
CITY OF KELOWNA

MEMORANDUM

Date: September 5th, 2001
File No.: 2255-20

To: City Manager

From: Electrical Utilities Manager

Subject: **Municipal Access Agreement (MAA) – Bell Intrigna Inc.**

RECOMMENDATION

THAT the City of Kelowna enter into a 5 year Municipal Access Agreement (MAA) with Bell Intrigna Inc. for the purpose of constructing, maintaining, operating and removing support structures, transmission lines and other related telecommunication facilities (as that term is defined in the Telecom Act) along or across the City Service Corridors in accordance to the terms and conditions as outlined in the attached agreement which forms part of this report;

AND THAT Council authorize staff to negotiate an appropriate fee schedule;

AND FURTHER THAT the Mayor and City Clerk be authorized to execute the contract documents.

BACKGROUND

During the past year staff has been carefully reviewing the issue of use of the road right away with particular focus on telecommunications. Staff's objective was to develop a standardized right of way Municipal Access Agreement (MAA) for all telecommunication firms that may chose to use the right of way on the basis of the Federation of Canadian Municipalities (FCM) recommended agreement.

Through many months of talks and negotiations, having input and discussions with other municipalities and meetings with telecommunication providers, this MAA agreement has now been standardized and is now ready for Council approval. Bel Intrigna is a firm that wishes to proceed with a MAA at this time. The City is also in discussion with other firms at this time who are considering entering into a MAA.

Key aspects of the agreement ensure that those installing telecommunications in the right of way provide drawings and conduct work consistent with City Bylaws and protect the City in the event of default or other problems. The agreement also allows the City to renegotiate the agreement pending future rulings by the Supreme Court, Federal government or CRTC.

As also recommended by the FCM, City staff will strike a Shallow Utilities Committee in order to coordinate construction works, etc. Telus, Shaw, BC Gas, WKP. Bell Intrigna and any other new communication providers (that come into the City) will all be invited to join in. The objective will be a consistent, mutually beneficial arrangement that will result in the best utilization of the City's Service Corridors and minimize costs and impacts to the citizens of Kelowna.

Rod Carle, Electrical Utilities Manager

cc. Director of Works & Utilities

MUNICIPAL ACCESS AGREEMENT

THIS AGREEMENT made the _____ day of _____ 2001 (“Effective Date”)

B E T W E E N:

BELL INTRIGNA INC.
(hereinafter called the Company)

- and -

CITY OF KELOWNA
(hereinafter called the Municipality)

WHEREAS the Company is a “Canadian carrier” as defined in subsection 2(1) of the *Telecommunications Act* (Canada) (“*Telecom Act*”), or a “distribution undertaking” as defined in subsection 2(1) of the *Broadcasting Act*, (Canada) (“*Broadcast Act*”);

AND WHEREAS, in order to operate as a Canadian carrier or distribution undertaking the Company wishes to enter on those highways within the jurisdiction of the Municipality delineated in Schedule “A” (“Service Corridors”) from time-to-time for the purpose of constructing, maintaining, operating and removing support structures, transmission lines and other related telecommunications facilities (as that term is defined in the *Telecom Act*), such support structures, transmission lines and other related telecommunications facilities hereinafter called “Equipment”, in, on, over, under, along or across the Service Corridors;

AND WHEREAS, the Municipality is the public authority having jurisdiction over the Service Corridors;

AND WHEREAS, the Municipality exercises such jurisdiction for *bona fide* municipal purposes and acts reasonably, except to the extent specifically otherwise required by law;

AND WHEREAS, the Company must obtain the Municipality's consent to the occupancy and use of the Service Corridors consisting of constructing, maintaining, operating and removing its Equipment in, on, over, under, along or across the Service Corridors;

AND WHEREAS, the Company must not unduly interfere with the public use, enjoyment and safety of the Service Corridors and must share the use of the Service Corridors with other providers of services to the public (the Company and all such providers hereinafter collectively called “Service Providers”) when occupying and using the Service Corridors as described above;

