

CORPORATION OF THE TOWNSHIP OF PELEE

BY-LAW NUMBER 2022 – 11

Being a by-law to enter into a capital facilities agreement with Gosfield North Communication for the provision of Pelee Island Fibre

MUNICIPAL CAPITAL FACILITIES AGREEMENT

THIS AGREEMENT (the “**Agreement**”), made in duplicate, dated and effective as of [MCF Agreement Date in Words]

BETWEEN: CORPORATION OF THE TOWNSHIP OF PELEE (hereinafter referred to as the “**Municipality**”)

And

GOSFIELD NORTH COMMUNICATION (hereinafter referred to as “**Project Co**”)

And

ROBERT PETRUK (hereinafter referred to as “**Project Co Appointee**”)

WHEREAS:

The Municipality has determined that it is in the public interest to enter into this Agreement for the provision of Pelee Island Fibre (the “**Facilities**”) by Project Co on the basis that the Municipality will provide financial [and other] assistance to Project Co which financial assistance will be funded by the Municipality through long-term financing arrangements that it will enter into with Ontario Infrastructure and Lands Corporation (“**OILC**”), provided that the money that the Municipality will receive from OILC pursuant to such long-term financing arrangements (“**OILC Funds**”), which will then be provided by the Municipality to Project Co, shall be used by Project Co only in respect of capital expenditures for the construction of the Facilities and provided that the Municipality’s obligations to OILC in respect of the OILC Funds shall be evidenced by a debenture

(which debenture is defined in the Definitions section of this Agreement below as the “**Debenture**”).

The Municipality will be responsible for arranging with OILC for the funding to the Municipality of monies that the Municipality will provide to Project Co. for capital expenditures for the construction of the Facilities [by way of a Municipal Grant (as defined below) or by way of a Municipal Loan (as defined below)]. [NTD delete the inapplicable way in which financial assistance will be provided by the Municipality to Project Co]

Contemporaneously with this Agreement the Municipality will enter into an agreement or agreements with Project Co [and others?] for the design, construction and development of the Facilities pursuant to which Project Co will construct the Facilities.

It is the intention of the Municipality and Project Co that the financial assistance to be provided by the Municipality to Project Co. utilizing the OILC Funds, will, under this Agreement, be for the purpose of the provision of municipal capital facilities under Section 110 of the *Municipal Act, 2001* and the regulations thereunder; and the Municipality and Project Co are entering into this Agreement pursuant to Subsection 110(1) of that Act.

NOW THEREFORE in consideration of the mutual covenants and agreements contained in this Agreement and for other good and valuable consideration (the receipt and sufficiency whereof are hereby acknowledged), the parties hereto covenant and agree as follows:

ARTICLE I DEFINITIONS

1.1 Definitions. In this Agreement the following words and expressions shall have the following meanings:

- (a) “**Act**” means the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended from time to time.
- (b) “**Agreement**” means the agreement constituted by this Agreement including all schedules attached hereto and referenced documents,

as the same may be amended, restated, supplemented, replaced, or otherwise modified from time to time. Terms such as “hereof”, “herein” and “hereto” refer to this Agreement.

- (c) **“Business Day”** means a day, other than Saturday or Sunday, on which banking institutions in Toronto, Ontario, Canada and the Municipality are not authorized or obligated by law or executive order to be closed.
- (d) **“Debenture”** means the debenture to be issued by the Municipality to OILC in a principal amount equal to the amount of the OILC Funds, which debenture shall be in a form satisfactory to OILC and shall be authorized by a by-law in form satisfactory to OILC, duly passed by the Council of the Municipality, in full compliance with the Act and the Regulations.
- (e) **“Eligible Costs”** means capital expenditures to be made by Project Co. in respect of the construction of the Facilities and excludes legal costs and expenses related to the construction of the Facilities.
- (f) **“Material Agreements”** means all agreements now or hereafter entered into by Project Co or Project Co Appointee in any manner related to the design, construction, development, operation, maintenance, repair, management, occupancy or use of the Facilities, or any part thereof, including, without limitation, those agreements set out in Schedule “A” attached hereto.
- (g) **“Municipal Capital Facilities”** means municipal capital facilities that meet the requirements of Section 110 of the Act and the Regulations.
- (h) **“Municipal Grant”** means the money to be given by the Municipality to Project Co in the principal amount of [insert amount], which money will be comprised of the OILC Funds, and such money shall be used by Project Co only in respect of Eligible Costs expended to construct

the Facilities. [NTD delete the definition if a Municipal Grant is not the way in which the financial assistance will be provided by the Municipality to Project Co]

