



22 January 2018

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

Filed online

Dear Secretary General,

Re: *Application for Determinations and Approvals re Municipal Consent by the City of Calgary, 8690-C126-201612250 (Calgary, 28 November 2016)*

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including telecommunications. We are writing in support of the above-noted application filed by the City of Calgary (Calgary).
- 2 The Forum supports a strong Canadian communications system, provided it serves the Canadian public interest. We define the public interest in terms of the legislative objectives set by Parliament for Canadian communications.
- 3 In telecommunications Parliament's concern for the public interest is expressed primarily in section 7 of the 1993 *Telecommunications Act*, but is at times expressed by other parts and sections of the *Act*. For example, section 43(3) emphasizes that Canadian telecommunications carriers and distribution undertakings may build transmission lines on, over, under or along highways or other public places, but require the consent of those responsible for these areas.¹ Parliament therefore anticipated a level of reasonable interaction between telecommunications and distribution carriers, and other levels of government.
- 4 Calgary is now asking the Commission to clarify the relevant law that applies to telecommunications carriers' access to and use of its rights of way,² and to permit it to rely on BYLAW NUMBER 17M2016, *Being A Bylaw Of The City Of Calgary To Regulate The Process For Access And Use Of Municipal Rights-Of-Way*, to process and resolve rights-of-way issues (Bylaw 17M2016).

¹ S. 43(3): "No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place".

² Calgary, *Application for Determinations and Approvals re Municipal Consent by the City of Calgary, 8690-C126-201612250* (Calgary, 28 November 2016), at ¶¶142-143 (Calgary 2016 Application); t

- 5 By way of background, we understand that Calgary currently addresses many rights-of-way matters under a 2012 municipal bylaw that expired in 2014.³ The replacement proposed by the city, Bylaw 17M2016, would have a five-year term if it enters into force in January 2018.⁴
- 6 Calgary is seeking declaratory relief from the CRTC in part because its negotiations with telecommunications carriers to develop fair terms and conditions under which it will or will not consent to carriers' access to its roadways, have failed. The negotiation process involving Bylaw 17M2016 began in May 2014. In October 2015 the telecommunications carriers told Calgary they would not agree to the terms in Bylaw 17M2016, a position they repeated in October 2016.⁵
- 7 The Forum understands that Bylaw 17M2016 is of significance to Calgary because decisions by telecommunications carriers to maintain, upgrade or extend their infrastructure often lead to construction on city roads. Calgary owns and manages 16,000 kilometres of public roadways;⁶ \$405 million of its \$3.6 billion in expenditures in 2015 were allocated to roads (including traffic and parking).⁷ That year, roughly a quarter of a million people⁸ - 24% of adults living in Calgary – were dissatisfied with the conditions of its road surfaces.⁹
- 8 The Forum supports Calgary's application, and the proposals it has made in Bylaw 17M2016, on the grounds that these generally comply with Parliament's telecommunications policy for Canada and with previous CRTC decisions. In particular, the Forum agrees that telecommunications carriers, and not taxpayers, should be responsible for the costs associated with carriers' access to and use of Calgary's assets, including its roads and sidewalks.
- 9 Apart from initial costs (including but not limited to the impact of roadway disruptions on drivers, pedestrians and merchants; city permitting and inspection requirements; surface

³ *Ibid.*, Appendix B, page 1 of 5, "2014 March".

⁴ *Ibid.*, at ¶147. Appendix E, page 3 of 22 "Term of Agreement".

⁵ *Ibid.*, Appendix B, "Timeline of Prior MCAA Negotiations".

⁶ *Ibid.*, at ¶11.

⁷ City of Calgary, *2015 Annual Report*, <http://www.calgary.ca/CA/fs/Documents/Plans-Budgets-and-Financial-Reports/Annual-Reports/Annual-Report-2015.pdf>, "Financial Synopsis 2015 Expenses", at 41.