AND WHEREAS the Municipality is willing to grant its consent to the occupancy and use of the Service Corridors consisting of the construction, operation, maintenance and removal of the Equipment in, on, over, under, along or across the Service Corridors having due regard to the safety, use and enjoyment of the Service Corridors by others, as described above;

AND WHEREAS the Municipality and the Company have agreed that it would be mutually beneficial to outline the terms and conditions pursuant to which said consent shall be provided by the Municipality to the Company in the form of a non-exclusive right;

NOW THEREFORE in consideration of the promises and mutual covenants herein contained, the Municipality and the Company each agree with the other as follows:

Scope of Municipal Consent

1. The Municipality hereby consents and grants a non-exclusive right to the Company to occupy and use locations specified by the Municipality within the Service Corridors (“Alignments”) for the purpose of constructing, operating, maintaining and removing its Equipment for use only in the provision of “telecommunications services” (as defined in subsection 2(1) of the *Telecom Act*) or “broadcasting” (as defined in subsection 2(1) of the *Broadcast Act*) subject to the terms and conditions hereinafter set forth and in accordance with all applicable federal, provincial and municipal statutes, laws and by-laws or other applicable rules and regulations.
2. The Company may access the Service Corridors in accordance with the terms of this Agreement for the purpose of exercising its rights under section 1 of this Agreement.

Authorization of Work

3. The Company shall not excavate, break up or otherwise breach the surface of any Service Corridors or engage in any other work therein for the purpose of constructing, operating, maintaining or removing any of its Equipment in, on, over, under, along or across any Service Corridors (each of these activities hereinafter collectively called “Work”) without first:
 - a) providing plans to the Municipality’s specified most senior municipal official responsible for overseeing such Work or his specified designate (“City Engineer”), setting out a proposal for an Alignment for the Company’s Equipment and such other information reasonably required by the City Engineer in a form acceptable to the City Engineer; and
 - b) obtaining the written authorization of the City Engineer to an Alignment. Which Alignment shall either be granted or refused within 30 days of the date, which the Municipality receives the plans, proposal and necessary information required by the City Engineer, acting reasonably.
4. The Company shall provide all required information and obtain all required municipal construction and/or other permits normally required and specified in writing by the Municipality in the circumstances prior to commencing any Work. Both the Municipality and the Company recognize that there is no municipal requirement for prior written consent for excavation or other disruption in the case of an emergency, provided

that the Company notifies the Municipality as soon as possible of the emergency and of the Company's activities in respect of it. In such instances whereby excavation is involved, the Company shall restore the surface(s) to the satisfaction of the City Engineer.

Conditions

5. All Work conducted by or on behalf of the Company is subject to the following conditions:
 - a) the Work shall conform to all applicable federal, provincial and municipal statutes, laws and by-laws or other applicable rules and regulations, including, but not limited to, the terms of any authorizations specified in writing and granted by the City Engineer, permits issued by the Municipality and the provisions of this Agreement;
 - b) the Work shall be conducted and completed to the satisfaction of the City Engineer as specified to the Company in writing before commencement of the Work;
 - c) the Work shall be performed in a manner that safeguards and protects all other support structures, transmission lines, equipment, facilities and improvements of any kind ("Improvements") present in the Service Corridors;
 - d) after completion of any Work, the Company shall leave the Service Corridors in substantially the same condition in which it was before such Work was undertaken by the Company, free from nuisance and to the satisfaction of the City Engineer. If the Company fails to repair and restore any Service Corridors to the satisfaction of the City Engineer within twenty (20) days of being notified by the Municipality, the Municipality may effect such repairs and charge all costs related thereto to the Company;
 - e) if the Municipality requires that any Work be stopped, acceptable reason provided, the Company shall cease such Work upon delivery of a notice to the Company to that effect by the City Engineer; and
 - f) the Company shall be responsible for all Work, including the cost of such Work.

