

THE CORPORATION OF THE TOWN OF AMHERSTBURG

BY-LAW NO. 2007-98

Being a By-law Authorizing the Signing of an Agreement with MaXess Networkx

WHEREAS MaXess has applied to the Town for permission to install a plant to carry fibre optic cables along those portions of highways under the jurisdiction of the Town which will greatly enhance the quality of internet services within the Town;

AND WHEREAS the plant shall be installed in accordance with the Plans submitted by MaXess and approved by the Town;

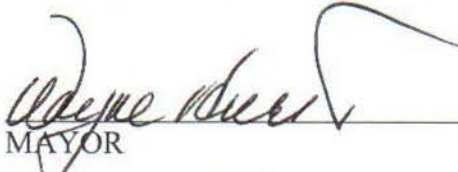
AND WHEREAS the Town and MaXess wish to enter into an Agreement for a period of 20 Years to set out the terms and conditions upon which the plant may be installed and maintained on the said highway;

AND WHEREAS MaXess has confirmed the location of other utilities currently existing within those portions of the highways as referred to in the agreement;

NOW THEREFORE THE CORPORATION OF THE TOWN

OF AMHERSTBURG HEREBY ENACTS AS FOLLOWS:

- 1) An Agreement between the municipality and Maxess Networkx for services is attached hereto and is hereby approved and the Mayor and Clerk are hereby authorized to execute the Agreement on behalf of the municipality.
- 2) This By-law shall come into force and take effect immediately upon the final passing thereof.


MAYOR


CLERK

1st Reading – January 14th, 2008

2nd Reading – January 14th, 2008

3rd Reading – January 14th, 2008

THIS AGREEMENT made this 14th day of January, 2008

BETWEEN:

THE CORPORATION OF THE TOWN OF AMHERSTBURG
(hereinafter called the "**Town**")

OF THE FIRST PART

-and-

MAXESS NETWORK[®],
A DIVISION OF ENWIN ENERGY LTD.
(hereinafter called "**MaXess**")

OF THE SECOND PART

WHEREAS MaXess has applied to the Town for permission to install a plant to carry fibre optic cables along those portions of highways under the jurisdiction of the Town;

AND WHEREAS the plant shall be installed in accordance with the Plans submitted by MaXess, and approved by the Town;

AND WHEREAS MaXess has confirmed the location of other utilities currently existing within those portions of the highways referred to herein;

AND WHEREAS the Town and MaXess wish to enter into this Agreement to set out the terms and conditions upon which the plant may be installed and maintained on the said highway;

NOW THEREFORE in consideration of the terms and conditions hereinafter set forth, the parties hereto mutually covenant and agree one with the other as follows:

PART I: DEFINITIONS

1. In this Agreement:

- (a) "plant" includes any conduit structure, manhole, cable (aerial or buried) stand support steel, pedestal and splice enclosure, concrete universal enclosures and all connections, attachments and related appurtenances necessary or ancillary thereto;
- (b) "Town Engineer" means the most senior individual employed by the Town with responsibilities for highways within the Town of Amherstburg, or the person so designated by such senior employee, or such other person as may be designated from time to time by the Council of the Town;
- (c) "highway" means a common and public highway or other road under the jurisdiction of the Town, and shall include any bridge, viaduct or structure forming part of a highway, any public square, road allowance, the traveled portion of such highway, ditches, driveways, sidewalks and sodded areas on or forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Town.

PART II: RIGHTS GRANTED

To Use the Highway

2. (a) Subject to the terms and conditions of this Agreement, the consent of the Town is hereby given and granted to MaXess to enter upon portions of the highways under the jurisdiction of the Town, to install, construct, maintain, replace, remove, operate and repair a plant or plants thereon.
- (b) MaXess shall be required to apply for and obtain a permit from the Town for each and every plant MaXess wishes to install. MaXess shall be required to comply with any and all plans attached to the permit and with any and all terms and conditions imposed by the Town on each permit.