(i) **“Municipal Loan”** means the money to be loaned by the Municipality to Project Co, in the principal amount of [insert amount], which money will be comprised of the OILC Funds and such money shall be used by Project Co only in respect of Eligible Costs to construct the Facilities. [NTD delete the definition if a Municipal Loan is not the way in which the financial assistance will be provided by the Municipality to Project Co]

(j) **“Regulations”** means the regulations made under the Act.

1.2 The Schedules attached to this Agreement and listed below shall have the same force and effect as if the information contained therein were contained in the body of this Agreement:

Schedule “A” - Material Agreements

1.3 In this Agreement, unless the context otherwise requires, words importing the singular include the plural, and vice versa, and words importing gender include all genders.

1.4 Except where expressly otherwise provided, all amounts in this Agreement are stated in and shall be paid in Canadian currency.

1.5 In the event that one or more of the provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality or enforceability of the remaining provisions hereof shall not be affected or impaired thereby. Each of the provisions of this Agreement is hereby declared to be separate and distinct.

1.6 This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

ARTICLE II
REPRESENTATIONS

2.1 Project Co and Project Co Appointee each represent to the Municipality that:

- (a) it is a corporation in good standing under the laws pursuant to which it was incorporated and shall remain as such during the term of this Agreement;
- (b) it has the power and authority, and has met all legal requirements, necessary to carry on its business, hold its property, and to enter into, deliver and perform this Agreement, and it shall remain as such for the term of this Agreement;
- (c) its signatories to this Agreement have been duly authorized to execute and deliver this Agreement;
- (d) this Agreement constitutes a legally binding obligation enforceable against it in accordance with its terms, subject to the application of bankruptcy, insolvency, reorganization and other laws affecting generally the enforcement of the rights of creditors and subject to a court's discretionary authority with respect to the granting of a decree ordering specific performance or other equitable remedies;
- (e) its execution and delivery of this Agreement and the performance of its obligations hereunder will not, with or without the giving of notice or the passage of time or both:
 - (i) violate the provisions of its by-laws, any other corporate governance document subscribed to by it or any of its resolutions
 - (ii) violate any judgment, decree, order or award of any court, government agency, regulatory authority or arbitrator; or

- (iii) conflict with or result in the breach or termination of any material term or provision of, or constitute a default under, or cause any acceleration under, any license, permit, concession, franchise, indenture, mortgage, lease, equipment lease, contract, permit, deed of trust or any other instrument or agreement by which it is bound.
- (f) it has acquired general liability insurance that is consistent with the level of risk exposure associated with the obligations undertaken pursuant to this Agreement;
- (g) it is under no obligation or prohibition, and is not subject to or threatened by any actions, suits or proceedings, which could or would prevent compliance with this Agreement and agrees that it will advise the Municipality forthwith of any such occurrence during the term of this Agreement;
- (h) it has not entered, (and will not enter, without the Municipality's prior written consent,) into any agreement that would prevent the full implementation of this Agreement;
- (i) all statements made to the Municipality, or a representative of the Municipality, by it are true and all material facts have been and will be disclosed; and
- (j) it has not directly promised or offered to any official or employee of the Municipality, any bribe, gift, or other inducement, nor has it authorized any person to do so on its behalf, for or with a view to having the Municipality enter into this Agreement.

2.2

The Municipality represents to Project Co and Project Co Appointee that:

- (a) it has the power and authority, and has met all legal requirements, necessary to carry out its purposes, hold its property, and to enter into, deliver and perform this Agreement;
- (b) the signatories to this Agreement, on behalf of the Municipality, have been duly authorized to execute and deliver this Agreement;
- (c) this Agreement constitutes a legally binding obligation of the Municipality enforceable against it in accordance with its terms, subject to the special jurisdiction and powers of the Ontario Land Tribunal over defaulting municipalities under the *Municipal Affairs Act*, R.S.O. 1990, c.M.46, as amended from time to time; and
- (d) it is under no obligation or prohibition, and is not subject to or threatened by any actions, suits or proceedings, which could or would prevent compliance with this Agreement.