Representations and Warranties

6. The Company represents and warrants to, and covenants and agrees with the Municipality that:
 - a) the Company's occupancy and use of the Service Corridors shall not unduly interfere with the public use and enjoyment of the Service Corridors;
 - b) all Work performed by or on behalf of the Company shall conform to all applicable federal, provincial and municipal statutes, laws and by-laws or other applicable rules and regulations, including, but not limited to, the terms of any authorizations as specified in writing and hereby granted by the City Engineer, permits issued by the Municipality and the provisions of this Agreement;
 - c) after completion of any Work, the Company shall leave the Service Corridors in substantially the same condition in which it was before such Work was undertaken

by the Company, free from nuisance and to the satisfaction of the City Engineer, as specified in the proper municipal permits granted to the Company for any Work;

- d) the Company has no title to or other ownership or property interest in any Alignments or Service Corridors;
 - e) the Company shall not register or permit to be registered any instrument claiming an estate, interest or property right in the Service Corridors or other property of the Municipality in any real or personal property registry by virtue of the Company's occupancy or use of the Service Corridors or this Agreement;
 - f) the Company shall not suffer or permit any lien to be filed or registered against any Service Corridors;
 - g) the Municipality has made no representations or warranties as to the state of repair of the Service Corridors or the suitability of the Service Corridors for any business, activity or purpose whatsoever and the Company hereby agrees to take the Service Corridors on an "as is" basis;
 - h) the Company shall use reasonable efforts to schedule Work and share Alignments and support structures with other Service Providers occupying and using the Service Corridors, with the intent of minimizing the necessity for road cuts, construction and the placement of support structures in the Service Corridors;
 - i) the Company shall notify the Municipality of any damage caused by the Company in connection with its Work, Equipment or enjoyment of its right to occupy and use Alignments under this Agreement;
 - j) the Municipality may cross the Company's Equipment with its own Improvements or otherwise, and may use the Service Corridors for any purpose, and may allow other parties to cross the Company's Equipment with their Improvements or otherwise and to use the Service Corridors; and
 - k) all of the covenants, representations, warranties, indemnities and outstanding obligations (including outstanding payment obligations) of the Company under this Agreement shall survive the termination of the Agreement, however caused.
7. The Municipality represents and warrants to and covenants and agrees with the Company that it has jurisdiction over any Service Corridors for which the Municipality grants consent to the Company and has the authority to grant such consent.

As-Built Drawings

8. The Company shall provide "as-built" drawings to the Municipality in form(s) and content acceptable to the City Engineer within two (2) months of completing the construction of Equipment in, on, over, under, along or across any Service Corridors.

Utility Coordination

9. The Company agrees to participate in any centralized utility location notification procedures of the Municipality with the Municipality and other Service Providers, and to pay its proportionate share of the costs of the administration of such procedures.

10. The Company further agrees to participate in any utility coordinating committees or forums as may be established by the Municipality, and to pay its proportionate share of the costs of the administration of such forums.
11. The Company shall, at no cost to the Municipality, provide locations of Equipment within two (2) business days of receiving such requests from the Municipality, unless the request is an emergency, in which case the location shall be provided within twenty-four (24) hours. Such locations of the Company's Equipment will be evident to the Municipality at all times as shown in Schedule "A" of the Agreement.

Emergencies

12. The Company shall provide to the City Engineer a list of twenty-four (24) hour emergency contact personnel and shall ensure that the aforementioned list is always current.
13. The Municipality shall provide to the Company a current list of twenty-four (24) hour emergency contact personnel for both its own personnel and those of the other Service Providers.

Relocation

14. If for municipal purposes the Municipality requires that the Equipment to which this Agreement relates be relocated, then the Company shall, within 30 days where, in the sole discretion of the Municipality there is a specific municipal need, relocate such Equipment subject to all of the following:
 - (a) the Company shall have received from the Municipality a written notice requesting the relocation; and
 - (b) if the written notice referred to in section 14(a) above is received:
 - (i) following the date written authorization is granted by the City Engineer under section 3 herein to an alignment (the "Authorization Date"), but prior to the end of the fourth (4th) year following the Authorization Date, the Municipality shall be responsible for and shall pay a portion of such costs of relocation on a straight line declining basis from the Authorization Date to and including the end of the fourth (4th) year following the Authorization Date as follows:

Year 1 – 100% of costs of relocation
Year 2 – 75% of costs of relocation
Year 3 – 50% of costs of relocation
Year 4 – 25% of costs of relocation
Year 5 – 0% of costs of relocation
 - (ii) after the end of the fourth (4th) year following the Authorization Date or if the Equipment is not installed in accordance with the approved as-built drawings, then the Company shall be solely responsible for and shall pay all costs of such relocation of the Equipment.

