SUBJECT: Communication Lamp Poles (PW09026/LS09005) - (City Wide)

RECOMMENDATION:

(a) That Council approves Communication Lamp Pole Access Agreement (CLP) with Bell Canada (Bell) and Cogeco Cable Canada, attached to Report PW09026/LS09005;

(b) That the Mayor and City Clerk be authorized and directed to execute the necessary documents, all documents being in a form satisfactory to the City Solicitor;

(c) That Council approves this agreement as the accepted template for future negotiations with other Telecommunications providers;

(d) That the Mayor and City Clerk be authorized and directed to execute documents with other telecommunications providers as long as this template is used and provided that any changes are minor in nature and are acceptable to the City Solicitor.

Gerry Davis, CMA
Acting General Manager
Public Works Department

Peter A. Barkwell
City Solicitor
Corporate Services Department
EXECUTIVE SUMMARY:

This agreement has been drafted as a result of a new product; the Communications Lamp Pole (CLP). The CLP will help reduce the number of telecommunications pedestals and outside equipment boxes in new subdivisions;

Typically the use of the CLP can reduce about 70% of the installations required to service new homes with telephone, cable, television and internet services, by housing some of the equipment in the base of the CLP;

CLP’s are in use across Ontario and have been adopted by our Standards and Approved Products Committee as an approved product for installation in new developments across Hamilton.

BACKGROUND:

In most residential subdivisions, above ground pedestals are required in the boulevards for telephone and cable television infrastructure. These pedestals are required in addition to other above ground fixtures such as transformers, switchgear, street light poles, fire hydrants, community mail boxes, signs, etc.

With new forms of development, lots have become smaller, boulevards narrower and the streetscape becomes cluttered with the required above ground fixtures. Conflict occurs between driveways and these fixtures and residents often object to the presence of above ground utilities in front of their homes.

Advances have been made in improving the streetscape in new subdivisions by attempting to locate large utility vaults adjacent to flankage lots, schools etc. Attempts have also been made to reduce the number of pedestals to service developments and in some subdivisions.

ANALYSIS/RATIONALE:

The City has allowed a pilot project to proceed in the Winona area and Mattamy Homes has installed the Trafalgar pole, which has an enlarged base enabling telecommunications carriers to install their hardware in a cabinet in the pole. With these utilities in the pole, over 70% of the telephone and cable television pedestals will be eliminated.

The benefits of the CLP are:

- improved streetscape by reducing above ground street furniture thereby reducing complaints about unsightly fixtures.
- reduced conflicts in locating street furniture on narrower boulevards in front of smaller frontage lots.
- damage to pedestals both during construction and afterwards is eliminated and hardware is not as susceptible to vandalism.

ALTERNATIVES FOR CONSIDERATION:

Alternative products include buried pedestals and vaults which are prone to leaking and infiltration therefore increasing the maintenance costs and decreasing the level of service.
Another consideration is to simply continue the existing servicing strategy of separate pedestal, transformers and switchgear to be installed separately as is current practice.

**FINANCIAL/STAFFING/LEGAL IMPLICATIONS:**

These poles are to be considered as standard installations in new subdivisions as required by the Planning and Economic Development Department. As a result of this agreement, the City Of Hamilton becomes the owner of the CLP once the subdivision is assumed through the Development Section.

The agreement provides for a future payment to be made by the utility companies to the City of $350 per user, per pole to a total of $700 per pole (both costs are a one time payment) if the pole is not occupied at the development stage to offset the additional operating and maintenance costs of the pole.

**POLICIES AFFECTING PROPOSAL:**

Public Works Strategic Plan:

Adoption of this product addresses the Process component of the Public Works Strategic Plan by integrating a new technology across divisions. Operations and Maintenance of Public Works together with the Planning and Economic Development have arrived at a mutually satisfactory technology that houses external utilities and City services.

**RELEVANT CONSULTATION:**

The CLP has been approved by the Standards and Approved Products committee with input from all operating departments affected by the installation and adoption of these poles.

Legal Services has been instrumental in developing both this report and the agreement.

**CITY STRATEGIC COMMITMENT:**

By evaluating the "Triple Bottom Line", (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

- **Community Well-Being is enhanced.** ☑ Yes ☐ No
  Partnerships are promoted.

- **Environmental Well-Being is enhanced.** ☐ Yes ☑ No

- **Economic Well-Being is enhanced.** ☑ Yes ☐ No
  Infrastructure and compact, mixed use development minimize land consumption and servicing costs.

- **Does the option you are recommending create value across all three bottom lines?** ☑ Yes ☐ No

- **Do the options you are recommending make Hamilton a City of choice for high performance public servants?** ☛ Yes ☐ No
JOINT USE AGREEMENT
FOR LICENSED USE OF COMMUNICATIONS LAMP POLES

THIS AGREEMENT made this 19th day of December, 2008.

BETWEEN

CITY OF HAMILTON, hereinafter called “the “Municipality”

-and-

COGECO CABLE CANADA INC., hereinafter called “the Company”

WHEREAS the Company operates telecommunications systems within the Municipality;

AND WHEREAS the Company has installed and will maintain certain Equipment in Communications Lamp Poles located within the Municipality’s Highways;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which by each of the parties hereto is hereby acknowledged, the Municipality and the Company each agree with each other as follows:

Defined Terms
1. In this Agreement, unless the context otherwise specifies or requires, the following terms shall have the respective meanings specified or referred to below and grammatical variations of such terms shall have corresponding meanings:

(a) “Affiliate” means “affiliate” as defined in the Canada Business Corporations Act;

(b) “Agreement” means this Joint Use Agreement;

(c) “Commissioner” means the General Manager of Public Works who has responsibilities for Highways within and under the jurisdiction of the
Municipality, or the person designated by him or her or such other person as may from time to time be designated by the Council of the Municipality;

(d) "Communications Lamp Pole(s)" or "CLP(s)" means a street lamp pole owned and approved by the Municipality and located within the Highway which lamp pole is specifically designed such that Equipment may be installed and operated from within a cavity internal to the street lamp pole and which street lamp pole has specifications as determined by the Municipality in consultation with all of the users of the CLP from time to time;

