shouldn’t they benefit from the use of a public asset for profit by a private corporation? The payment of compensation by these private companies for the use of public property, would reduce the property tax burden. In the absence of this payment, there is an economic transfer (an effective subsidy) from property taxpayers to the companies’ customers and shareholders.

The historical relationship involving the provision of free access to municipal rights-of-way resulted in many of the municipalities' costs not being identified. Now many municipalities have come to understand the need to evaluate costs associated with the increasing demand for private sector use of the municipal rights-of-way. Many organizations such as the American Public Works Association (APWA), the Federation of Canadian Municipalities (FCM) and the Ontario Good Roads Association (OGRA) are engaged in efforts to develop approaches to these issues and make this information available to others for adaptation to their specific situation.

It's very important to point out that some of these efforts are being undertaken jointly with municipal, utility and telecommunications people working together in a partnership. It's not about one group or the other trying to gouge the other. It's about coming up with mechanisms to ensure that all players are dealt with fairly and reasonably.

Of course, as a matter of policy, you may indeed wish to subsidize some private companies. These companies will invariably point out the economic benefits accruing to your community due to their presence. Just because you are entitled to receive compensation does not oblige you to do so. These are economic decisions that must be decided community by community. The rest of this paper describes the type of costs and fees that you could consider and outlines some of the costs that may be incurred by your municipality, although you may chose not to recovery them.

In Ontario, at this time, municipalities are limited in their ability to collect fees from gas and electric companies. In 1986, the Ontario Energy Board ruled (Energy Board Order 125, 21 May 1986) gas companies to be exempt from municipal rights-of-way management fees. More recently, Bill 35, the Energy Competition Act, 1998, prohibits the levying of fees to transmitters and distributors of electrical power. There is some provision for compensation for damage to the rights-of-way caused by their entry.

With respect to telecommunications companies, Regulation 34/98 under the *Municipal Act* precludes municipalities from imposing fees in excess of cost recovery. However, there is nothing to prevent municipalities from negotiating and entering into an agreement with a telecommunication company for a fair and reasonable fee in return for the company's use of municipal rights-of-way.

### **Cost Recovery**

Most utilities and telecommunications companies agree that municipalities should be able to recover **costs** associated with the presence of a utility or telecommunication company in municipal rights-of-way.

Much work has been done in recent years to identify the nature and magnitude of these costs. A review of the references at the end of this paper will show that there is good agreement among the leading municipalities with respect to what costs should be included.

These costs relate to:

- administration
- the review of plans
- co-ordination
- permit issuance
- inspection
- record keeping
- legal costs
- and any other costs associated with the physical presence of the utility's plant in the municipal rights-of-way e.g. the cost of relocating a utility's plant and any extra costs related to working around or supporting a utility's plant.

More recently, much work has been carried out by municipalities and others with respect to the impacts of utility activities on pavement life and on traffic management issues. Ottawa-Carleton has initiated a major review of the management of utility and construction activities on its roads.

The National Research Council of Canada (NRC), a major sub-consultant for Ottawa-Carleton on this project, has found that utility cuts can reduce the life of a roadway by up to 60%. Municipalities should be entitled to recover the costs resulting from this lost road life. These costs can easily run into the million of dollars annually in larger urban municipalities. Over 30 different studies carried out by others on this issue were referenced by the NRC and most of them show permanent pavement damage arising from utility cuts. Ottawa-Carleton is undertaking its own technical assessment of pavement damage and will consider implementing a pavement degradation fee as part of its permitting process.

Sacramento, California implemented a pavement damage fee in 1998. The basic fee, subject to the time since the last overlay, is about \$17.00 (Canadian) per linear metre. Interestingly, the technical work carried out by a consultant for the City of Sacramento found that the pavement damage was actually in the order of \$85.00 (Canadian) per linear metre. The lower fee was implemented initially to make the concept more palatable to utility companies. In Canada, Surrey, British Columbia has introduced a pavement damage fee.

Traffic impact costs are another area under increased scrutiny by municipalities. These are real costs, although they may not all be incurred directly by the municipal corporation. This fact may inhibit your ability or desire to recover. However, utility works can be very disruptive to businesses and the general public. Existing traffic engineering procedures are available to calculate delay times and the economic cost of imposing these delays on a community.

There are also, health and safety impacts if the movements of emergency vehicles are negatively impacted, as can easily happen when a utility, perhaps for very valid reasons, occupies one or more traffic lanes on a busy arterial road, especially during peak traffic periods. Several of the references outline approaches for assigning a value to traffic disruption costs.