15. If the Company fails to complete the relocation of the Equipment in accordance with section 14, the Municipality may, but is not obligated to, at its sole option, complete such relocation or other Work. In such event the Company shall pay the cost of such relocation or other Work to the Municipality, together with an administrative charge of fifteen percent (15%) of such cost.

Security

16. The Company may be required to post security with the Municipality from time-to-time in an amount and form acceptable to the City Engineer to guarantee the performance by the Company of its obligations in connection with Work performed under this Agreement. The vehicle by which such security is granted shall, in each case, specify with precision the Work that is guaranteed by the security, and the circumstances under which the Municipality may have recourse to the security. Security posted in respect of certain Work shall be released promptly by the Municipality if and to the extent that the Work is completed to the satisfaction of the City Engineer.

Payments to Municipality

17. The Company covenants and agrees to pay to the Municipality:
 - a) all of the usual permit fees associated with the permits that the Company requires in connection with its Work; and
 - b) the consideration set out in Schedule "B" with respect to the approval of plans and inspections.
18. The fees and charges specified in Schedule "B" shall be adjusted annually on December 31 of each year for the Term of the Agreement commencing in 2002, including any subsequent renewal periods in accordance with the Consumer Price Index (CPI), as set out in the Canadian Economic Observer published by Statistics Canada. All amounts payable under this Agreement shall be payable in Canadian currency.

Taxes and Utilities

19. The Company shall, in addition to other amounts specifically payable by it under this Agreement, be responsible for the payment of all taxes attributable to the Company, including, without limitation, those taxes attributable to the Company's Equipment, including without limitation, those taxes attributable to the Company's use and occupancy of the Service Corridors, and for the payment of the cost of all services and utilities consumed in respect of the Company's operations.
20. For the purpose of section 19, "taxes" includes, without limitation, all taxes, duties, levies, assessments, rates, fees or charges of any kind whatsoever, imposed, levied, assessed or charged now or in the future by any government authority of any kind, and any payments that are levied in substitution, or in lieu, or in addition to any of the foregoing.

Late Payment Charges

21. Payment terms are net thirty (30) days under this Agreement. Overdue accounts shall be charged interest at the rate of one point five - percent (1.5%) per month compounded monthly.

Abandoned Equipment

22. The Company shall notify the Municipality promptly when it abandons Equipment situated in, on, over, under, along or across the Service Corridors. If the Company ceases to use the Equipment for one (1) year it shall be deemed abandoned. Upon such notification or deemed abandonment, the Municipality may thereafter, at any time, require the Company to remove the said Equipment or part thereof within a specified period of time, being no less than ninety (90) days from the date of the Company's notification or deemed abandonment, failing which the Municipality may at its option remove the Equipment at the Company's expense or the Equipment and any support structure containing only such abandoned Equipment shall be deemed to have been abandoned by the Company and title thereto shall vest in the Municipality.

Excess Capacity

23. Whenever the Company installs new conduits by open cut along or across any Service Corridors, and the new conduits are not employed for the sole purpose of connecting a single building or customer location to the Company's Equipment, the Company shall:
 - a) use its best efforts to ensure that any conduits to be placed in the Service Corridors are sized so as to accommodate the total estimated future transmission capacity requirements of the Company during the Term and any renewals thereof along or across the Service Corridors;
 - b) subject to the mutual agreement of the Company and the Municipality, use its best efforts to install and make available to other providers of telecommunications services or broadcasting, on reasonable terms and conditions, such additional excess conduit capacity as the Commissioner may request in writing for the more efficient administration of the occupancy and use of the Service Corridors by all Service Providers; and
 - c) at the option of the Municipality, to be exercised at the time of approval of the Work, install additional conduits on behalf of the Municipality at the same time as the Work is installed, at the cost of the Municipality based on the incremental costs incurred by the Company in installing the additional conduits, provided that such additional conduits shall become the property of the Municipality after the incremental costs are paid.