(e) "Development" means any land within the Municipality that is designated or zoned for residential uses where such land has a plan of subdivision approved in accordance with the provisions of the Planning Act, R.S.O. 1990, c. P.13, as amended;

(f) "Equipment" means the telecommunication materials, apparatus, fibre optic and/or wire cables or other facilities of the Company located within a Communications Lamp Pole;

(g) "Highway" means any of the Municipality’s common and public highways, streets, avenues, parkways and includes the area between the lateral property lines thereof;

(h) "Municipal Acceptance" means the decision of the Council of the Municipality, through resolution or by-law, to accept the infrastructure or any portion thereof installed in the Development and to initiate the maintenance period for any portion of the municipal infrastructure;

(i) "Proportionate Share" means that the Company shall pay 15% of the Municipality’s costs of a Replacement Pole but shall not pay any non-Company labour, equipment or material costs.

(j) "Useful Life" means the life of any CLP, as determined by the Municipality in its sole discretion, whether as consequence of routine wear and tear or as a result of damage from an accident, willful misconduct by a third party or otherwise;

(k) "Work" means, but is not limited to, any installation, removal, construction, maintenance, repair, replacement, relocation, adjustment or other alteration of Equipment in, on, over, along, under, above or across a Highway.
Term

2. This Agreement shall be subject to approval by the City Council and upon such approval shall be deemed effective and shall, unless earlier terminated in accordance with this Agreement, terminate twenty-five (25) years after the first day of the month in which the Agreement is deemed effective. This Agreement shall automatically renew for up to two (2) consecutive renewals of ten (10) years each unless either the Municipality or the Company gives written notice of its intention not to renew to the other party not less than six (6) months prior to the expiration of this Agreement or any renewal of this Agreement and all rights and privileges hereunder shall come to an end.

Application of this Agreement

3. This Agreement shall be applicable to the placement, operation and maintenance of the Equipment within CLPs located within Developments as are described by the Municipality from time to time.

Communications Lamp Pole Installation and Transfer of Ownership

4. The Municipality agrees to include provisions relating to the design, construction and installation of CLPs as a condition of approval in all relevant draft plans of subdivision where CLPs are requested to be installed by the Municipality and the owner of the lands under application has agreed to install CLPs.

5. Following the assumption of any Highway by the Municipality, to the Municipality’s satisfaction, the Municipality shall be responsible for all costs associated with the maintenance, repair and/or replacement of CLPs located within those Highways.

Use of Communications Lamp Poles

6. In completing Work on any Equipment in a CLP, the Company shall not carry out any physical disruption or change to the Highway or its use, without the Municipality’s prior written consent, not to be unreasonably withheld.

7. In Developments where the Municipality and the owner of the Development have agreed to install CLPs and where the Company has agreed, in writing, with the Developer to install its Equipment in the CLPs, the Company will design its Equipment for the initial installation in a manner which will enable the installation of as much of its Equipment inside the cavity of the CLPs and, during the Term or any renewals or extensions thereto, the Company shall use commercially reasonable efforts to continue to design and use Equipment that can be accommodated within the cavities of the CLPs so as to avoid placing additional structures (pedestals, handwells, etc.) in the Municipal right-of-way.
8. In the event that either party determines that the continued use of any CLP for the purposes of installing and/or operating its equipment does not meet the engineering, technical, operational, health and safety requirements of the party, such party shall notify the other party in writing of the reasons why the continued use of any CLP does not meet the party’s requirements and the parties shall use commercially reasonable efforts in consultation with the other party to resolve such issues. If after using commercially reasonable efforts to resolve the issues, the parties are not able to come to a mutually acceptable resolution, then the party issuing the notice shall have the right, exercisable at any time during the Term, or any renewals or extensions thereto, upon providing six (6) months written notice to the other party, to require the removal of the Equipment at that party’s expense from the relevant CLP in a reasonable time and require it to be placed in underground flush to grade vault(s) or an above ground pedestal(s) or cabinet(s) in such location(s) as may be approved and required by the Municipality, acting reasonably.

Conditions of Work

9. The Company is responsible for all Work related to its Equipment including the cost of such Work. In this regard, the Company is responsible for any cost it incurs to support, maintain, protect or upgrade its Equipment made necessary as a result of the normal activities of the Municipality;

Work of Company to be in Conformity with all Applicable Laws

10. The Company shall, in performing any and all Work in connection with this Agreement, ensure:

   (a) that its employees and contractors are qualified to do the Work they are doing;

   (b) that safe work practices are used in carrying out the Work;

   (c) that any and all of its employees, agents and contractors, at all times, comply with all applicable laws, the Workplace Safety Insurance Act, 1997, the Occupational Health and Safety Act and the Canadian Labour Code Part II, or any amendments or additions thereto and all applicable environmental laws; and

   (d) all Work shall be in accordance with the applicable industry and municipal standards and applicable law.

Representations and Warranties

11. The Company represents and warrants to the Municipality that it is a company in good standing under the applicable corporate and bankruptcy laws;
Supply of Information

12. The Company shall, at the request of the Commissioner, provide to the Municipality, in a format satisfactory to the Municipality a listing or record of the location where it has removed all of its Equipment from any CLP within the municipality to the date of such request.

Fees

13. Subject to Section 14, there shall be no additional application fees, permit fees, or other charges related to the Company’s installation of Equipment in a CLP.

Subsequent Installations

14. Any new installation of Equipment in a CLP directed after Municipal Acceptance, which CLP is not a replacement for an existing CLP, shall be installed subject to the following:

   (i) with the prior approval of the Municipality, which approval shall not be unreasonably withheld or delayed; and

   (ii) the payment by the Company to the Municipality of a one time fee of three hundred and fifty dollars ($350.00) per cavity that it applies to use.

