



CITY OF HAMILTON

PUBLIC WORKS DEPARTMENT
Environment & Sustainable Infrastructure Division
and
CITY MANAGER'S OFFICE
Legal Services Division

TO: Chair and Members Public Works Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: September 6, 2011	
SUBJECT/REPORT NO: Creation of Telecommunication License Agreement with Level 3 Communications, LLC (PW11060/LS11009) (City Wide)	
SUBMITTED BY: Gerry Davis, CMA General Manager Public Works Department Peter A. Barkwell City Solicitor City Manager's Office	PREPARED BY: Gord McGuire (905) 546-2424, Extension 2439 Helen Vastis (905) 546-2424, Extension 2622
SIGNATURE:	

RECOMMENDATION

- (a) That Appendix "A" attached to Report PW11060/LS11009 respecting a Telecommunications License Agreement (TLA) with Level 3 Communications, LLC (Level 3) for the purpose of allowing Level 3 access to the City's Public Highways for a term of five years, with the option to renew for two additional five-year periods, be approved;
- (b) That the Mayor and City Clerk be authorized and directed to execute the necessary TLA documentation with Level 3, all documents being in a form satisfactory to the City Solicitor;

- (c) That the net proceeds of this license agreement be transferred into the Annual Utilities Capital Account 49214-4031110003.

EXECUTIVE SUMMARY

Level 3 and its predecessor companies have telecommunication services in the City of Hamilton. The City of Hamilton does not currently have a formal agreement with Level 3, however the City and WFI Urbanlink entered into an agreement for the original construction in 2001. Since that time the original agreement has lapsed and there has been consolidation in this industry, resulting in Level 3 acquiring the network originally constructed.

The network originally constructed is along the CPR rail corridor it crosses City Roads in approximately 50 locations. The total collective crossing distance is approximately 1700m. This network is a fibre optics system. See attached map (Appendix "B").

Both parties agree to adopting an agreement that outlines the terms and conditions for access to the City's Public Highways will streamline and coordinate business processes.

Staff has negotiated an agreement that meets the City of Hamilton's needs and provides mechanisms to address future enhancements. This Telecommunications License Agreement is attached as Appendix "A" and staff recommends that Council approve this Telecommunications License Agreement.

Alternatives for Consideration - See Page 4

FINANCIAL / STAFFING / LEGAL IMPLICATIONS

Financial: If adopted the City will receive a fee of \$50,000 annually from Level 3, which fee is indexed to the Consumer Price Index for the duration of the agreement. Having a single favourably negotiated agreement will provide a stable base to the City moving forward.

Level 3 is an American company, and therefore the City is not constrained by Canadian regulatory policy re: fees and charges for the occupation of the right of way. Level 3 have agreed to pay \$195,000 for previous use of the City's roads as part of this agreement.

Staffing: N/A

Legal: Legal Services has assisted and directed negotiations with the telecommunications provider, and recommends that the City enter into the attached agreement.

HISTORICAL BACKGROUND

The business of Telecommunications services in Canada is regulated by the Canadian Radio-Television and Telecommunication Commission (CRTC). As previously noted this

firm is American and based in Colorado, therefore not subject to the same regulatory provisions as Canadian Telecommunications providers. Agreements between municipalities and Telecommunication suppliers have evolved over the past ten years based on changing market conditions.

Telecommunication providers require different access techniques to deliver modern telecommunication services, such as internet and broadband access. This agreement allows the continued existence of the fiber optic network while realizing the work around and administrative impacts on the right of way that result from the occupation of Level 3 infrastructure.

The Proposed Telecommunications License Agreement

Staff has negotiated the proposed TLA with Level 3 that is recommended to Council for its consideration and approval. The proposed TLA reflects the negotiated conditions of access similar to agreements already in place with Canadian telecommunication carriers.

Access to properties owned by the City other than City highways is not part of the scope of this agreement, i.e.: Cell Tower sites. Any project that proposes to cross City lands other than City highways will require an easement to be negotiated in a form satisfactory to the City of Hamilton.

City staff has negotiated the term of the Agreement to be five years, with options to automatically renew for two additional five year periods if both parties are satisfied with the operation of the agreement. This provides a reasonable opportunity for the City to revisit the terms and conditions of the Agreement since standards in the industry continue to change.

POLICY IMPLICATIONS

This agreement aligns with the Public Work Strategic Plan “Innovate Now” by integrating business planning processes between Level 3 and the City of Hamilton. The agreement formalizes the relationships and defines timelines for relocations of equipment, provides for a more integrated sharing of data and the return of as constructed records to the City for recording purposes.

The agreement aligns with the financial goals of the Public Works Strategic Plan as well by defining relocation costs allowing for more effective use of capital and obtaining annual fees.