The Company shall use its best efforts to place its Equipment along routings previously assigned to Service Providers by the Municipality and in or along any support structures situated therein.

Third Party Equipment

24. The Company shall not permit any third party to use any Alignment occupied or used by the Company under this Agreement, unless the Company and the third party have entered into an agreement in respect of such use and such agreement provides that the third party shall comply, at the third party's sole expense, with all applicable laws, statutes, bylaws, codes, ordinances, rules, orders and regulations of all governmental authorities in force, and that the third party shall obtain and maintain any and all permits, licenses, official inspections or any other approvals and consents necessary or required for the placement of the third party's Equipment and/or structures.
25. In all cases where the Company permits any third party to use any Alignment occupied or used by the Company under this Agreement or otherwise shares ownership or other rights with a third party in respect of any Equipment situated in, on, over, under, along or across an Alignment occupied or used by the Company under this Agreement, the Company shall remain responsible for performing all of its obligations under this Agreement, as if it is the sole owner of the Equipment.
26. Where a third party is permitted to use any Alignment occupied or used by the Company under this Agreement, the third party shall not undertake any Work or excavation in, on, over or under a Service Corridor or commence any other activity which would cause disruption or inconvenience to pedestrians or traffic or to the Municipality or the public in respect of any use of the Service Corridor, without the prior written consent of the Municipality.
27. For the purpose of sections 24, 25 and 26 of this Agreement:
 - a) a "third party" includes any individual, corporation, partnership, association, joint venture, or organization of any kind, including the lawful trustee, successor, assignee, transferee or personal representative thereof; and
 - b) a "use" of an Alignment by a third party occurs whenever a third party situates any Equipment or connects any Equipment to the Equipment of the Company in, on, over, under, along or across the Alignment, or is in the position where it may cause any Work to be performed in, on, over, under, along or across the Alignment.

Term of Agreement

28. Unless otherwise terminated in accordance with its provisions, the term of this Agreement shall commence on Effective Date and shall be 5 years in duration

Despite any term or condition of this Agreement, the Company covenants and agrees that if the Federal Court of Appeal or Supreme Court of Canada allow the appeal of the Federation of Canadian Municipalities to the Canadian Radio-television and Telecommunications Commission's (the "Commission") January 25, 2001 Decision

(Decision CRTC 2001-23), the parties shall within 180 days of that Decision revise this Agreement to reflect the Decision of the Federal Court of Appeal or Supreme Court of Canada, as the case may be, and in the event the parties are unable to agree on such revision, the parties agree to seek the assistance of the Commission in determining the revisions to this Agreement and share the costs equally of doing so."

Default and Termination

29. This Agreement may be terminated at any time during the Term by the mutual written agreement of the Municipality and the Company.
30. This Agreement may be terminated by the Municipality by written notice delivered to the Company upon the occurrence of one of the following events:
 - a) the Company fails to pay any undisputed amount payable pursuant to this Agreement within ninety (90) days of the date on which the payment is due;
 - b) the Company fails to pay fifty percent (50%) of any disputed amount payable pursuant to this Agreement within ninety (90) days of the date on which the Municipality claims that the payment is due;
 - c) the Company unduly interferes with the public (including Service Provider) use or enjoyment of the Service Corridors and does not begin to rectify such interference within thirty (30) days of being notified by the Municipality of the occurrence of such undue interference; or
 - d) there is filed by or against the Company in any court an uncontested petition in bankruptcy or insolvency or for reorganization or for appointment of a liquidator of the Company's property, or if the Company makes an assignment or petitions for or enters into an arrangement for the benefit of creditors and any such assignment or petition remains undismissed after thirty (30) days or is not stayed on appeal.
31. A party to this Agreement may terminate the Agreement upon one hundred and eighty (180) days written notice delivered to the other party if that other party defaults under any of its obligations under this Agreement and fails to begin to correct the default prior to the expiry of the one hundred and eighty (180) day period.
32. Upon termination of the Agreement and in the absence of a new agreement, subject to the right to appeal to the Commission, the Municipality may thereafter, at any time, require the Company to remove its Equipment or part thereof within a specified period of time, being no less than one-hundred and eighty (180) days from the date of the Company's notification, failing which the Municipality may at its option remove the Equipment at the Company's expense, payable upon receipt of invoice, or the Equipment and any support structure shall be deemed to have been abandoned by the Company and title thereto shall vest in the Municipality.