15. When the Municipality determines, at its sole reasonable discretion, that an existing CLP has reached the end of its Useful Life and must be replaced, and the Company wishes to place its Equipment in the cavity of a new pole, the Municipality shall replace the CLP with a pole that, to the extent possible, having regard to the type and nature of poles that are commercially available at the time of replacement, generally meets the appearance of the CLP as approved by the Municipality from time to time, acting reasonably.

16. During the Term and any renewals or extensions thereto, upon installation of any Replacement Pole, where the Municipality has not been compensated by a third party for the costs of the Replacement Pole, then, where the Company has advised the Municipality that its Equipment is to be installed within a cavity of the Replacement Pole, the Municipality shall invoice the Company, the Company shall pay, for its Proportionate Share. Payment by the Company shall be made no later than ninety (90) days after receipt of an invoice therefore from the Municipality. The Company shall pay its own labour costs for installation of its own Equipment inside a Replacement Pole and its own material cost of its own Equipment installed in such Replacement Pole. Where the Company has advised the Municipality that they will not be installing any Equipment in a Replacement Pole, the Municipality may install a light pole which has no cavities designed for Equipment.

Operation

17. In the event that a CLP is damaged and is unsuitable for continued use by the Company, the Company shall be permitted to place Equipment in temporary above ground pedestals or cabinets, in locations mutually acceptable to the Company and the Municipality. Within thirty
(30) days of written notification to the Company of the installation of a suitable replacement CLP, the Company, at its expense, shall relocate from the temporary location, reintroduce its Equipment into the new CLP and remove the temporary pedestal or cabinet. The Company shall be responsible for any landscaping, grading, sodding or other restoration Work required in the removal of their own temporary pedestal or cabinet which Work shall be done at their expense and to the satisfaction of the Municipality.

18. In the event of an emergency, or to repair an interruption in service, where either occurrence cannot be resolved without removing the Equipment from a CLP, the Company shall be permitted to remove the Equipment and relocate it to a temporary above ground pedestal or cabinet in a location mutually acceptable to the Company and the Municipality. The Company shall, at its expense and within thirty (30) days of such emergency or the interruption in service being resolved, introduce the Equipment back into the original location of the CLP. The Company shall be responsible for any landscaping, grading, sodding or other restoration Work required in the removal of their own temporary pedestal or cabinet which Work shall be done at their expense and to the satisfaction of the Municipality.

Liability and Indemnification

19. The Company shall ensure that any Work to its Equipment it carries out does not damage, disrupt, move, remove or destroy any other Equipment in the CLP or the pole itself. Any party utilizing a CLP shall indemnify and save the other harmless from any damage to the other party's Equipment caused by their respective negligent act or omission or any negligent act or omission of any of their respective employees, servants or agents in the performance of this Agreement.

20. (a) The Company shall, at all times, defend, indemnify and save harmless the Municipality from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Company operating, constructing, and maintaining its Equipment in the CLP, or utilizing its Equipment for the delivery of its services to Third Parties or users, provided that the Company shall not be required to indemnify or save harmless the Municipality from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damages to any property, resulting from the negligence or wrongful act of the Municipality, its servants, agents or employees.

(b) The rights to indemnify provided for in this Section shall survive the expiration or any termination of the Agreement.

(c) Despite anything contained in this Agreement, the Municipality and the Company shall not be liable to each other in any way for special, incidental, indirect or consequential losses, including damages for pure economic loss, howsoever caused or contributed to, in connection with this Agreement or use of the CLP even if advised of the possibility thereof.
Insurance

21. Each of the parties hereto shall maintain insurance, or provide reasonable evidence of self insurance, in an amount of $5,000,000.00, and with such coverage and provisions as will protect the other parties from claims for damages and personal injury including death, and for claims from property damage which may arise under this Agreement, including but not limited to the construction, maintenance or operation of the Equipment and the CLPs or any act or omission of each party’s employees, servants, agents, licenses or contractors. In the event any renewal premium is not paid, the Municipality, in order to prevent the lapse of such liability insurance policy, may pay the renewal premium or premiums and the Company agrees to pay the cost of such renewal or renewals with fourteen (14) days of the account therefor being rendered by the Municipality.

22. In addition to the foregoing, each of the parties covenants and agrees that:

(a) The limits of liability for personal injury, bodily injury and property damage combined shall be for not less than five million dollars ($5,000,000.00) for each occurrence;

(b) The Comprehensive General Liability Insurance or self insurance shall extend to cover the contractual obligations of each party as stated within this Agreement;

(c) The Municipality shall be added as an additional insured but only with respect to liabilities arising from the operations of the Equipment; and

(d) All policies shall provide that they cannot be cancelled, lapsed or materially changed to the adversity of each party without at least thirty (30) days notice to the other party by registered mail.

Termination

23. (a) The Municipality and the Company mutually agree that should either party materially fail to carry out any of the terms, covenants and conditions herein contained or default in any of its obligations under the terms hereof and fail within thirty (30) days after receiving written notice from the other party to correct or commence to correct any such failure capable of correction, then this Agreement may, at the option of the non-defaulting party, be terminated by giving written notice to be effective upon receipt, provided that the Company shall continue to be liable to the Municipality for all payments due and obligations incurred under the Agreement prior to such termination.

(b) Despite subsection 23(a), the Municipality may terminate this Agreement immediately and without prior notice in the event that:

(i) the Company becomes insolvent, makes an assignment for the benefit of its creditors, has a liquidator, receiver or trustee in bankruptcy appointed
for it or become voluntarily subject as a debtor to the provisions of the
Winding Up Act, the Companies’ Creditors Arrangement Act, the
Bankruptcy and Insolvency Act, as amended from time to time, or any
successor legislation;

(ii) the Company transfers, assigns, or sublicenses any part or all of its interest
in this Agreement other than in accordance with the provisions of this
Agreement, or attempts to do same.

24. Upon the termination of this Agreement pursuant to subsection 23(a) or (b) and in
addition to fulfilling its other obligations and rights under this Agreement, the Company shall at
its option, remove all or any portion of its Equipment from the CLP and, in this event, shall
restore the CLP at the Company’s expense and to the satisfaction of the Commissioner, acting
reasonably. Notwithstanding the foregoing, if the Agreement is terminated under subsection
23(a) due to a material breach by the Municipality, any actions undertaken by the Company in
this Section 24 shall be at the Municipality’s expense.