RELEVANT CONSULTATION

Consultation with the Managers of Construction and Design sections within the Environment and Sustainable Infrastructure Division of Public Works has led to their agreement of this arrangement.

Consultation with Real Estate led to the agreed upon valuation for the land occupation charges, reflecting the easement condition impacts on our right of way.

Consultation with Legal Services and Risk Management has led to the proposed new TLA. Legal Services has assisted in negotiating all aspects of contract law. Risk Management has negotiated the elements regarding liability and indemnity to the City's satisfaction.

ANALYSIS / RATIONALE FOR RECOMMENDATION

The current lack of an agreement for relocation of equipment with Level 3 places the financial responsibility with the City of Hamilton in certain instances. Those costs usually become part of a capital project.

Responsibility for the cost of relocating equipment installed in absence of an agreement is in accordance with the provisions of the *Public Service Works on Highways Act*. This Provincial legislation (*Public Service Works on Highways Act*) dictates that the costs are borne equally between the two parties. This new agreement ensures that all plant installed prior to this agreement is the responsibility of Level 3, ensuring the City of Hamilton has cost certainty in its capital program going forward.

Responsibility for the cost of relocating equipment installed after the execution of this Agreement shall be that of Level 3.

This TLA also provides specific timeframes for the relocation of Level 3 Plant in anticipation of upcoming City work. Level 3 must be given sixty days written notice to relocate its plant. This is a favourable condition for the City as construction timelines can be planned using this information.

Level 3 will be obliged under the terms of this agreement to supply all of its plant information to the City in a form acceptable and usable in our engineering systems. This includes the right of the City to request "as-constructed" records of installations, providing the City a permanent, reliable, record of the installed utilities in its highways.

ALTERNATIVES FOR CONSIDERATION

Options exist to allow Level 3 continued access to our rights of way without entering into this TLA. This would continue the existing model of limited control and opportunity to coordinate activity with this firm.

CRTC Decision 2007-08 allowed the Province of New Brunswick to collect a per km fee from a telecommunications company to access its highways. Ontario law and regulations under the Municipal Act appear to bar that option to the City of Hamilton for Canadian telecommunications carriers. Pursuing this option is valid in this instance as Level 3 is a non Canadian carrier, as such the option outlined above would deprive the City of Hamilton \$245,000 in 2011 and a projected \$750,000 (2011 dollars) over the projected 15 year term of this agreement.

Pending changes to the Telecommunications Act may not address all Municipal interests and may change terms of access for all carriers. In spite of lobbying efforts by the Federation of Canadian Municipalities, all the changes suggested to the new Telecommunication Act that were favourable to Municipalities may not be implemented.

**SUBJECT: Creation of Telecommunication License Agreement with Level 3
Communications, LLC - (PW11060/LS11009) - (City Wide) - Page 5 of 5**

As such an agreement with the Level 3 under terms mutually agreed upon will protect the City's interests directly.

CORPORATE STRATEGIC PLAN

Focus Areas: 1. Skilled, Innovative and Respectful Organization, 2. Financial Sustainability, 3. Intergovernmental Relationships, 4. Growing Our Economy, 5. Social Development, 6. Environmental Stewardship, 7. Healthy Community

Financial Sustainability

- ◆ Effective and sustainable Growth Management.
- ◆ Ensuring the proper allocation of costs are distributed between the parties allows more consistent budgeting and delivery of the City of Hamilton's capital.

Growing Our Economy

- ◆ An improved customer service
- ◆ A co-ordinated effective utility network that allows access from all properties in accordance with development standards enhances the economic well being of Hamilton.

Environmental Stewardship

- ◆ A sustainable utility network provides cohesive supply of telecommunications services. All work performed under this agreement meets all Provincial Environmental requirements.

APPENDICES / SCHEDULES

Appendix "A" - License Agreement between City of Hamilton and Level 3
Communications, LLC

Appendix "B" - Map of Level 3 Network

LICENSE AGREEMENT

THIS AGREEMENT made this 1st day of January, 2011, hereinafter called the "Effective Date",

BETWEEN:

CITY OF HAMILTON
hereinafter called the "Municipality"

- and -

LEVEL 3 COMMUNICATIONS, LLC
hereinafter called the "Company"

WHEREAS the Company wishes to construct, install and maintain its Equipment in, on, under, over, along or across ("Within") highways, streets, road allowances, lanes, bridges or viaducts of the Municipality (singularly a "Highway" and collectively, the "Highways");

AND WHEREAS, pursuant to section 43 of the Telecom Act, the Company requires the Municipality's consent to construct its Equipment Within the Highways;

AND WHEREAS the Municipality is willing to permit the use of its Highways where, in its judgment, such use will not interfere with its own service requirements and the public use of the Highways, including the consideration of the economy, safety or any rights or privileges previously conferred or hereafter conferred by the Municipality by contract or otherwise on others not parties to this Agreement to use any of the Highways;