Occupational Health and Safety and Traffic

33. The Company shall conform and shall be responsible for the conformance by its officers, employees, agents, contractors and invitees to all health and safety laws including any regulations requiring installation of safety devices or appliances, and any applicable traffic laws or regulations. The Municipality may, on twenty-four (24) hours written notice to the Company, suspend Work performed by or on behalf of the Company on that portion of the Equipment located in, on, under, along or across Service Corridors if there appears to be a failure to install such devices or because conditions of immediate danger exist that would likely result in injury to any person. Such suspension shall continue until the default or failure is corrected.

Environmental Responsibility

34. The Municipality is not responsible, either directly or indirectly, for any damage to property or injury to a person, including death, arising from the escape, discharge or release of any hazardous substance from its Service Corridors. The Company shall request, copies of any existing environmental reports that the Municipality may have at the time of requesting written approval to conduct Work, and the Municipality shall make reasonable efforts to provide any existing environmental reports at the time of receiving the written request to conduct Work.
35. The Company agrees to assume all environmental liability directly relating to its occupancy and use of the Service Corridors, including but not limited to any liability for clean-up of any hazardous substance in, on, under, along, across and around Service Corridors which result from:
 - a) The operations directly attributed to the Company's occupation in, on, under, along, across or around the Service Corridors; or
 - b) Any products or goods brought in, on, under, along, across or around the Service Corridors by the Company, or by any other person with the express or implied consent of the Company.
36. For the purpose of sections 34 and 35, "hazardous substance" means any hazardous substance and includes, but is not limited to, electromagnetic or other radiation, petroleum products and byproducts, industrial wastes, contaminants, pollutants, dangerous substances, and toxic substances, as defined in or pursuant to any law, ordinance, rule, regulation, by-law or code, whether federal, provincial or municipal.

Liability and Indemnification

37. Subject to the provisions of section 40, the Municipality shall not, in connection with this agreement, be liable for any damage to the equipment of the Company or any third party with whom the Company has entered into an agreement for the purpose of constructing, operating, maintaining and removing such third party's support structures, transmission lines and other related telecommunications facilities within the Service Corridors (the "Permitted Third Party"), or for the injury or death of any officer, employee, agent, contractor, licensee or invitee of the Company or any Permitted Third Party, except where any damage is due to the wrongful act or omission, default or negligence of the Municipality or its employees, officers, agents, contractors, licensees, or invitees.

38. The Company hereby indemnifies the municipality from and against all losses, liabilities, costs, damages, and expenses (including reasonable attorneys' fees and disbursements) incurred by the Municipality:
- a) in connection with this Agreement as a result of any claim, action, suit or proceeding based on a claim of injury to the person or property of any third party caused by the wilful misconduct or negligence of the Company, its officers, employees, agents, contractors, licensees or invitees; and
 - b) as a result of any damage to the support structures, transmission lines and other related telecommunications facilities of a Permitted Third Party within a Service Corridor, except where any damage is due to the wrongful act or omission, default or negligence of the Municipality or its employees, officers, agents, contractors, licensees or invitees.
39. Subject to the provisions of section 33, the Municipality hereby indemnifies the Company from and against all losses, liabilities, costs, damages, and expenses (including reasonable attorneys' fees and disbursements) incurred by the Company in connection with this agreement as a result of any claim, action, suit or proceeding based on a claim of injury to the person or property of any third party caused by the wilful misconduct or negligence of the Municipality, its officers, employees, agents, contractors, licensees or invitees.
40. Notwithstanding anything contained in this agreement, both the Municipality and the Company shall not be liable in any way for indirect or consequential losses or damages, or damages for pure economic loss, howsoever caused or contributed to, in connection with this agreement or with any equipment or Service Corridors governed hereby.