ARTICLE III

ACKNOWLEDGEMENTS AND COVENANTS

3.1 The Municipality, Project Co and Project Co Appointee acknowledge and agree that the principal agreements relating to the design, development, construction, operation, maintenance, repair and management of the Facilities are the Material Agreements listed in Schedule “A” hereto.

3.2 Project Co and Project Co Appointee acknowledge that the Municipality, as an Ontario municipality, has only those powers granted to it by the Province of Ontario under the Act, the Regulations, or other statutes, or as it may have at common law.

3.3 The Municipality, Project Co and Project Co Appointee acknowledge and agree that the Material Agreements collectively provide as follows:

- (a) Project Co will construct the Facilities;

- (b) Project Co Appointee will operate, maintain, repair and manage the Facilities, or will cause a manager approved by the Municipality to operate, maintain, repair and manage the Facilities, and will be responsible for the operation, maintenance, repair and management of the Facilities after the construction of the Facilities;
- (c) The Municipality will provide financial assistance to Project Co in accordance with Section 110 of the Act and the Regulations, in order to assist in the construction of the Facilities [and will provide other assistance to Project Co to assist in the operation and maintenance of the Facilities].

3.4 Project Co, the Municipality and Project Co Appointee acknowledge and agree that it is their common intention that the financial [and other] assistance being provided by the Municipality to Project Co for the design, construction, development, operation, maintenance, repair and management of the Facilities, as set out in the Material Agreements, will be provided on the basis that the construction of the Facilities will be funded by the Municipality through the OILC Funds by way of [the Municipal Grant or the Municipal Loan], which will be provided by the Municipality pursuant to Section 110 of the Act and the provisions set out in the Regulations, and that such financial assistance will be provided by the Municipality to Project Co for the construction of Municipal Capital Facilities as defined herein. Under the Material Agreements:

- (a) Project Co is obligated to construct the Facilities referred to therein,
- (b) Project Co and Project Co Appointee are obligated to design and develop the Facilities referred to therein; and
- (c) Project Co Appointee is obligated to operate, maintain, repair and manage the Facilities referred to therein.

So long as the provisions of Section 110 of the Act, the provisions of the Regulations, and the provisions of this Agreement are complied with, the Municipality is obligated to provide the OILC Funds to Project Co by way of [the Municipal Grant or the Municipal Loan] in

order that such Facilities can be constructed. [NTD-delete the inapplicable way in which the financial assistance will be provided by the Municipality to Project Co]

3.5 The Municipality shall co-operate with Project Co and Project Co Appointee and process as expeditiously as reasonably possible, and in compliance with all municipal by-laws and other applicable laws, any applications for governmental consents necessary to permit the construction and development of the Facilities for its intended use as set out in the Material Agreements, so that Project Co can construct and Project Co and Project Co Appointee can develop the Facilities as expeditiously as possible.

3.6 Project Co shall design, construct, develop, operate, maintain, repair and manage the Facilities, or cause Project Co Appointee(s) to design, construct, develop, operate, maintain, repair and manage the Facilities so that the Facilities satisfy the terms and provisions of this Agreement and the requirements applicable to Municipal Capital Facilities pursuant to Section 110 of the Act, and the Regulations thereunder, as they exist on the date of this Agreement, and, subject to the balance of this Section 3.6, as they may be amended after the date of this Agreement. [If the Act or the Regulations change in any way that would impact on the eligibility of those portions of the Facilities that are eligible for designation as Municipal Capital Facilities, or would impact on the eligibility of such parts of the Facilities to qualify for financial assistance contemplated by the Material Agreements, Project Co and Project Co Appointee will use their best efforts to cause those parts of the Facilities, which are eligible for designation as Municipal Capital Facilities, and their use, management and operation, to qualify for designation as Municipal Capital Facilities under any such amendments to the Act or Regulations, provided that such changes are reasonably possible to implement and would not have a materially negative financial impact on Project Co or Project Co Appointee, or otherwise materially prejudice Project Co or Project Co Appointee. If such changes would not be reasonably possible or would have a materially negative financial impact on Project Co or Project Co Appointee and if without such changes the said portions of the Facilities which qualify as Municipal Capital Facilities would not qualify for designation as Municipal Capital Facilities under such amendments to the Act and the Regulations, or if the financial assistance contemplated by the Material Agreements could not be provided,

then the Municipality, Project Co and Project Co Appointee covenant and agree to proceed in good faith and revise their business arrangements, including making any changes that may be required to the Material Agreements, in a fair and equitable way, so that the financial arrangements will not be materially less favourable to Project Co than those financial arrangements in effect prior to the amendments to the Act or Regulations that necessitated such changes.]