25. Upon termination of this Agreement by reason of the expiry of this Agreement, the
Company shall be entitled to the continued operation of its Equipment on such terms and
conditions as are agreed to between the Municipality and the Company provided that
notwithstanding such termination the Company shall continue to be liable to the Municipality for
all obligations incurred under the terms of this Agreement to the date of such termination and
further provided that the Municipality and the Company are unable to agree upon the terms and
conditions for the continued operation of the Company’s Equipment, either party may invoke the
provisions of Section 26 (Arbitration) herein.

Arbitration

26. (a) In the event of any dispute or disagreement between the parties hereto as to the
meaning or interpretation of anything contained in this Agreement or as to the
performance or non-performance hereof or as to the respective rights and
obligations of the parties hereunder, the parties may agree to refer such dispute or
disagreement to non-binding arbitration.

(b) The procedure upon arbitration shall be as follows:

Within twenty (20) days after the written request of either of the parties hereto for
arbitration, in the event the parties are unable to agree upon a single, mutually
acceptable arbitrator, each of them shall appoint one arbitrator and the two so
appointed shall, within twenty (20) days after the expiration of the twenty day
period select a third. In case either of the parties hereto fails to name an arbitrator
within twenty (20) days after the written request for arbitration, the arbitrator
appointed shall be the only arbitrator. In case the two arbitrators so appointed are
unable to agree on a third arbitrator within twenty (20) days after the expiration of
the first twenty day period mentioned above, application shall be made as soon as
reasonably possible to any Judge of the Superior Court of Justice for the appointment of a third arbitrator. The arbitrator or arbitrators so appointed shall have all the powers accorded to arbitrators by the *Arbitrations Act*, R.S.O. 1990, c. A.24 as from time to time amended, or any Act in substitution therefor. The decision of the said arbitrator or arbitrators (or of a majority of such arbitrators) shall be final and binding on the parties hereto. However:

(i) either party may appeal an arbitration award to the Courts of the Province of Ontario on a question of law;

(ii) either party may apply to a court of competent jurisdiction;
- for an interim measure of protection; or
- for any order for relief which the arbitrator or arbitrators do not have the jurisdiction to provide.

**Transfers**

27. (a) This Agreement may be sub-licensed, granted, transferred or assigned:

(i) by the Municipality or the Company in whole or in part to any sub-licensee, grantee, transferee or assignee with the other party’s prior written consent which consent shall not be unreasonably withheld; or

(ii) by the Company in whole or in part to a parent company, any Affiliate, subsidiary, partnership, joint venture or any other entity in the context of any corporate re-organization with notice to the Municipality;

(iii) any sub-licensee, grantee, transferee or assignee shall be bound by the terms and conditions of this Agreement as those terms and conditions relate to the interest sub-licensed, granted, transferred or assigned; and

(iv) such sub-license, grant, transfer or assignment shall not release the Company from its obligations and liabilities under this Agreement until the Municipality has entered into a satisfactory agreement with the sub-licensee, grantee, transferee or assignee.

(b) the Company may pledge the license granted by this Agreement as security without the consent of the Municipality to any person directly or indirectly providing financing to the Company but such pledge shall not release the Company from its obligations and liabilities under this Agreement.
Notice

28. Any notice required or permitted to be given hereunder or any tender or delivery of documents may be sufficiently given by personal delivery or, if other than the delivery of an original document, by facsimile transmission to the Municipality at the following address:

Office of the City Clerk

Attn: Gord McGuire, OLS, OLIP
Manager, Survey and Technical Services
City of Hamilton
Public Works
71 Main Street West, 2nd Floor
Hamilton, Ontario L8P 4Y5

and to the Company at the following address:

Attn: Tim Brown, with a copy to:
Senior Manager Municipal Relations Legal Affairs
950 Syscon Road 5 Place Ville-Marie, Suite 1700
PO Box 5076, STN LCD1 Montreal, PQ H3B 0B3
Burlington, ON L7R 4S6 Fax: (514) 874-0776

Any notice may also be given by prepaid registered mail mailed within the Province of Ontario and such notice shall be effective five (5) days following the date of mailing, except in the event that there shall be a disruption in postal services at the date of mailing, in which case notice shall be effective by personal delivery or a facsimile transmission followed by receipt of original notice the next business day of transmission as stated above.

General Provisions

29. The Municipality has made no representations or warranties as to the condition or state of repair of the CLP or the suitability of CLP for any business, activity or purpose whatsoever and the company hereby agrees to take the CLP on an “as is” basis. The Company shall be responsible for maintenance and replacement of access panels covering the cavity of the CLPs which are used to accommodate its Equipment.
30. No use of CLP under this Agreement shall create or vest in the Company any ownership of or property rights in CLP, and the Company shall be and remain a mere non-exclusive occupant of the CLP and placement of the Equipment in a CLP shall not create or vest in the Municipality any ownership in or property rights to the Equipment.

31. Nothing in this Agreement shall be construed as affecting any rights or otherwise of others not a party to this Agreement to use any CLP in accordance with the Municipality’s legal authority.

32. The failure of any party to this Agreement to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

33. This Agreement does not preclude or prevent the Municipality from entering into agreements with other parties with respect to the use of the CLPs, provided such agreements do not interfere with or infringe upon any rights granted hereunder to the Company.

34. In the event that any user of the CLP adds new Equipment or new technology to the CLP which causes interference with the Equipment of other users of the CLP or causes such Equipment of other users of the CLP not to perform to current specifications, then the Municipality shall direct such user to remove or modify such Equipment or technology so as to eliminate such interference.