AND WHEREAS the Company acknowledges that it must not unduly interfere with the public use, enjoyment and safety of the Highways and must share the use of the Highways with other providers of services to the public when occupying and using the Highways as described herein;

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:

DEFINITIONS

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 an affiliated body corporate as defined in the *Canada Business Corporations Act*, as well as any partnership or other unincorporated association in which the Company or any of its affiliated bodies corporate (as so defined) has a controlling interest;
 - (b) **"Agreement"** means this License Agreement;
 - (c) **"Business Day"** means a day that is not Saturday, Sunday or a statutory or civic holiday;
 - (d) **"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;
 - (e) **"Contractor"** includes subcontractors, workers, suppliers and materialmen;
 - (f) **"Emergency"** means an unforeseen situation where immediate action must be taken to preserve the environment, public health, safety or an essential service of the parties;
 - (g) **"Equipment"** means the Company's wires, cables, ducts, conduits, handholes, manholes, pedestals and any other accessories, structures, transmission facilities and equipment;
 - (h) **"Hazardous Substance"** means any hazardous substance and includes, but is not limited to electromagnetic or other radiation, petroleum products and by-products, industrial wastes, contaminants, pollutants, dangerous substances, and toxic substances, as defined in or pursuant to any applicable law, ordinance, rule, regulation, by-law or code, whether federal, provincial or municipal;
 - (i) **"Letter of Credit"** means a letter of credit in the form approved by the Municipality and issued by a chartered bank;
 - (j) **"Municipality's Costs"** means the verifiable costs and expenses of the Municipality to complete an activity, based on the cost of labour and materials, plus an overhead cost equal to fifteen percent (15%) of the total cost of labour and materials;

- (k) **“Road Occupancy Permit”** means the Municipality’s document which grants approval for the Company to occupy and/or access a Highway to perform its Work;
- (l) **“Third Party”** means any person that is not a party to this Agreement and includes a person that attaches its facilities to the Company’s Equipment pursuant to an agreement; and
- (m) **“Work”** means, but is not limited to, any installation, removal, construction, maintenance, repair, replacement, relocation, excavation, adjustment or other alteration of Equipment Within a Highway.

TERM

- 2. **Term and Renewal.** This Agreement shall be subject to approval by the City Council and, upon such approval, shall be deemed effective on the Effective Date and shall, unless earlier terminated in accordance with this Agreement, expire five (5) 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 renewal periods of five (5) years 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 term thereof, following which all rights and privileges hereunder shall come to an end, save and except for the Company’s continued use of the Highways and the Company’s obligations pursuant to Section 14-16, 25-30, 35-39 and 41-42 of this Agreement.

USE OF THE HIGHWAYS

- 3. **Consent to Use Highways.** The Municipality hereby provides its consent to the Company to use the Highways for its Work subject to the terms and conditions herein and in accordance with all applicable federal, provincial and municipal statutes, laws and by-laws or other rules and regulations pertaining to the application and use of the Highways or the Equipment; provided, however, that said provincial and municipal statutes, laws and bylaws or other rules and regulations are not in conflict with the applicable federal statutes or regulations or with this Agreement.
- 4. **No Ownership Rights.** No use of a Highway under this Agreement shall create or vest in the Company any ownership of or property rights in a Highway, and the Company shall be and remain a mere non-exclusive occupant of the Highway and placement of the Equipment in a Highway shall not create or vest in the Municipality any ownership in or property rights to the Equipment.
- 5. **No Rights to Third Parties.** Nothing in this Agreement shall be construed as affecting any rights or otherwise of others not a party to this Agreement to use any Highway in accordance with the Municipality’s legal authority.