3.7 Subject to Section 3.6 hereof, the Municipality, Project Co and Project Co Appointee shall not, do any act or thing, or omit to do any act or thing if doing so or omitting to do so, as the case may be, would result in the Facilities ceasing to satisfy the requirements applicable to Municipal Capital Facilities pursuant to the Act and the Regulations as they exist at the date of this Agreement.

3.8 The Municipality has passed a by-law permitting it to enter into this Agreement and after this Agreement has been executed by the Municipality, Project Co and Project Co Appointee, the clerk of the Municipality shall give written notice of the by-law to the Minister of Finance.¹

ARTICLE IV
AGREED UPON PRINCIPLES TO QUALIFY THE FACILITIES
AS MUNICIPAL CAPITAL FACILITIES

4.1 Project Co, Project Co Appointee and the Municipality acknowledge and agree that the following principles and guidelines govern the designation of the Facilities as Municipal Capital Facilities under the Act and Regulations as they exist at the date of this Agreement and that these principles and guidelines shall be followed and adhered to, in order that the Municipality can provide financial [and other] assistance to Project Co and Project Co Appointee pursuant to the Material Agreements in compliance with the Act and Regulations as they exist as of the date of this Agreement:

¹ Subsection 110 (5) of the Act provides that on the passing of a by-law permitting a municipality to enter into an agreement under Section 110 of the Act, the clerk of the municipality shall give written notice of the by-law to the Minister of Finance.

- (a) The Facilities will be used for Pelee Island Fibre.

ARTICLE V
MISCELLANEOUS

5.1 This Agreement must remain in full force and effect and cannot be terminated, modified or amended until the maturity date of the Debenture and the payment in full by the Municipality of the amount owed by the Municipality to OILC thereunder after which time this Agreement may only be modified or amended by an agreement in writing signed by the parties to this Agreement, and duly approved by the Council of the Municipality.

5.2 The execution of this Agreement and any other arrangements with respect to the Facilities are not intended to create and shall not be treated as having created as between the Municipality, Project Co and Project Co Appointee, or between any two of them, a general or limited partnership, joint venture, corporation or joint stock company.

5.3 Time is of the essence of this Agreement.

5.4 From time to time, Project Co, Project Co Appointee or the Municipality, as the case may be, will execute and deliver to the other such additional documentation and will provide such additional information as the other may reasonably require, in order to carry out the intention and terms of this Agreement.

5.5 This Agreement shall be binding upon the Municipality, Project Co and Project Co Appointee and their respective successors and permitted assigns. This Agreement may not be assigned by Project Co or by Project Co Appointee without the prior written consent of the Municipality, which consent may be unreasonably withheld.

NTD—Consideration can be given to including the following additional provisions- dispute resolution; notice (addresses and effective date); entire agreement; electronic signatures.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed on the date first written above.

GOSFIELD NORTH COMMUNICATIONS

Per: _____

Per: _____

We have the authority to bind the corporation

PROJECT CO APPOINTEE

Per: _____

Per: _____

We have the authority to bind the corporation

CORPORATION OF THE TOWNSHIP OF PELEE

Per: Original Signed By: _____

RAY DUROCHER
MAYOR

Per: Original Signed By: _____

JANICE HENSEL
CHIEF ADMINISTRATIVE OFFICER AND CLERK

We have the authority to bind the corporation

Executed by the above parties as authorized by By-Law 2022 -XX of the Municipality.

SCHEDULE "A"

MATERIAL AGREEMENTS

1. [Development Agreement] – TB finalized (legal)
2. [Construction Agreement] – TB finalized (legal)
3. [Municipal Grant Agreement and Security and Ancillary Documents thereunder or Municipal Loan Agreement and Security and Ancillary Documents thereunder] – Federal and Provincial Funding Agreements TB finalized (legal)