Successors and Assigns

41. This Agreement shall be binding upon and shall enure to the benefit of the Company and the Municipality and their respective successors and assignees. For the purposes of this Agreement, "successors" of a party shall include any person, firm, corporation, or other entity which at any time, whether by merger, acquisition, purchase, or otherwise, shall acquire all or substantially all of the assets of that party. The Company may assign this Agreement during the Term to an "affiliate", as that term is defined in the *Canada Business Corporations Act* (Canada), upon advance written notice to the Municipality. The Company may not otherwise assign this Agreement without the advance written consent of the Municipality, which consent may not be unreasonably withheld, conditioned, or delayed. Except as otherwise provided in Section 38, upon any assignment, the Company shall enter into an agreement with the assignee whereunder the assignee shall assume the obligations of the Company under this Agreement.
42. In the event of any assignment of the Agreement by the Company, the Company shall be released from its obligations under this Agreement and the assignee shall become liable under this Agreement in all respects, and the Municipality may require the Assignee to enter into its own agreement with the Municipality before the assignment becomes effective.

43. Despite section 41, the Company may pledge the rights 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.

Non Parties to Agreement

44. There are no third party beneficiaries contemplated by this Agreement. Nothing in this Agreement shall be construed as affecting any rights or otherwise of others not a party to this Agreement to use any Service Corridors in accordance with the Municipality's legal authority.

No Property Rights

45. No occupancy or use of the Service Corridors under this Agreement shall create or vest in the Company or any other party any ownership or property rights in any Alignments or in the Service Corridors, and the Company shall be and remain a non-exclusive occupant and user of the Service Corridors; provided, however, that nothing contained in this Agreement shall be construed to prohibit or restrict the Company from entering into an agreement with one or more third parties for the purpose of constructing, operating, maintaining and removing such third party's support structures, transmission lines and other related telecommunications facilities within the Service Corridors.
46. Placement of the Equipment in the Service Corridors shall not create or vest in the Municipality any ownership or property rights to the Equipment, except as specifically provided herein.

Workers' Compensation Coverage

47. The Company agrees that it shall, at its own expense, procure and carry, or cause to be procured and carried and paid for, full workers' compensation coverage for itself and all workers, employees, and others engaged in or upon any Work.

Insurance

48. The Company shall maintain insurance in sufficient amount and description as will protect the Municipality from claims for damages, 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 in, on, under, over, along and across the Service Corridors or any act or omission of the Company's employees, agents, contractors or licensees.
49. In addition to the foregoing, the Company covenants and agrees that with respect to the insurance coverage, if any, described in section 48:
 - a) the limits of liability for personal injury, bodily injury and property damage combined shall be for not less than two million dollars (\$2,000,000.00) for each occurrence;

- b) the comprehensive general liability insurance shall extend to cover the contractual obligations of the Company as stated within this Agreement; and
 - c) all policies shall provide that they cannot be cancelled, lapsed or materially changed without at least thirty (30) days notice to the Municipality by registered mail.
 - d) The City of Kelowna will be named as an Additional Insured on the comprehensive general liability and this insurance will be primary without any right of contribution by any insurance otherwise maintained by the Municipality
50. The Company shall deliver to the Municipality (i) certificates of insurance or (ii) a letter of assurance, in either case, from the Company's insurers with respect to the insurance described in Section 49.

General

51. **Independent Contractors.** The relationship of the Company and the Municipality established by this Agreement is that of independent contractors, and nothing contained 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 venturers, co-owners or otherwise as participants in a joint or common undertaking; or
 - c) to allow either party to create or assume any obligation on behalf of the other party for any purpose whatsoever.
52. **Notice.** All formal notices hereunder shall be in writing and shall be deemed effective upon receipt when delivered by hand, overnight delivery courier, by facsimile transmission (provided such notice is also given in any of the other manners set forth herein) or when mailed by registered or certified mail (return receipt requested), postage prepaid, to the parties at the addresses listed below (or at such other address for a party as shall be specified by like notice).