Duration of Agreement

3. (a) The consent hereby given and granted by the Town to MaXess is for a term of 20 years from the date of the final passing by the Council of the Town of the By-law to authorize the execution of this Agreement (namely _____20____), or until such time as this Agreement is superseded by any other Agreement, whichever event shall first occur. Notwithstanding the provisions of this paragraph, the parties hereto acknowledge and agree that this Agreement may be terminated by either party on sixty (60) days notice in writing if at any time the other party commits a substantial breach or is in default of the terms of this Agreement.
- (b) Prior to being in a position to terminate this Agreement on the basis of a breach or default, the defaulting party shall have the opportunity to correct or cure the breach or default within 20 days of the date of the written notice from the non-defaulting party to do so.
- (c) This Agreement is not assignable by MaXess without the express written consent of the Town, such consent not to be unreasonably withheld.
- (d) MaXess shall contact the Town at least four (4) months prior to the expiry of this Agreement should it wish to renew this for an additional term. The terms and conditions of any future agreement shall be negotiated between the parties at the time of the renewal. However, it is understood and agreed that any fees chargeable under the renewed agreement shall apply only to new plants installed by MaXess after the date of renewal.

PART III: TERMS AND CONDITIONS

Construction and Maintenance

4. Prior to the commencement of any construction, repairs or changes to the plant, MaXess shall file with the Town Engineer whatever plans and other documents the Town Engineer may require, acting reasonably. The said plans shall be drawn to scale and shall be of sufficient detail considering the complexity of the location of the plant and those portions of the highway upon which the plant is to be constructed, maintained or changed.
5. MaXess acknowledges and agrees that the Town Engineer shall have the sole discretion to determine whether or not there is sufficient room available on the highway to permit the installation, maintenance or relocation of the plant. The Town Engineer shall also have the discretion to require sections of the plant to be relocated to facilitate existing facilities or known projects. Geodetic information will not be required except in complex urban intersections in order to facilitate existing facilities or known projects reasonably anticipated by the Town Engineer.

6. MaXess acknowledges and agrees that no construction, maintenance or relocation shall begin or be completed unless and until approval has first been obtained from the Town Engineer to the planned works. The timing for construction, the progress of construction, and the terms and conditions relating to the installation of the plant shall all be to the satisfaction of Town Engineer, acting reasonably.
7. In the construction, maintenance and relocation of the plant, MaXess shall use due care and diligence so as to ensure that there shall be no unnecessary impediment or interference with the highway, or the ditches or drains adjacent thereto.
8. MaXess hereby agrees to take the necessary steps to maintain the plant, at its own expense.
9. Notwithstanding the permission granted herein MaXess shall not cut, trim, remove, or interfere with any trees on the highway without the prior approval in writing of the Town Engineer.
10. In the event any damage occurs to the MaXess plant as a result of the maintenance, cleaning, clearing, snow removal or other work or repairs done by the Town on the highway, other than through the willful conduct or gross negligence of the Town, its servants, agents, workers or contractors, any such damage shall be repaired by MaXess, at its sole expense, without any cost whatsoever to the Town.

Relocation

11. If in the course of constructing, reconstructing, changing, repairing, altering or improving any highway or a portion thereof, and the Town deems it necessary that the plant be relocated, MaXess shall, within thirty (30) days of receiving written notice from the Town Engineer, remove and relocate the said plant at MaXess's own expense, to a new location approved by the Town Engineer. In the event it is not feasible for MaXess to remove the said plant within the said thirty (30) days due to weather conditions, frozen ground or flooding, MaXess shall be granted whatever additional time that may be necessary or appropriate having regard to such conditions.
12. In the event MaXess has constructed and installed the plant in a location that was not approved by the Town Engineer, MaXess may be required by the Town Engineer, in his sole discretion, acting reasonably, to relocate the plant to a location satisfactory to the Town Engineer.
13. In the event MaXess fails to effect the removal and/or relocation of the plant to the satisfaction of the Town within the required notice period, the Town may undertake the removal and/or relocation of the plant, and the Town shall not be liable for any damage of any nature or kind whatsoever by reason of such removal and/or relocation.

As-Built Drawings

14. MaXess shall not deviate from the approved location for any portion of the plant without the prior written approval of the Town Engineer. MaXess shall be required to provide the Town Engineer, within six (6) months of the completion of the works, "as constructed" plans satisfactory to the Town Engineer, which plans shall also note the date of completion of the works.
15. When requested by the Town, MaXess shall, within 24 hours of receiving the said request, stake or mark the location of any portion of the plant.