35. Except for the parties accessing and working on their Equipment in the CLPs, matters in this Agreement related to the parties carrying out any Work (including but not limited to an installation, removal, excavation, construction, operation, maintenance, repair, testing, replacement, relocation, adjustment or alteration of the parties’ wires, fibre optic cables, ducts, manholes, poles, cables, pipes conduits, pedestals, antennas, vaults, support structure or other related facilities, equipment or structures located outside of the Communications Lamp Pole) in, on, over, along, under, above or across any Highway that by its nature requires Municipal consent, or any physical disruption, change, cut, break, repair, restoration or excavation to the Highway, shall be subject to the terms and conditions of any required Municipal consent including the applicable terms and conditions of any existing binding Municipal Access Agreement.

36. This Agreement benefits and binds the Municipality and the Company and the successors of each of them.

37. If any term of this Agreement is found to be invalid, illegal, or unenforceable by a court having the jurisdiction to do so, that term is to be considered to have been severed from this Agreement and the remainder of this Agreement shall remain in full force and be unaffected by the severance of that term.

38. Time shall be of the essence in this Agreement.
39. The relationship of the Company and the Municipality established by this Agreement is that of independent contractors, and nothing in this Agreement shall be construed:

(a) to give either party the power to direct or control the day-to-day activities of the other;

(b) to constitute the parties as partners, joint ventures, co-owners or otherwise as participants in a joint or common undertaking; or

(c) to allow either party to create or assume any obligations on behalf of the other party for any purposes whatsoever.

40. No alleged waiver or breach of this Agreement is effective unless it is an express waiver in writing of the breach in respect of which it is asserted against the party alleged to have given the waiver. No waiver by a party of any breach of this Agreement operates as a waiver of any other breach of this Agreement.

41. In this Agreement, unless the context otherwise requires, the singular includes the plural and the masculine includes the feminine gender and a corporation.

42. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, whether written or oral between the parties. Except as provided in this Agreement, there are no conditions, covenants, agreements, representations, warranties, acknowledgments or other provisions, express or implied, collateral, statutory or otherwise, that form part of or affect this Agreement. The execution of this Agreement has not been induced by, nor do any of the parties rely upon or regard as material, any conditions, covenants, agreements, representations, warranties, acknowledgments, or other provisions not expressly made in this Agreement.

43. This Agreement shall be governed by and construed and enforced in accordance with the laws of the Province of Ontario and the laws of Canada which may be applicable to a party in the Province of Ontario.
IN WITNESS WHEREOF the parties hereto have executed this Agreement by their duly authorized representatives.

SIGNED, SEALED AND DELIVERED

) CITY OF HAMILTON

) )

) )

) )

Clerk

) )

Date

) COGECO CABLE CANADA INC.

) )

Signature

) CHRISS MACFARLANE

Print Name and Title

) Jan 6, 2009

Date
JOINT USE AGREEMENT
FOR LICENSED USE OF COMMUNICATIONS LAMP POLES

THIS AGREEMENT made this 30th day of Feb, 2009.

BETWEEN

CITY OF HAMILTON, hereinafter called "the "Municipality"

-and-

Bell Canada, hereinafter called "the Company"

WHEREAS the Company operates telecommunications systems within the Municipality;

AND WHEREAS the Company has installed and will maintain certain Equipment in Communications Lamp Poles located within the Municipality’s Highways;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which by each of the parties hereto is hereby acknowledged, the Municipality and the Company each agree with each other as follows:
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(b) "Agreement" means this Joint Use Agreement;

(c) "Commissioner" means the General Manager of Public Works who has responsibilities for Highways within and under the jurisdiction of the Municipality, or the person designated by him or her or such other person as may from time to time be designated by the Council of the Municipality;

(d) "Communications Lamp Pole(s)" or "CLP(s)" means a street lamp pole owned and approved by the Municipality and located within the Highway which lamp pole is specifically designed such that Equipment may be installed and operated from within a cavity internal to the street lamp pole and which street lamp pole has specifications as determined by the Municipality in consultation with all of the users of the CLP from time to time;

(e) "Development" means any land within the Municipality that is designated or zoned for residential uses where such land has a plan of subdivision approved in accordance with the provisions of the Planning Act, R.S.O. 1990, c. P.13, as amended;
(f) "Equipment" means the telecommunication materials, apparatus, fibre optic and/or wire cables or other facilities of the Company located within a Communications Lamp Pole;

(g) "Highway" means any of the Municipality’s common and public highways, streets, avenues, parkways and includes the area between the lateral property lines thereof;

(h) "Municipal Acceptance" means the decision of the Council of the Municipality, through resolution or by-law, to accept the infrastructure or any portion thereof installed in the Development and to initiate the maintenance period for any portion of the municipal infrastructure;

(i) "Proportionate Share" means that the Company shall pay 15% of the Municipality’s costs of a Replacement Pole but shall not pay any non-Company labour, equipment or material costs.

(j) "Useful Life" means the life of any CLP, as determined by the Municipality in its sole discretion, whether as consequence of routine wear and tear or as a result of damage from an accident, willful misconduct by a third party or otherwise;

(k) "Work" means, but is not limited to, any installation, removal, construction, maintenance, repair, replacement, relocation, adjustment or other alteration of Equipment in, on, over, along, under, above or across a Highway.
2. This Agreement shall be subject to approval by the City Council and upon such approval shall be deemed effective and shall, unless earlier terminated in accordance with this Agreement, terminate twenty-five (25) years after the first day of the month in which the Agreement is deemed effective. This Agreement shall automatically renew for up to two (2) consecutive renewals of ten (10) years each unless either the Municipality or the Company gives written notice of its intention not to renew to the other party not less than six (6) months prior to the expiration of this Agreement or any renewal of this Agreement and all rights and privileges hereunder shall come to an end.

Application of this Agreement

3. This Agreement shall be applicable to the placement, operation and maintenance of the Equipment within CLPs located within Developments as are described by the Municipality from time to time.

Communications Lamp Pole Installation and Transfer of Ownership

4. The Municipality agrees to include provisions relating to the design, construction and installation of CLPs as a condition of approval in all relevant draft plans of subdivision where CLPs are requested to be installed by the Municipality and the owner of the lands under application has agreed to install CLPs.
5. Following the assumption of any Highway by the Municipality, to the Municipality's satisfaction, the Municipality shall be responsible for all costs associated with the maintenance, repair and/or replacement of CLPs located within those Highways.