⁸ According to Statistics Canada, the census metropolitan area of Calgary was 1,392,609 in 2016 (an increase of 14.6% from 2011). Calgary's population grew more between 2011 and 2016 than other cities (such as Toronto [6.2%] and Vancouver [6.5%] and Ottawa-Gatineau [5.5%]), and compared to Alberta as a whole (11.6%) and Canada (5.0%). Statistics Canada, "Focus on Geography Series, 2016 Census: Calgary, (CMA) – Alberta", <http://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-cma-eng.cfm?GC=825&GK=CMA&LANG=Eng&TOPIC=1>.

The city survey's statistic that 24% of adults in Calgary were dissatisfied or very dissatisfied indicates that 272,966 people shared this view; the 4.4% margin of error means that 95 times out of a hundred, the actual number of people dissatisfied with Calgary's road surface conditions would fall within the range of 222,922 to 323,009 people.

⁹ City of Calgary, *Roads Annual Survey 2016*, prepared for the City of Calgary by HarGroup Management Consults Inc., <http://www.calgary.ca/Transportation/Roads/Documents/Roads-Annual-Survey-2016.pdf>, at 13; in 2015 20% were "dissatisfied" and an additional 4% were "very dissatisfied". We were unable to locate more recent surveys.

restoration costs; lost parking metre revenue, and abandoned equipment removal), carriers' roadway works have long-term implications for roadway quality, as the CRTC noted in 2001.¹⁰

- 10 Cuts made by utility companies in roads reduce the lifespan of their surfaces because the original and repaired pavements react differently to the same environment and traffic:

[p]avements, when constructed new, act as one uniform structure consisting of similar material through the length of the project. Such pavements move up or down evenly in the event of freeze and thaw. Introducing cuts and backfilling with different or even the same material, but compacted at different times, with different levels of effort and having different moisture content, makes that section of pavement react differently to the applied traffic and environmental loading. This divides the road into many different segments with a potential for uneven heaving or depressions. This can result in a rough surface, reduced serviceability, requirement for additional maintenance activities, and ultimately early major rehabilitation or reconstruction.¹¹

- 11 While Calgary designs its roads to last 30 years,¹² a 2014 study of the impact of utility companies' cuts in Calgary's roads found that cuts in roads built in the previous decade reduced their serviceability by at least a fifth.¹³ In other words, roads designed and built to last 30 years, could instead last 24 years simply due to cuts in their surface. Reduced roadway lifespans cost more money: where Calgary's taxpayers might expect to pay to replace a given road three times a century, cuts in the road would require them to pay for four replacements in the same period.
- 12 In our view, it is unreasonable to require taxpayers to pay for the longer-term road restoration costs created by works undertaken by telecommunications companies to maintain or increase their competitive position and/or revenues. Fees paid by telecommunications to municipalities for their access to and amendment of, city roads should, therefore, also include a reasonable evidence-based component to compensate cities (and, indirectly, taxpayers) for the affected roads' reduced serviceability and lifespan.
- 13 The alternative – giving favourable consideration to telecommunications companies' plea that they should not have to compensate Calgary for the degradation of its roadways caused

¹⁰ *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, (Ottawa, 25 January 2001), Decision CRTC 2001-23, <http://www.crtc.gc.ca/eng/archive/2001/DT2001-23.htm>, at ¶99 (*Ledcor/Vancouver*): “[t]he Commission accepts that utility cuts contribute to the degradation of pavement. ...”

¹¹ Mohammad Karim et. al. “Effect of Utility Cuts on Serviceability of Pavement Assets – A Case Study from The City of Calgary”, Paper prepared for presentation at the Pavement and Asset Management Session of the 2014 Annual Conference of the Transportation Association of Canada (Montreal, Quebec: 2014), <http://conf.tac-atc.ca/english/annualconference/tac2014/s-7/karim.pdf>, at 2.