One example cited in the references calculates a traffic disruption fee on the basis of \$0.30 per kilometre involved in a detour per vehicle per day. For an arterial road with an average daily traffic of 15,000 vehicles, a detour of 200 metres and a five day project duration, a traffic disruption fee of \$4,500 would be charged. Other jurisdictions do not levy a disruption fee until

after a reasonable period of time to complete the work has passed. This encourages utilities to complete their work in an expeditious fashion to minimize disruption.

Some of the references also discuss the issue of a fee versus a tax. Any cost recovery fee should be in line with your municipality's actual costs for providing the service. If not, it could be construed to legally be a tax and you may not have the authority to levy a tax of this nature.

In Ontario, the *Public Works on Highways Act* deals with allocating costs between municipalities and utilities where utility works must be relocated because of municipal road works. In essence this requires labour costs to be shared equally among the two parties with all other costs to be borne by the utility. This formula applies only to municipal road works and not to municipal utility projects such as water and sewer works.

The usual method of recovering direct costs is via a permitting fee at the time of approval of a utility's proposed work. An alternate approach would be to charge a municipal consent application fee and perhaps a further fee for a road cut permit if the project is approved. Some municipalities attempt to recover some costs via an annual "franchise" fee, although others try to separate the cost recovery fee from a separate franchise fee, which could be a fee for the use of the municipal rights-of-way that is over and above actual costs. Many times these fees are "blurred" together. There is no right or wrong way, as long as you do your homework.

If not dealt with under the *Public Works on Highways Act*, the allocation of utility plant relocation costs could be handled via the terms of a municipal access agreement and allocated separately from a permitting fee i.e. via invoice etc. It would be necessary to address this cost issue in this latter manner, if the utility or telecommunication company is to be responsible for 100% of its costs.

If the cost recovery mechanism is via a permit fee, the simplest approach is to tally up all the costs to be recovered in this manner and divide by the number of permits. Pavement degradation costs and traffic disruption costs get can get a little more sophisticated e.g. a pavement degradation fee could be levied on per square metre basis and vary depending on how long it has been since the last overlay. Simple table lookups for clerical staff can be generated.

If your municipality carries out the actual physical reinstatement for cuts or winter maintenance pending permanent reinstatement, you will, of course, want to recover these costs as well.

Specific approaches and some other direct costs that you may want to consider are outlined in the references. Permit fees based on cost recovery would, of course, depend on your specific municipality's costs. These costs could range from less than \$50.00 a permit in a rural municipality to over a \$1000 a permit in a large urban municipality. In the absence of actual cost data, a fee of \$100 per permit for a rural municipality and \$300 per permit for a large urban municipality would appear to be reasonable.

## **Revenue Opportunity**

Once the matter of the recovery of costs is dealt with, a possible revenue generation opportunity may exist with respect to charging a utility or telecommunications company a licence fee for the grant of access to municipal rights-of-way. Notwithstanding, the revenue generation potential, the author does not see this as much as an opportunity to make a lot of money but more as a **duty** to be **responsible** with respect to the proper management of a scarce and valuable public asset.

From the author's work with the FCM, APWA and OGRA, as well as work in Ottawa-Carleton with telecommunications and utility companies, the rights-of-way fee issue is clearly much more difficult to address than the cost recovery one. There is much less agreement among municipalities and utility/telecommunication companies with respect to this.

In recognition of the role of municipalities as owners and trustees of public property, some municipal organizations such as the FCM have adopted several important principles with respect to municipal rights-of-way management.

The National Association of Telecommunications Officers and Advisors, an organization of local government officials in the United States, articulates these principles well and one especially relevant example is as follows:

**“Local government has a duty under general legal principles governing property rights not to give away public property for private use without just compensation.”**

They go on to say:

**“Limiting compensation to the recovery of costs would also result in giving away public land for private use and gain.”**

One of the rights-of-way management principles adopted by the FCM reads as follows:

**“municipal governments are entitled to receive revenues over and above direct costs associated with rights-of-way as compensation from corporations using public (municipal) property for profit, as federal and provincial governments do today.”**

From a municipality's perspective, the question isn't is it fair and reasonable for the public to receive compensation for the use of a public asset by private profit seeking corporations? **The answer obviously is yes.** The real question is how is this accomplished?