Use of Communications Lamp Poles

6. In completing Work on any Equipment in a CLP, the Company shall not carry out any physical disruption or change to the Highway or its use, without the Municipality's prior written consent, not to be unreasonably withheld.

7. In Developments where the Municipality and the owner of the Development have agreed to install CLPs and where the Company has agreed, in writing, with the Developer to install its Equipment in the CLPs, the Company will design its Equipment for the initial installation in a manner which will enable the installation of as much of its Equipment inside the cavity of the CLPs and, during the Term or any renewals or extensions thereto, the Company shall use commercially reasonable efforts to continue to design and use Equipment that can be accommodated within the cavities of the CLPs so as to avoid placing additional structures (pedestals, handwells, etc.) in the Municipal right-of-way.
8. In the event that either party determines that the continued use of any CLP for the purposes of installing and/or operating its equipment does not meet the engineering, technical, operational, health and safety requirements of the party, such party shall notify the other party in writing of the reasons why the continued use of any CLP does not meet the party’s requirements and the parties shall use commercially reasonable efforts in consultation with the other party to resolve such issues. If after using commercially reasonable efforts to resolve the issues, the parties are not able to come to a mutually acceptable resolution, then the party issuing the notice shall have the right, exercisable at any time during the Term, or any renewals or extensions thereto, upon providing six (6) months written notice to the other party, to require the removal of the Equipment at that party’s expense from the relevant CLP in a reasonable time and require it to be placed in underground flush to grade vault(s) or an above ground pedestal(s) or cabinet(s) in such location(s) as may be approved and required by the Municipality, acting reasonably.

Conditions of Work

9. The Company is responsible for all Work related to its Equipment including the cost of such Work. In this regard, the Company is responsible for any cost it incurs to support, maintain, protect or upgrade its Equipment made necessary as a result of the normal activities of the Municipality;

Work of Company to be in Conformity with all Applicable Laws

10. The Company shall, in performing any and all Work in connection with this Agreement, ensure:
(a) that its employees and contractors are qualified to do the Work they are doing;

(b) that safe work practices are used in carrying out the Work;

(c) that any and all of its employees, agents and contractors, at all times, comply with all applicable laws, the Workplace Safety Insurance Act, 1997, the Occupational Health and Safety Act and the Canadian Labour Code Part II, or any amendments or additions thereto and all applicable environmental laws; and

(d) all Work shall be in accordance with the applicable industry and municipal standards and applicable law.

Representations and Warranties

11. The Company represents and warrants to the Municipality that it is a company in good standing under the applicable corporate and bankruptcy laws;

Supply of Information

12. The Company shall, at the request of the Commissioner, provide to the Municipality, in a format satisfactory to the Municipality a listing or record of the location where it has removed all of its Equipment from any CLP within the municipality to the date of such request.

Fees

13. Subject to Section 14, there shall be no additional application fees, permit fees, or other charges related to the Company’s installation of Equipment in a CLP.
Subsequent Installations

14. Any new installation of Equipment in a CLP directed after Municipal Acceptance, which CLP is not a replacement for an existing CLP, shall be installed subject to the following:

(i) with the prior approval of the Municipality, which approval shall not be unreasonably withheld or delayed; and

(ii) the payment by the Company to the Municipality of a one time fee of three hundred and fifty dollars ($350.00) per cavity that it applies to use.

15. When the Municipality determines, at its sole reasonable discretion, that an existing CLP has reached the end of its Useful Life and must be replaced, and the Company wishes to place its Equipment in the cavity of a new pole, the Municipality shall replace the CLP with a pole that, to the extent possible, having regard to the type and nature of poles that are commercially available at the time of replacement, generally meets the appearance of the CLP as approved by the Municipality from time to time, acting reasonably.

16. During the Term and any renewals or extensions thereto, upon installation of any Replacement Pole, where the Municipality has not been compensated by a third party for the costs of the Replacement Pole, then, where the Company has advised the Municipality that its Equipment is to be installed within a cavity of the Replacement Pole, the Municipality shall invoice the Company, the Company shall pay, for its Proportionate Share. Payment by the Company shall be made no later than ninety (90) days after receipt of an invoice therefore from
the Municipality. The Company shall pay its own labour costs for installation of its own Equipment inside a Replacement Pole and its own material cost of its own Equipment installed in such Replacement Pole. Where the Company has advised the Municipality that they will not be installing any Equipment in a Replacement Pole, the Municipality may install a light pole which has no cavities designed for Equipment.

Operation

17. In the event that a CLP is damaged and is unsuitable for continued use by the Company, the Company shall be permitted to place Equipment in temporary above ground pedestals or cabinets, in locations mutually acceptable to the Company and the Municipality. Within thirty (30) days of written notification to the Company of the installation of a suitable replacement CLP, the Company, at its expense, shall relocate from the temporary location, reintroduce its Equipment into the new CLP and remove the temporary pedestal or cabinet. The Company shall be responsible for any landscaping, grading, sodding or other restoration Work required in the removal of their own temporary pedestal or cabinet which Work shall be done at their expense and to the satisfaction of the Municipality.

18. In the event of an emergency, or to repair an interruption in service, where either occurrence cannot be resolved without removing the Equipment from a CLP, the Company shall be permitted to remove the Equipment and relocate it to a temporary above ground pedestal or cabinet in a location mutually acceptable to the Company and the Municipality. The Company shall, at its expense and within thirty (30) days of such emergency or the interruption in service
being resolved, introduce the Equipment back into the original location of the CLP. The Company shall be responsible for any landscaping, grading, sodding or other restoration Work required in the removal of their own temporary pedestal or cabinet which Work shall be done at their expense and to the satisfaction of the Municipality.

**Liability and Indemnification**

19. The Company shall ensure that any Work to its Equipment it carries out does not damage, disrupt, move, remove or destroy any other Equipment in the CLP or the pole itself. Any party utilizing a CLP shall indemnify and save the other harmless from any damage to the other party's Equipment caused by their respective negligent act or omission or any negligent act or omission of any of their respective employees, servants or agents in the performance of this Agreement.