6. **No Warranties.** The Municipality makes no representations or warranties as to the state of repair of the Highways or the suitability of the Highways for any business, activity or purpose whatsoever and the Company hereby agrees to take the Highways on an "as is" basis.
7. **Consent Required for Work.** The Company shall not commence any Work Within a Highway without first, where required, providing the Commissioner a description of the Work, and secondly, obtaining any required written consent of the Commissioner, which consent may establish the terms and conditions under which the Work may be conducted and may require the Company to provide detailed construction plans of the Work; provided, however, that such consent shall not be unreasonably withheld or delayed.
8. **Municipality May Refuse to Grant Consent.** The Company acknowledges and agrees that the Municipality may refuse to grant its consent with regard to any proposed location of the Equipment for reasons related to *bona fide* municipal purposes. In such circumstances, the Commissioner shall make a good faith effort to provide and approve alternative suggestions, wherever possible, for routing the Equipment Within the Highway to assist the Company in the installation of its Equipment.
9. **Consent Not Required for Routine Work.** Despite Section 7 and Section 8, the Company, without the prior written consent of the Municipality, may:
 - (a) utilize existing ducts or similar structures of the Equipment where no physical disruption or changes to the Highway or its use is required; provided that it gives the Municipality at least twenty-four (24) hours advance notice; and
 - (b) carry out routine maintenance and field testing to its Equipment and install subscriber connections,provided that in no case shall the Company 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.
10. **Emergency Work.** Notwithstanding Section 7, in the event of an Emergency, the Company shall be permitted to perform such remedial Work as is reasonably necessary to restore or maintain its services without complying with Section 7; provided that the Company does comply with Section 7 within five (5) Business Days of completing the Work.
11. **Conditions of Work.** All Work conducted by the Company on a Highway is subject to the following conditions:
 - (a) The portions of the Equipment which pass over or under existing utilities' equipment or cross beneath streets shall be placed in a carrier pipe or be encased in concrete, and shall not place substantial point loading or bear directly on any existing pipe, conduit or structure unless otherwise approved by the

Commissioner. Where practicable and approved by the Commissioner, Equipment that crosses a paved roadway shall be constructed or installed using a trenchless method.

- (b) If the Company breaks the paved surface of a Highway, it shall, upon completion of the Work, complete a temporary repair to restore the surface of the Highway to substantially the same condition it was in before the Work was undertaken, all in accordance with the Municipality's Procedure for the Installation of Utilities on Road Allowances, this Agreement and the Road Occupancy Permit, and to the satisfaction of the Commissioner. If the Company fails to complete the temporary repair to the satisfaction of the Commissioner within twenty-four (24) hours of being notified by the Municipality, the Municipality may effect such temporary repair and charge all of the Municipality's Costs related thereto to the Company.
- (c) After completion of any Work, the Company shall notify the Commissioner of such completion and leave the Highway in a neat, tidy, and safe condition and free from nuisance, all to the satisfaction of the Commissioner acting reasonably.
- (d) Immediately following the completion of the Work, the Company shall advise the Municipality of any paved surface of a Highway that requires permanent restoration, following which the Municipality shall complete the permanent restoration and the Company shall pay the Municipality's Costs related thereto forthwith upon receipt of an invoice from the Municipality accompanied by supporting documents. The Municipality shall use its best efforts to render its invoice to the Company within two (2) months following the completion of the restoration work.
- (e) If the Municipality requires the Work to be stopped for any *bona fide* municipal purpose or cause relating to public health and safety, special events or any circumstances beyond its control any reasonable reason, the Company shall cease all such Work forthwith upon receipt of verbal notice from the Municipality, which shall include the reasons for the Work stoppage. Within two (2) business days of issuing the verbal stop work order, the Commissioner will provide to the Company written reasons for such order and a reasonable estimate of when the stop work order will be lifted. Upon the Municipality lifting the stop work order in writing to the Company, the Company may resume its Work.
- (f) The Company is responsible for all construction, excavation, installation, maintenance and removal of its Equipment, including the cost of such Work.
- (g) The Company shall comply with municipal tree protection requirements in place at the time the Work is undertaken and shall not cut down or trim trees or the roots of trees on any Highway without the prior permission of the Commissioner.
- (h) The Company shall take all reasonable measures, to the satisfaction of the Municipality, to clean, remove or conceal graffiti or other unauthorized marks

from the Equipment. Without limiting the generality of the foregoing, the Company will remove or conceal graffiti which is considered offensive or inflammatory within two (2) working days' notice from the Municipality and all other graffiti within five (5) working days' of notice from the Municipality or such other time period as mutually agreed to by the parties. In the event the Company does not remove or conceal the graffiti in accordance with this subsection, the Municipality may take such steps as it deems reasonable and necessary to remove or conceal the graffiti and charge the Municipal Costs related thereto to the Company.

- (i) The Company shall ensure that all worksites have signage clearly identifying the Contractor working there on behalf of the Company, and the name and phone number of the Company. The Company shall ensure that all Contractors are working in accordance with current municipal standards, labour legislation and obtain any permits as may be reasonably required from time to time.
- (j) The Parties to this Agreement acknowledge that the Company shall comply with the provisions of this section for all Work following execution of this Agreement. The Municipality acknowledges that as at the Effective Date of this Agreement it is not aware of any non-compliance by the Company with the provisions of this section. The Company hereby further acknowledges and agrees that if any non-compliance with this section is discovered by the Municipality in respect to installations by the Company prior to the Effective Date of this Agreement and it is determined that said non-compliance is having, or will have, a material effect on the Municipality's use of its property, then the Company shall take such reasonable measures upon reasonable notice from the Municipality to rectify any such deficiency or non-compliance all at the expense of the Company.