Some of the references listed at the end of this paper go into detail with respect to various models for arriving at a rights-of-way use fee. There are two principle methods used for the calculation of such a fee. The first is a fee that is based on the linear length of plant installed (e.g. a cost per metre of rights-of-way used etc.). The second is a fee that is based on the percentage of a utility or telecommunication company's gross revenue derived from the use of the plant installed in the municipal rights-of-way. There are pros and cons to each method and both are used widely.

There are at least six different models for determining a value for rights-of-way that can be used to develop a reasonable use fee. These models range from using the assessed value of adjacent

private lands to calling for proposals and/or auctioning the right to use the rights-of-way. However, at the end of the day, the rights-of-way are only worth what someone is willing to pay for it and usually the models are only used to establish an initial value that is used for negotiating purposes. There have been some surveys done that show what other municipalities are receiving in compensation. The presence of confidentiality/non-disclosure clauses in some municipal access agreements has somewhat limited the amount of information available, however, there is enough information to give a reasonable clear picture.

Canadian data suggests that compensation in the order of 2 or 3 % of gross revenue can be obtained and linear compensation can exceed \$10.00 per linear metre of rights-of-way used.

There are also many examples of compensation “bartering”. Municipalities may accept dark fibre or preferred rates on lit fibre and other services in lieu of financial compensation. The nice thing about many “bartering” arrangements is that the cost to the utility/telecommunications company to provide the “bartered” service may be marginal, whereas the value to the municipality based on market rates could be much more.

There is also some good information on public sector/private sector partnering arrangements. Some US State Highway Departments have acquired access to fibre cable for traffic management systems. Some municipal jurisdictions are installing duct and other telecommunications plant for lease or auction to telecommunications companies. There is also the potential to generate revenue from abandoned municipal plant such as old water mains as is being done today in the City of Toronto.

It may be suggested to you that, in Ontario, Regulation 34/98 under the *Municipal Act* prevents a municipality from charging a rights-of-way use fee in excess of costs. Ottawa-Carleton’s view of this is that the regulation, although it prevents municipalities from imposing a fee, there is nothing to preclude a municipality from negotiating a fair and reasonable rights-of-way use fee as one of the terms and conditions of granting municipal consent. Subject to this qualification and the aforementioned limitations with respect to charging fees to electric and gas companies, the *Municipal Act* clearly gives municipalities the authority to charge a fee for the use of municipal property.

If its fair and reasonable to require a hot dog vendor to pay a fee for the use that he/she makes of the municipal rights-of-way, it would seem that it would be just as fair and reasonable to require billion dollar corporations to do the same. At the end of the day, each will pass on the costs to their customers in a true user pay fashion.

It’s also worthwhile to point out that a rights-of-way use cost is a relatively small part of the costs of doing business for these companies and if everyone within a given industry was paying the same thing there would not be a competitive advantage given to one company over an other.

Wireline telecommunications companies may state that they are at a competitive disadvantage to the wireless companies because wireless technology consumes less property. In reality, this fact is a technological advantage for the wireless companies. Free access to the municipal rights-of-way, in essence, severely distorts the economic situation and good decision making. If wireline

companies can't compete successfully unless they receive a subsidy from property taxpayers, perhaps the whole industry should go wireless.

One company in Ottawa-Carleton, decided to trench through 85 metres of pavement on a major arterial road because it did not want to pay less than \$100 for access to a third party's support poles. This decision would not have been made this way, if the full costs associated with the two alternatives were to have been properly considered. The way to obtain good decision making is to properly assign costs in a true user pay fashion, rather than have property tax subsidization of utility costs.

Utility and telecommunication companies will argue that they should not have to pay a rights-of-way access licence fee in addition to all the taxes they pay. The answer to this is simple. The proper payment of taxes, does not automatically grant a right to use public property for free. There is a requirement for companies and citizens to pay taxes. There is also a requirement for the same to pay fair and reasonable fees, whether it is a fee to use a public library, a fee for a drivers licence, a fee for a hot dog vendors licence or a fee for the use of public property (i.e. municipal rights-of-way).

There may be an issue right now in the Ontario with respect to whether a level playing field exists for telecommunication companies with respect to the tax issue. Not all companies are subject to the same taxes, even though they are in essentially in the same business. Resolution of this issue could open the door to more agreement among municipalities and utility and telecommunication companies with respect to a fair and reasonable fee for the use of municipal rights-of-way.

The issue of fair and reasonable compensation to the property taxpayer is so basic that the FCM is taking contributions from municipalities toward a municipal defense fund that would be used to take a test case with respect to the telecommunications companies to the CRTC.