¹² Venkat Lakkavalli, Barry Poon and Sukhwinder Dhanoa, “Challenges in Utility Coordination and Implementation of Pavement Degradation Fees”, Paper prepared for presentation at the Safe Management of Utility Infrastructure within our Roadways Session of the 2015 Conference of the Transportation Association of Canada Charlottetown, PEI: 2015), <http://conf.tac-atc.ca/english/annualconference/tac2015/s23/venkat.pdf>, at 2 (“2. Balancing the growth”).

¹³ *Ibid.*, at 17 (Table 6: Percent Serviceability Loss Due to Utility Cuts in Pavements of Different Age Ranges”). Serviceability was reduced by 22% in roads built in the previous 5 years, and by 20% in road built from 6 to 10 years earlier.

by their cuts¹⁴ – unfairly transfers the burden of these cuts to taxpayers (whose taxes pay to repair and replace roads) and to drivers (whose vehicles’ suspension, steering and tires suffer from poorly surfaced roads and consequently require repair). Granting the companies’ pleas also unreasonably affects the ability of Calgary’s elected representatives to respond effectively to their constituents’ reasonable concerns over poor road quality:¹⁵ in the absence of compensation for the impact of utilities’ cuts, Calgary’s city councillors will be required to ignore residents’ concerns about road quality, to re-allocate their city’s budget to roadworks at the expense of other functions performed by the city, and/or to raise taxes. Carriers benefit in that they are able to continue to operate in Calgary based on its expired right-of-way bylaw; but neither Calgary nor Calgarians benefit from the direct and indirect costs imposed by carriers’ cuts in roadways.

- 14 The Forum also agrees that a five-year agreement for Calgary’s framework for utilities’ access to its roads will provide telecommunications carriers and distributors, as well as Calgary, with more certainty.¹⁶ The carriers apparently object to a five-year term.¹⁷ Yet, as the Commission noted in 2015 when considering its new regulatory framework for mandating wholesale services, predictability provides certainty for all.¹⁸ Do the carriers believe that municipalities are not entitled to benefit from the certainty and predictability that carriers enjoy?
- 15 Finally, the Forum wishes to set out its concern about the speed of CRTC proceedings. We note that in this case, Calgary had pursued negotiations with telecommunications carriers for more than two years before approaching the CRTC. The city first sent its bylaw proposals to affected telecommunications carriers in May 2014; the carriers declined Calgary’s proposals in January 2015, October 2015, September 2016 and October 2016. From February 2015 to May 2015 the carriers attempted to circumvent the negotiation process altogether, by appealing to the CRTC,¹⁹ albeit unsuccessfully.

¹⁴ The carriers have apparently said “No” to Calgary’s proposals for pavement ‘degradation’ fees – see Calgary 2016 Application, Appendix E, pp. 19-20.

¹⁵ The city worked from early 2015 to the end of 2016, for example, “with thousands of Calgarians to identify short-, medium-, and long-term changes and upgrades to address current issues and challenges along Crowchild Trail [Calgary’s main north-south link on its west side, providing access to the city’s centre – see City of Calgary, *Crowchild Trail Study: About the study*, <http://www.calgary.ca/Transportation/TI/Pages/Road-projects/crowchild-trail-upgrades/About-the-study.aspx>] and to accommodate the continued growth of Calgary in the years to come”: City of Calgary, *Crowchild Trail Study* <http://www.calgary.ca/Transportation/TI/Pages/Road-projects/crowchild-trail-upgrades/Crowchild-Trail-Study.aspx>.

¹⁶ In 2001 the Companies argued that one of their proposals was “provides certainty as to the specific terms thereby simplifying administration and provides an incentive to municipalities to conduct advance planning”: *Ledcor/Vancouver*, at ¶135.

¹⁷ Calgary 2016 Application, Appendix E, pp. 3-4.

¹⁸ *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326 (Ottawa, 22 July 2015), <http://www.crtc.gc.ca/eng/archive/2015/2015-326.htm>, at ¶24: “The Commission’s framework for determining whether wholesale services should be mandated should be predictable and practical for the industry and should constitute an efficient regulatory regime that provides a high degree of regulatory certainty to both incumbent carriers and competitors.”