12. **Work to be in Conformity with all Applicable Laws.** The Company shall, in performing any and all Work in connection with this Agreement, ensure that:

- (a) its employees and contractors are qualified for the activities they perform;
- (b) safe work practices are used in carrying out the Work;
- (c) any and all of its employees, agents and contractors, at all times, comply with all applicable laws, including but not limited to, the *Workplace Safety Insurance Act, 1997*, the *Occupational Health and Safety Act*, the *Canadian Labour Code Part II* and all applicable environmental laws; and
- (d) all Work shall be in accordance with applicable law.

13. **WISB.** Prior to commencing any Work, the Company:

- (a) shall submit to the Municipality an original Clearance Certificate from the Ontario Workplace Safety and Insurance Board ("WSIB") and shall provide additional certificates with respect to such coverage as often as the Municipality deems necessary during the term of the Agreement to ensure continued good standing with the WSIB; or
 - (b) furnish proof in a form satisfactory to the Municipality from the WSIB that the Company does not require WSIB insurance, but in such a case if the Company changes its status during the term of the Agreement so that such coverage is required, the Company shall immediately provide the Municipality with the certificate required under **subsection (a)**.
14. **Work Performed by Contractors.** Where a substantial portion of the Work to be done under the Agreement is to be carried out by a subcontractor, the Municipality may require the Company to furnish the same evidence as provided under **Section 13**.
15. **Other Obligations of Company.** The Company covenants and agrees with the Municipality as follows.
- (a) The Company shall not suffer or permit any lien to be filed or registered against a Highway. In this regard and, subject to any existing rights of the Company or consents granted to the Company by the Municipality, the Company shall, within twenty (20) days following notice from the Municipality, remove, or diligently commence to remove, from title any instrument claiming an estate, interest, property right or lien against the Highway that is directly related to the Equipment or the Work Within the Highway. If the Company fails to remove or commence to remove such instrument within the twenty (20) days noted above, then, in addition to any other right or remedy of the Municipality, the Municipality may discharge or vacate the instrument by paying into Court the amount required by statute to obtain a discharge, and the amount so paid by the Municipality, together with all costs and expenses including solicitor's fees (on a solicitor and his client basis), incurred by the Municipality in connection therewith, shall be due and payable by the Company to the Municipality on demand.
 - (b) The Company represents and warrants to the Municipality that it is a company in good standing under the applicable corporate and bankruptcy laws.
 - (c) The Company will circulate all of its permit applications to the Public Utilities Coordinating Committees ("PUCC") of the Municipality and obtain related approvals for its Work in accordance with the Municipality's policies, as amended from time to time.
 - (d) The Company shall apply for and maintain active membership in the PUCC of the Municipality and bear a reasonable proportionate share of its costs of operation. The Company agrees to support the creation and costs of operation of any utility plan registries maintained by such committee, provided such utility plan registry

is generally accepted in the industry and where such operation and costs are agreed to by the Company in accordance with a cost-sharing arrangement established by such committees from time to time.

- (e) The Company will indemnify and save harmless the Municipality from any claims, demands, causes of action, loss, costs or damages, legal fees and disbursements that the Municipality may suffer, incur or be liable for, resulting from the Company providing inaccurate locates of its Equipment, or related to construction of Equipment in a non-approved location.

SUPPLY OF INFORMATION

- 16. **“As-constructed” Drawings.** The Company shall provide to the Municipality, at its own expense and within two (2) months of completing the construction or installation of any of the Equipment, “as constructed” record drawings in an electronic format compatible with the Municipality’s utility mapping system. Upon request from the Company, digital ortho-imagery and/or mapping may be provided by the Municipality at the Company’s expense.
- 17. **Listing of Equipment:** The Company shall, at the request of the Commissioner, provide to the Municipality, in a format satisfactory to the Municipality a listing of the location of all the Equipment installed, altered, relocated, or removed by it, or on its behalf in the Highways to the date of such request. This listing shall include the particulars of all parties within the existing structure, a statement of their rights and interests and contact information.
- 18. **Locates.**
 - (a) Upon receiving a request from the Municipality, the Company shall, at no cost to the Municipality, provide locates of its Equipment:
 - (i) in the event of an Emergency, within two (2) hours of receiving the request. The requesting party shall, using commercially reasonable efforts, have either a representative on-site or provide a contact number for a representative so that the locate can be completed in the affected area; and
 - (ii) in all other cases, within a reasonable time to be agreed upon by the Company and the Municipality.
 - (b) The locates provided by the Company to the Municipality for pre-design shall contain sufficient design information and survey detail as required by the Commissioner.

- (c) During the term of this Agreement, the Company shall either be a member in good standing in a utility locate notification system used in Ontario or provide its own locate services to the same or better standard as supplied by the utility locate notification system.