If to the Municipality:
Corporation of the City of Kelowna
City Hall
1435 Water Street
Kelowna, B.C.
V1Y 1J4
Attn: City Engineer
Fax: (250) 862-3349

If to the Company:

Bell Intrigna Inc.
205 – 5th Avenue, SW
Bow Valley RPO

P.O. Box 20067
Calgary, Alberta
T2P 3H6
Attn: Real Estate Operations
Fax: (403) 237-9417

53. **Modifications.** No waiver of or changes to any provision of this Agreement shall be effective unless reduced to writing and signed by authorized representatives of both parties.
54. **Waiver.** The failure of either party to insist upon strict adherence to any term or condition of this Agreement on any occasion shall not be considered a waiver of any right thereafter to insist upon strict adherence to that term or condition or any other term or condition of this Agreement.
55. **Severability.** If any provision of this Agreement is held to be invalid or unenforceable by a court or regulator of competent jurisdiction, then the remaining provisions will nevertheless remain in full force and effect, and the parties shall endeavour to give effect to the Agreement as originally contemplated before the provision was held to be invalid or unenforceable to the maximum extent permitted by law.
56. **Counterparts; Original Signature Copies.** This Agreement may be executed in counterparts, each of which shall be deemed an original.
57. **Time.** Time is of the essence in this Agreement.
58. **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the province or territory in which the Municipality is situated and the laws of Canada applicable therein, excluding the conflict of laws provisions thereof.
59. **Equitable Relief.** Either party may, in addition to any other remedies it may have at law or equity, seek equitable relief, including, without limitation, injunctive relief, and specific performance to enforce its rights or the other party's obligations under this Agreement.
60. **Headings.** The section headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement. The term "section" refers to a section of this Agreement, unless explicitly otherwise stated.
61. **Gender, Number and Person.** Words importing the neuter gender shall include the masculine and feminine genders. In this Agreement, "person" means any individual, corporation, partnership, association, joint venture or organization of any kind and the lawful trustee, successor, assignee, transferee or personal representative of any of the foregoing. Words importing person shall include firms and corporations and vice versa. Words importing the singular shall include the plural and vice versa.
62. **Treatment of Personnel.** Each party shall bear sole responsibility for payment of compensation (including applicable benefits) to its personnel assigned to perform that party's obligations under this Agreement, and shall also bear sole responsibility for any

applicable source deductions required by law in respect of such personnel. Under no circumstances shall the other party be considered the employer of any such personnel.

63. **Cumulative remedies.** Except as otherwise expressly stated in this Agreement, all remedies available to either party for breach of this Agreement are cumulative and may be exercised concurrently or separately and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.
64. **No Rules of Construction.** This Agreement shall not be interpreted in favour or against a party on the basis of the existence or absence of legal representation in the case of either party.
65. **Inconsistency with Municipal By-laws.** In the event of an inconsistency between this Agreement and any applicable by-law, rule or regulation of the Municipality, the by-law, rule or regulation shall take precedence to the extent of the inconsistency.
66. **Entire Agreement.** This Agreement set forth the entire agreement and understanding of the parties relating to the subject matter herein and supersede all prior agreements, whether oral or written, relating to the subject matter hereof.
67. **Acknowledgement.** Each party acknowledges that it has read this Agreement, including the Annexes attached hereto and forming part hereof, and each party understands and agrees to be bound by its terms and conditions.
68. **Discretion.** In exercising its discretion under this Agreement, the Municipality shall in all cases act reasonably, except to the extent specifically otherwise required by law.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives.

BELL INTRIGNA INC.
by its authorized signatories:

CITY OF KELOWNA
by its authorized signatories:

Richard Gutor
Vice President Finance, CFO

Walter Gray
Mayor

Name:
Title:

David Shipclark
City Clerk