¹⁹ Calgary 2016 Application, Appendix B (“Timeline”).

- 16 In January 2017, after Calgary filed its application on 28 November 2016, the carriers asked the CRTC to suspend or adjourn Calgary's application pending a constitutional challenge until the courts could make a decision about the carriers' constitutional challenge of the city's proposed by-law; the CRTC denied the carriers' request five months later on 30 May 2017.²⁰ The carriers next asked the CRTC at the end of June 2017 to review and vary this denial; the CRTC denied this application seven months later on 20 December 2017.²¹ Considering the CRTC's many efforts for decades to streamline its regulatory frameworks to provide those it regulates with more flexibility,²² it is surprising and disappointing that a municipal request that the CRTC exercise the authority granted to it by Parliament on behalf of the public interest, has now been derailed by an entire year by two procedural steps of the carriers (a procedural request and their subsequent appeal of the request's result).
- 17 Process-based errors have added to the delays in Calgary's attempts to negotiate with the carriers. While the carriers told Calgary in January 2015 that they would be challenging Bylaw 17M2016 via the CRTC, they did not serve Calgary with a copy of their 2 February 2015 application for interim relief until Calgary noted this failure to the CRTC a week later (10 February). Similarly, when the CRTC effectively dismissed the carriers' application on 25 May 2015 and encouraged them to continue to negotiate with Calgary, it did not send Calgary a copy of this determination for two months – Calgary first learned of the CRTC's determination on 27 July 2015, when it asked the CRTC about the carriers' application.
- 18 In the Forum's view, the public interest would be served in proceeding by a prompt decision by the CRTC – and, based on our review of its application, a decision in favour of Calgary. Regardless of the decision's outcome, however, the CRTC should not only set clear, timely and preferably speedy deadlines for the carriers if it requires them to take or respond to specific actions, but it should also monitor the timeliness of the carriers' response: the CRTC should then consider the necessity of further regulatory action if these responses are tardy rather than timely.

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²⁰ Telecom Procedural Letter Addressed to Distribution List, (Ottawa, 30 May 2017), http://www.crtc.gc.ca/eng/archive/2017/lt170530a.htm?_ga=2.130880845.311669983.1516379877-18065054.1505399347.

²¹ *Application to review and vary the Commission's 30 May 2017 letter decision denying certain telecommunications carriers' request to suspend the City of Calgary's application regarding municipal access*, Telecom Decision CRTC 2017-461 (Ottawa, 20 December 2017), <https://www.crtc.gc.ca/eng/archive/2017/2017-461.htm>.

²² See e.g. *PRICE CAP REGULATION AND RELATED ISSUES*, Telecom Decision CRTC 97-9 (Ottawa, 1 May 1997), <http://www.crtc.gc.ca/eng/archive/1997/dt97-9.htm>, at ¶167:

The Commission notes that pre-determining aggregate price levels over a multi-year period significantly reduces the regulatory burden by eliminating revenue requirement proceedings. Earnings regulation proceedings are replaced with a streamlined regulatory process for the disposition of price changes that comply with the price cap formula and other pre-determined pricing constraints. ...

- 19 The Forum has appreciated this opportunity to intervene. Should you have any questions, please let us know as indicated below.

Sincerely yours,



Monica L. Auer, M.A., LL.M.
Executive Director
Forum for Research and Policy in Communications (FRPC)
Ottawa, Ontario

- cc. Douglas I. Evanchuk, McLennan Ross LLP, devanchuk@mross.com
City of Calgary, matt.lonsdale@calgary.ca
Bell Canada, bell.regulatory@bell.ca
Rogers Communications, rwi_gr@rci.rogers.com
Shaw Communications Inc., regulatory@sjrb.ca
TELUS Communications Company, regulatory.affairs@telus.com
Zayo Canada, regulatory@zayo.com
The Federation of Canadian Municipalities, stephane_emardchabot@sympatico.ca