The Company shall, at the request of the Commissioner, provide to the Municipality, in a format satisfactory to the Municipality, a listing of the location of all the Equipment installed, altered, relocated or removed by it, or on its behalf in the Highways to the date of such request.

19. **Emergency Contacts.** Each party shall provide to the other party a list of southern Ontario Emergency contact personnel who shall be available at all times, and shall ensure that the aforementioned list is current.

ADDITIONAL DUCTS OR CABLES

20. Within ten (10) days of receiving an application for Municipal consent from the Company, the Municipality may request in writing that the Company purchase and install additional ducts and/or cabling on its behalf at the same time the Equipment is installed. Provided that the fulfillment of such request does not unduly delay the completion of the proposed Work, the costs associated with the supply and installation of the additional ducts and/or cabling will be the responsibility of the Municipality and be based on the proportionate costs incurred by the Company, including design and engineering costs, in installing the additional ducts and/or cabling. Upon installation and payment in full to the Company, the additional ducts and/or cabling will become the property of the Municipality.

PAYMENT FOR PREVIOUS USE

21. The Company acknowledges previous use and occupation of the Municipality's Highways prior to the Effective Date of this Agreement and hereby agrees to and shall make a one time payment in the amount of \$195,000.00 to the Municipality in full and final satisfaction of all previous use of the Municipality's Highways. This acknowledgment of previous use and payment for previous use shall not operate to release or negate the obligations of the Company or the Municipality as otherwise set out in this License Agreement.

FEES

22. **Annual Administration Fee.** The Company shall pay to the Municipality, upon execution of this Agreement and annually thereafter on the anniversary date of the execution of this Agreement, an annual fee as calculated in accordance with Schedule "A" attached hereto for use of the Municipality's Highways.

23. **Permit Fees.** The Company agrees to pay to the Municipality all applicable amounts, including application fees, permit fees, excavation or Road Occupancy Permit fees and charges. The Municipality shall give notice to and consult with the Company with respect to any increase in such fees or the application thereof.
24. **Interest on Unpaid Amounts.** The Company and the Municipality shall pay simple interest at the prime rate plus two percent (2%) per annum on all amounts required to be paid under this Agreement, from the due date until payment in full, both before and after judgment.
25. The fee outlined above in section 22 are 2011 rates and shall be adjusted annually on December 31 of each year commencing in 2012, based on a percentage increase equal to the Consumer Price Index Variation as set out in the Canadian Economic Observer published by Statistics Canada, and expressed as a percentage rate per annum, calculated and compounded annually for each and every year of the Agreement. If the change in the Consumer Price Index is a negative sum for any given year then the change in the base rate for that year shall be zero.

RELOCATION OF EQUIPMENT

26. **Requirement to Relocate Equipment.** Upon receipt of no less than sixty (60) days written notice from the Municipality the Company shall relocate its Equipment within a Highway or perform any Work in connection with the Highway, as may be required by the Municipality for *bona fide* municipal purposes or as required by law. The Municipality will, to the best of its ability, avoid unnecessary relocations but reserves the right to request such relocation as required. Special circumstances may arise with respect to a specific relocation whereby the parties may mutually agree to negotiate alternative cost sharing arrangements. Such alternative arrangements shall be mutually agreed upon in writing by both parties prior to approval of a new location and commencement of the relocation Work.
27. **Relocation in the Event of an Emergency.** In cases of an Emergency, after first making a reasonable attempt to contact the Company and obtain an Equipment locate, the Municipality may take such temporary measures with respect to the Equipment it deems necessary for public safety or the public interest in the circumstances and the Company shall reimburse the Municipality for the Municipality's Costs thereby incurred which are directly related to the existence of the Equipment in the Highway, provided the emergency was not caused by Municipality's gross negligence or willful misconduct. The Municipality will make a good faith effort to avoid damage to the Equipment affected by the relocation and to assist the Company in its efforts to ensure uninterrupted service to its customers.
28. **If Company Fails to Complete Relocation.** If the Company fails to complete the relocation of the Equipment in accordance with **Section 25**, the Municipality may

complete such relocation or repair and the Company shall pay the Municipality the Municipality's Costs related thereto, provided such failure was not caused by Municipality's own gross negligence or willful misconduct.

29. The Company shall be responsible for all of its costs, including any related Municipality's cost relating to the relocation of the Equipment.

LIABILITY AND INDEMNIFICATION

30. **Indemnification by Company.** Except for the gross negligence or wilful misconduct of the Municipality, its servants, agents or employees, 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's Work in the Highways, or utilizing its Equipment for the delivery of its services to Third Parties or users.
31. **Survival.** The rights to indemnity provided for in this Section shall survive the expiration or any termination of the Agreement.
32. **No Liability.** Despite anything contained in this Agreement, the Municipality shall not be liable to the Company 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 the Highway even if advised of the possibility thereof.