### **Ottawa-Carleton's Experience**

Ottawa-Carleton's Council has adopted the following five rights-of-way management principles developed by the FCM and Council has also approved that access to rights-of-way will be denied to any telecommunications company that does not agree in writing to these principles:

1. 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.
2. The use of municipal rights-of-way by telecommunication companies must not impose financial costs on municipal governments and taxpayers.
3. 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.

4. 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.
5. Municipal governments are entitled to receive revenues over and above direct costs associated with rights-of-way as compensation from corporations using public (municipal) property for profit, as federal and provincial governments do today.

In recognition of the issue of treating incumbent and new telecommunication companies fairly (i.e. the Bell Canadas versus the MetroNets) on 9 September 1998, Ottawa-Carleton's Council approved a policy for establishing a level playing field and an approach for moving forward to obtain municipal access agreements with all telecommunications companies using Regional rights-of-way. Essentially, all Telecom companies (incumbent or new) must now agree to the following in writing:

1. the five FCM principles
2. to disclose all third parties using their equipment
3. to agree to negotiate a MAA with the Region

If these three conditions were not satisfied by 1 January 1999, Ottawa-Carleton staff's authority to issue municipal consent/permits would expire and all municipal consent approvals after that date would have to go to Regional Council for approval.

As of 20 January 1999, the necessary agreement from two companies has not been received and staff is now preparing a report to Council to seek direction.

### **Municipal Access Agreements**

The instrument for setting out the agreed upon terms and conditions, including fee issues, for permitting utility or telecommunication company access to municipal rights-of-way is called a municipal access agreement.

In reviewing various municipal access agreements, a number of standard provisions can be identified:

- 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 for other 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
- Workman's Compensation
- Insurance/liability
- Notice
- Amendment process
- Indemnification
- Fee
- Inflationary increases
- Reporting provisions
- Third party access/attachments to plant
- Dispute mechanism
- Bartering provisions (dark fibre etc.)
- Assignment of the agreement

One of the FCM documents listed in the references gives a good overview with respect to approaching negotiations on a municipal access agreement with a telecommunication company.

Ottawa-Carleton has prepared its own draft municipal access agreement that contains a number of provisions in addition to the standard items outlined above. These are:

- dark and lit fibre compensation
- excess capacity requirement to reduce future trenching
- environmental responsibility
- abandoned plant disposition
- Geodetic location references
- Encourage use of existing plant

The fees for the grant of access to Ottawa-Carleton's rights-of-way apply whether the installed utility plant is underground or overhead or whether it is owned or leased. Most telecommunication companies will agree that third parties need the permission of the road authority before the third party can attach its plant to its support structures and they advise third parties accordingly. In Ottawa-Carleton, these third parties will require their own municipal access agreements.

Negotiation of a municipal access agreement requires a significant time and effort investment on the part of municipal staff. However, there are many sample documents available to assist. It's important that one keep abreast of current developments. Terms of 20 years are not uncommon

and the commitment being made is therefore long in duration. It is essential that sufficient staff resources be assigned and there must be multi-disciplinary involvement from legal, engineering, financial and property departments. Outside technical consulting assistance could be considered as well to deal with the resource issue and to assist with addressing the specialized aspects of the different industries involved.

Assistance/information can be obtained from the following:

FCM: Jena Cameron	(613) 241-5221 Ext. 299 (jcameron@fcm.ca).
OGRA: Diana Summers	(905) 795-2555 (diana@ogra.org)
APWA: John (Mac) MacMullen	(816) 472-6100 Ext. 3591 (jmacmullen@apwa.net)

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## Conclusion

The community investment in municipal rights-of-way represents a significant expenditure of taxpayers' funds. Accordingly, Municipal governments have an obligation to manage the municipal rights-of-way as trustees for the public. There is a duty to protect the public's investment and to ensure that the use of municipal rights-of-way for private purposes provides a fair return to taxpayers.

To accomplish this mandates municipal governments to recover all direct and indirect costs associated with a utility or telecommunications company's presence on the rights-of-way. Taxpayers often insist that municipalities not subsidize private endeavors with taxpayers funds. Just as the telecommunications industry charges the municipality fair market value, not just direct cost recovery, for the use of services or facilities it provides, municipalities should receive compensation for the use of municipal rights-of-way that is commensurate with their value as municipal property.

The use of municipal rights-of-way is an issue of **both cost recovery and revenue generation.**

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