20. (a) The Company shall, at all times, defend, indemnify and save harmless the Municipality from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Company operating, constructing, and maintaining its Equipment in the CLP, or utilizing its Equipment for the delivery of its services to Third Parties or users, provided that the Company shall not be required to indemnify or save harmless the Municipality from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damages to any property,
resulting from the negligence or wrongful act of the Municipality, its servants, agents or employees.

(b) The rights to indemnify provided for in this Section shall survive the expiration or any termination of the Agreement.

(c) Despite anything contained in this Agreement, the Municipality and the Company shall not be liable to each other in any way for special, incidental, indirect or consequential losses, including damages for pure economic loss, however caused or contributed to, in connection with this Agreement or use of the CLP even if advised of the possibility thereof.

Insurance

21. Each of the parties hereto shall maintain insurance, or provide reasonable evidence of self insurance, in an amount of $5,000,000.00, and with such coverage and provisions as will protect the other parties from claims for damages and personal injury including death, and for claims from property damage which may arise under this Agreement, including but not limited to the construction, maintenance or operation of the Equipment and the CLPs or any act or omission of each party’s employees, servants, agents, licenses or contractors. In the event any renewal premium is not paid, the Municipality, in order to prevent the lapse of such liability insurance policy, may pay the renewal premium or premiums and the Company agrees to pay the cost of such renewal or renewals with fourteen (14) days of the account therefor being rendered by the Municipality.
22. In addition to the foregoing, each of the parties covenants and agrees that:

(a) The limits of liability for personal injury, bodily injury and property damage combined shall be for not less than five million dollars ($5,000,000.00) for each occurrence;

(b) The Comprehensive General Liability Insurance or self insurance shall extend to cover the contractual obligations of each party as stated within this Agreement;

(c) The Municipality shall be added as an additional insured but only with respect to liabilities arising from the operations of the Equipment; and

(d) All policies shall provide that they cannot be cancelled, lapsed or materially changed to the adversity of each party without at least thirty (30) days notice to the other party by registered mail.

Termination

23. (a) The Municipality and the Company mutually agree that should either party materially fail to carry out any of the terms, covenants and conditions herein contained or default in any of its obligations under the terms hereof and fail within thirty (30) days after receiving written notice from the other party to correct or commence to correct any such failure capable of correction, then this Agreement may, at the option of the non-defaulting party, be terminated by giving written
notice to be effective upon receipt, provided that the Company shall continue to be liable to the Municipality for all payments due and obligations incurred under the Agreement prior to such termination.

(b) Despite subsection 23(a), the Municipality may terminate this Agreement immediately and without prior notice in the event that:

(i) the Company becomes insolvent, makes an assignment for the benefit of its creditors, has a liquidator, receiver or trustee in bankruptcy appointed for it or become voluntarily subject as a debtor to the provisions of the Winding Up Act, the Companies’ Creditors Arrangement Act, the Bankruptcy and Insolvency Act, as amended from time to time, or any successor legislation;

(ii) the Company transfers, assigns, or sublicenses any part or all of its interest in this Agreement other than in accordance with the provisions of this Agreement, or attempts to do same.

24. Upon the termination of this Agreement pursuant to subsection 23(a) or (b) and in addition to fulfilling its other obligations and rights under this Agreement, the Company shall at its option, remove all or any portion of its Equipment from the CLP and, in this event, shall restore the CLP at the Company’s expense and to the satisfaction of the Commissioner, acting reasonably. Notwithstanding the foregoing, if the Agreement is terminated under subsection
23(a) due to a material breach by the Municipality, any actions undertaken by the Company in this Section 24 shall be at the Municipality’s expense.

25. Upon termination of this Agreement by reason of the expiry of this Agreement, the Company shall be entitled to the continued operation of its Equipment on such terms and conditions as are agreed to between the Municipality and the Company provided that notwithstanding such termination the Company shall continue to be liable to the Municipality for all obligations incurred under the terms of this Agreement to the date of such termination and further provided that the Municipality and the Company are unable to agree upon the terms and conditions for the continued operation of the Company’s Equipment, either party may invoke the provisions of Section 26 (Arbitration) herein.

Arbitration

26. (a) In the event of any dispute or disagreement between the parties hereto as to the meaning or interpretation of anything contained in this Agreement or as to the performance or non-performance hereof or as to the respective rights and obligations of the parties hereunder, the parties may agree to refer such dispute or disagreement to non-binding arbitration.

(b) The procedure upon arbitration shall be as follows:
Within twenty (20) days after the written request of either of the parties hereto for arbitration, in the event the parties are unable to agree upon a single, mutually acceptable arbitrator, each of them shall appoint one arbitrator and the two so appointed shall, within twenty (20) days after the expiration of the twenty day period select a third. In case either of the parties hereto fails to name an arbitrator within twenty (20) days after the written request for arbitration, the arbitrator appointed shall be the only arbitrator. In case the two arbitrators so appointed are unable to agree on a third arbitrator within twenty (20) days after the expiration of the first twenty day period mentioned above, application shall be made as soon as reasonably possible to any Judge of the Superior Court of Justice for the appointment of a third arbitrator. The arbitrator or arbitrators so appointed shall have all the powers accorded to arbitrators by the *Arbitrations Act*, R.S.O. 1990, c. A.24 as from time to time amended, or any Act in substitution therefor. The decision of the said arbitrator or arbitrators (or of a majority of such arbitrators) shall be final and binding on the parties hereto. However:

(i) either party may appeal an arbitration award to the Courts of the Province of Ontario on a question of law;

(ii) either party may apply to a court of competent jurisdiction;

   - for an interim measure of protection; or

   - for any order for relief which the arbitrator or arbitrators do not have the jurisdiction to provide.
Transfers

27. (a) This Agreement may be sub-licensed, granted, transferred or assigned:

(i) by the Municipality or the Company in whole or in part to any sub-licensee, grantee, transferee or assignee with the other party's prior written consent which consent shall not be unreasonably withheld; or

(ii) by the Company in whole or in part to a parent company, any Affiliate, subsidiary, partnership, joint venture or any other entity in the context of any corporate re-organization with notice to the Municipality;

(iii) any sub-licensee, grantee, transferee or assignee shall be bound by the terms and conditions of this Agreement as those terms and conditions relate to the interest sub-licensed, granted, transferred or assigned; and

(iv) such sub-license, grant, transfer or assignment shall not release the Company from its obligations and liabilities under this Agreement until the Municipality has entered into a satisfactory agreement with the sub-licensee, grantee, transferee or assignee.