INSURANCE AND LETTER OF CREDIT

33. **Company to Maintain Insurance.** The Company shall maintain insurance in an amount and description as set out below to protect the Company and the Municipality solely with respect to liability arising out of the negligence of the Company, its employees, agents and contractors, from claims for damages, personal injury including death, and for claims from physical damage to tangible property which may arise from the Company's operations or Work or failure to do Work under this Agreement, including without limitation the Company's use or maintenance of the Equipment on or in the Highways or any act or omission of the Company's agents or employees while engaged in Work, and such coverage shall include all costs, charges and expenses reasonably incurred for any injury or damage for which the Company is responsible in law.
34. **Insurance Policies.** The Company shall obtain and maintain at its own expense the following policies of insurance:
 - (a) Commercial General Liability Insurance, written on IBC Form 2100 or its equivalent, including but not limited to bodily and personal injury liability, property damage, products liability, completed operations liability, owners and contractors protective liability, blanket contractual liability, premises liability, and contingent employer's liability coverage, having an inclusive limit of not less

than \$2,000,000 per occurrence and an annual aggregate limit of not less than \$4,000,000 for completed Work and subject to the following;

- (i) Where the description of the Work provides for or contemplates (A) the use of explosives for blasting, (B) vibration from pile driving or caisson work or (C) the removal or weakening of support of any property, building or land, whether such support be natural or otherwise, then explosion, collapse and underground (XCU) coverage shall be included and same shall be noted on the certificate of insurance.
 - (ii) Coverage shall be included for pollution from "hostile fires".
 - (iii) Non-owned automobile liability limit of not less than \$1,000,000 per accident in respect of automobiles rented or otherwise not owned by the Company for a period not exceeding thirty (30) days that are used or operated on its behalf for the Work under this Agreement.
 - (iv) Coverage shall include Cross Liability and Severability of Interest clauses.
 - (v) The Municipality and those for whom it is responsible in law, shall be added as an Additional Insured but solely with respect to liability arising out of the negligence of the Company, its employees, agents and contractors.
- (b) Standard Form Automobile Liability Insurance that complies with all requirements of the current legislation of the Province of Ontario, having an inclusive limit of not less than \$2,000,000 per accident in respect of the use or operation of vehicles owned or leased by the Company for the Work under this Agreement.
- (c) The required insurance limits for comprehensive general liability and automobile insurance may be composed of any combination of primary and excess (or 'umbrella') insurance policies.
- (d) The Company shall maintain Property insurance, as may be applicable, with respect to physical loss or damage (including fire, theft, burglary, etc.) of its own property and property in its care, custody and control, including its equipment, tools and stock, used in connection with the Agreement. Such Property insurance shall be written on a replacement cost basis of said property, repairs, additions or equipment being installed, otherwise being handled or stored on or off premises, and include a waiver of subrogation against the Municipality.
35. **Requirements of Policies.** The insurance policies required to be maintained by the Company shall:

- (a) be primary to the extent of the Municipality's rights as Additional Insured and shall be placed with insurers maintaining a minimum A.M. Best "A" rating that is licensed to carry on business in Ontario;
 - (b) be maintained continuously during the course of carrying out of the Work;
 - (c) provide that at least thirty (30) days prior written notice (fifteen (15) days in the case of automobile liability insurance and ten (10) days in the event of non-payment of premiums) shall be given to the Municipality by the Insurer before policy cancellation, or termination or material change of insurance coverage to the detriment of the Municipality.
36. **Company Still Liable.** Any insurance coverage acquired under the Agreement shall in no manner discharge, restrict or limit the liabilities assumed by the Company under the Agreement. The dollar limit of insurance coverage shall not be limited by the dollar amount of the Agreement.
37. **Proof of Insurance and Claims Protocol.**
- (a) The Company shall deposit with the Municipality on the execution of this Agreement certificates of insurance as well as renewal certificates thereafter.
 - (b) The Company shall not do or omit to do anything that would impair or invalidate the insurance policies.
 - (c) Delivery to and examination or approval by the Municipality of any certificates of insurance or other evidence of insurance shall not relieve the Company of any of its indemnification or insurance obligations under the Agreement. The Municipality shall be under no duty either to ascertain the existence of or to examine such certificates of insurance or to advise the Company in the event such insurance coverage is not in compliance with the requirements set out in the Agreement.
 - (d) Claims reported to the Company by a third party or by the Municipality (a "**Claimant**") shall be promptly investigated by the Company. The Company shall make contact with the Claimant within forty-eight (48) hours of receipt of notice of a claim. The Company shall initiate an investigation of the claim immediately upon notice, and advise the Claimant by letter of its position regarding resolution of the claim within twenty (20) Business Days of the notice. The Company shall include in its letter of resolution the reasons for its position. Failing acceptance of the resolution by the Claimant of the proposed resolution, the Company agrees to report the claim to its insurer for further review and response to the Claimant. Failure to follow this procedure shall permit the Municipality to investigate and resolve any claims and offset the resultant costs against any monies due, from time to time, under the Agreement.

38. **Letter of Credit.** Upon the Municipality's request, the Company shall provide to the Municipality security for the performance of its obligations consisting of a Letter of Credit in an amount that represents the projected restoration costs to the Highway resulting from the Company's pending Work, and naming the Municipality as beneficiary for a one (1) year period after completion of the proposed Work in the Highway. If requested by the Municipality, the Letter of Credit shall be provided prior to starting the proposed Work.

ENVIRONMENTAL LIABILITY

39. **Municipality Not Liable.** The Municipality is not responsible, either directly or indirectly, for any damage to property, including any nuisance or injury to any person, howsoever caused, including death, arising from the escape, discharge, spill or release of any Hazardous Substance resulting from the Company's use of the Highway. The foregoing release shall not extend to any loss, damage, injury or death caused by the gross negligence or wilful misconduct of the Municipality, its employees, agents, contractors or those other persons for whom the Municipality is in law responsible
40. **Where Company Liable.** The Company agrees to assume all environmental liabilities relating to its use of the Highway including but not limited to any liability for clean-up of any Hazardous Substance on or under the Highway which arise from:
- (a) the operations or Work of the Company Within the Highway, or
 - (b) any Equipment brought Within the Highway by the Company, its contractors, agents or employees or by any person with the express or implied consent of the Company.

The Municipality agrees to provide notice to the Company of any liability arising under this provision in a reasonable period of time after the occurrence.

TERMINATION

41. **Termination for Default.**
- (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 be terminated by the non-defaulting party with 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 41(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 becomes voluntarily subject as a debtor to the provisions of the *Winding-Up Act*, the *Companies' Creditors Arrangement Act*, the *Bankruptcy and Insolvency Act*; or
 - (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.

42. **Rights upon termination – Abandonment of Equipment.** If this Agreement is terminated or expires, then, at the Municipality's option:

(a) the Company shall, within six months' written notice from the Municipality and at its own expense, remove all or any portion of its Equipment that is used solely by the Company from the affected Highways and restore such Highways in accordance with this Agreement (ordinary wear and tear excepted), failing which the Municipality may remove such Equipment and restore the affected Highways and charge its reasonable costs of doing so back to the Company; or

(b) upon six months' written notice from the Municipality to the Company for default under Subsection 41 (b) all right, title and interest in the Equipment will vest in the Municipality on an "as is, where is" basis, free and clear of all liens and charges, and the Company shall have no further right, title or interest in such Equipment.

ARBITRATION

43. **Referral to Arbitration.** 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 arbitration.

44. **Procedure for Arbitration.** The procedure upon arbitration pursuant to the provisions of Section 43 shall be as follows:

- (a) 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 (20) 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.

- (b) The arbitrator or arbitrators so appointed shall have all the powers accorded to arbitrators by the *Arbitration Act, 1991*, S.O. 1991, c.17. The decision of the said arbitrator or arbitrators (or of a majority of such arbitrators) shall be final and binding on the parties hereto.
- (c) Either party may appeal an arbitration award to the Courts of the Province of Ontario on a question of law.
- (d) Either party may apply to a court of competent jurisdiction for (A) an interim measure of protection or (B) any order for relief which the arbitrator or arbitrators do not have the jurisdiction to provide.

ASSIGNMENT AND TRANSFERS

45. **When Consent Required.** This Agreement may be sub-licensed, granted, transferred or assigned:

- (a) 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;
- (b) 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;

46. **Assignees to be Bound by Agreement.** 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 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.

47. **Company May Pledge Agreement as Security.** 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

48. 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 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:

Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Attention: General Counsel

with a courtesy copy to:

Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Attention: Senior Director, NIS

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.

INTERPRETATION

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

50. 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 rest of this Agreement shall remain in force unaffected by the severance of that term.

51. Words having well known technical or trade meanings within the context of municipal construction and the communications industry shall be so construed, and all listings of items

shall not be taken to be exclusive, but shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

52. All references to statutes in this Agreement shall include amendments thereto, regulations thereof, and successor legislation thereafter.

53. If any payment is required to be made or other action is required to be taken pursuant to this Agreement on a day which is not a Business Day, then such payment or action shall be made or taken on the next Business Day.

54. Time shall be of the essence in this Agreement.

55. 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.

56. 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.

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

58. 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.

SCHEDULE "A"

Annual Fee for 2011

\$50,000.00 *

*subject to adjustment in accordance with section 25.