(b) the Company may pledge the license granted by this Agreement as security without the consent of the Municipality to any person directly or indirectly providing financing to the Company but such pledge shall not release the Company from its obligations and liabilities under this Agreement.
Notice

28. Any notice required or permitted to be given hereunder or any tender or delivery of documents may be sufficiently given by personal delivery or, if other than the delivery of an original document, by facsimile transmission to the Municipality at the following address:

Office of the City Clerk
Att: Gord McGuire, OLS, OLIP
Manager, Survey and Technical Services
City of Hamilton
Public Works
71 Main Street West, 2nd Floor
Hamilton, Ontario L8P 4Y5

and to the Company at the following address:

Bell Canada
Manager, Municipal Relations
100 BOROUGH DR. 5 BLUE,
TORONTO, ON M1P 4W2

Attention: Frank Fucile

With a copy to:
Assistant General Counsel
Bell Canada Law Department
100 Wynford Drive, Suite 300
TORONTO, ON M3C 4B4

Attention: Corporate Counsel
Fax: (416)-383-6269
Any notice may also be given by prepaid registered mail mailed within the Province of Ontario and such notice shall be effective five (5) days following the date of mailing, except in the event that there shall be a disruption in postal services at the date of mailing, in which case notice shall be effective by personal delivery or a facsimile transmission followed by receipt of original notice the next business day of transmission as stated above.

General Provisions

29. The Municipality has made no representations or warranties as to the condition or state of repair of the CLP or the suitability of CLP for any business, activity or purpose whatsoever and the company hereby agrees to take the CLP on an “as is” basis. The Company shall be responsible for maintenance and replacement of access panels covering the cavity of the CLPs which are used to accommodate its Equipment.

30. No use of CLP under this Agreement shall create or vest in the Company any ownership of or property rights in CLP, and the Company shall be and remain a mere non-exclusive occupant of the CLP and placement of the Equipment in a CLP shall not create or vest in the Municipality any ownership in or property rights to the Equipment.
31. Nothing in this Agreement shall be construed as affecting any rights or otherwise of others not a party to this Agreement to use any CLP in accordance with the Municipality's legal authority.

32. The failure of any party to this Agreement to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

33. This Agreement does not preclude or prevent the Municipality from entering into agreements with other parties with respect to the use of the CLPs, provided such agreements do not interfere with or infringe upon any rights granted hereunder to the Company.

34. In the event that any user of the CLP adds new Equipment or new technology to the CLP which causes interference with the Equipment of other users of the CLP or causes such Equipment of other users of the CLP not to perform to current specifications, then the Municipality shall direct such user to remove or modify such Equipment or technology so as to eliminate such interference.
35. Except for the parties accessing and working on their Equipment in the CLPs, matters in this Agreement related to the parties carrying out any Work (including but not limited to an installation, removal, excavation, construction, operation, maintenance, repair, testing, replacement, relocation, adjustment or alteration of the parties' wires, fibre optic cables, ducts, manholes, poles, cables, pipes conduits, pedestals, antennas, vaults, support structure or other related facilities, equipment or structures locates outside of the Communications Lamp Pole) in, on, over, along, under, above or across any Highway that by its nature requires Municipal consent, or any physical disruption, change, cut, break, repair, restoration or excavation to the Highway, shall be subject to the terms and conditions of any required Municipal consent including the applicable terms and conditions of any existing binding Municipal Access Agreement.

36. This Agreement benefits and binds the Municipality and the Company and the successors of each of them.

37. If any term of this Agreement is found to be invalid, illegal, or unenforceable by a court having the jurisdiction to do so, that term is to be considered to have been severed from this Agreement and the remainder of this Agreement shall remain in full force and be unaffected by the severance of that term.
38. Time shall be of the essence in this Agreement.

39. The relationship of the Company and the Municipality established by this Agreement is that of independent contractors, and nothing in this Agreement shall be construed:

(a) to give either party the power to direct or control the day-to-day activities of the other;

(b) to constitute the parties as partners, joint ventures, co-owners or otherwise as participants in a joint or common undertaking; or

(c) to allow either party to create or assume any obligations on behalf of the other party for any purposes whatsoever.

40. No alleged waiver or breach of this Agreement is effective unless it is an express waiver in writing of the breach in respect of which it is asserted against the party alleged to have given the waiver. No waiver by a party of any breach of this Agreement operates as a waiver of any other breach of this Agreement.

41. In this Agreement, unless the context otherwise requires, the singular includes the plural and the masculine includes the feminine gender and a corporation.
42. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, whether written or oral between the parties. Except as provided in this Agreement, there are no conditions, covenants, agreements, representations, warranties, acknowledgments or other provisions, express or implied, collateral, statutory or otherwise, that form part of or affect this Agreement. The execution of this Agreement has not been induced by, nor do any of the parties rely upon or regard as material, any conditions, covenants, agreements, representations, warranties, acknowledgments, or other provisions not expressly made in this Agreement.

43. This Agreement shall be governed by and construed and enforced in accordance with the laws of the Province of Ontario and the laws of Canada which may be applicable to a party in the Province of Ontario.
IN WITNESS WHEREOF the parties hereto have executed this Agreement by their duly authorized representatives.

SIGNED, SEALED AND DELIVERED

CITY OF HAMILTON

________________________
Clerk

________________________
Date

________________________
Ralph Tannahill
Regional Manager – Access Network

________________________
Date