Emergencies

16. In the event MaXess is required to perform emergency repairs to the plant, and there is insufficient time to obtain the approval from the Town Engineer prior to effecting such emergency repairs, MaXess shall be permitted to proceed with the emergency repairs without prior approval from the Town Engineer, on the condition that MaXess use its best efforts to immediately notify the Town Engineer of the location of the emergency repairs and the nature of the work required to be done. In the event the Town Engineer deems it necessary or appropriate to do so, MaXess shall also notify the police force having jurisdiction over the said highway of the emergency repairs required to be effected. MaXess shall provide the Town Engineer with at least one 24-hour emergency contact, and MaXess shall ensure the contact name and information remain current from time to time.
17. In the event the Town Engineer considers that, as a result of the installation, maintenance or relocation of the plant by MaXess, any emergency repairs to the highway or other abutting Town property is required, the Town may proceed to make such emergency repairs and to charge the costs thereof to MaXess. The decision as to whether any repairs are to be considered as emergencies shall lie within the sole discretion of the Town Engineer, and in the event that in the course of making such emergency repairs, damage is done to the plant of MaXess by the servants, agents, employees or contractors of the Town other than by their willful conduct or gross negligence, then neither the Town nor its servants, agents, employees or contractors acting in the course of effecting these emergency repairs shall incur any liability for such damage.

Restoration

18. MaXess shall, at its own expense, well and sufficiently restore, to the satisfaction of the Town Engineer, all portions of the highways upon which a plant is installed, and shall restore and make good any settling and subsidence thereafter caused by any excavation or interference with the said highways. In the event the pavement structure of the highway is disturbed in any way, virgin replacement material shall be utilized by MaXess to replace that portion of the pavement structure that was disturbed, all of which shall be completed to the satisfaction of the Town Engineer. In the event MaXess fails to perform any such restoration required by this Agreement within a reasonable period of time, the Town may do or cause such restoration to be done and MaXess shall be responsible to reimburse the Town for any and all costs incurred therefor.
19. MaXess acknowledges and agrees that drainage facilities either on or abutting the highways must be maintained in pre-construction state. Where the construction, maintenance or relocation of any works by MaXess disturbs an existing ditch or roadside drain, MaXess shall be required to restore proper grades to the said ditch or drain to the satisfaction of the Town Engineer. All disturbed grassed areas shall be restored using topsoil and seed. In the event the affected roadside ditch is a municipal drain, MaXess shall be required to obtain approval from the drainage superintendent from the local municipality having jurisdiction over that drain to ensure that any works proposed by MaXess will not interfere with the function of the said drain.

Consent Fee and Costs

20. At the time of the initial application for a permit by MaXess to the Town for the installation or construction of a plant on any highway, MaXess shall pay to the County a consent fee of \$100.00, plus a further fee of \$0.10 per metre for each metre of highway owned by the Town under which the plant is to be installed. Such fees shall be accepted by the Town as payment in full for any and all rights granted by the Town under this Agreement, and for all services provided by the Town, its employees, servants, and agents for the processing, approval, consent and inspection of construction, if applicable.

21. In the event the Town incurs any costs with regard to the installation, maintenance, removal and/or relocation of the plant to be installed pursuant to this Agreement, MaXess shall be liable to reimburse the Town for the said costs incurred within thirty (30) days of demand being made by the Town therefor. In the event MaXess fails to reimburse the Town for the said expenses then, in addition to any other remedies which the Town may have, this Agreement may be terminated by the Town in accordance with the provisions of paragraph 3 of this Agreement.

Insurance and Indemnity

22. MaXess hereby undertakes and agrees to indemnify and save the Town harmless from any and all claims, liabilities, losses, costs, damages or other expenses of every nature and kind whatsoever which the Town may incur or suffer as a consequence of or in connection with the construction, installation, maintenance, operation or repair of the plant by MaXess on the highways concerned.
23. MaXess shall obtain and maintain a public liability insurance policy in an amount not less than \$2,000,000.00, in which policy the Town is named as a additional insured and in which policy it is provided that there shall be protection for the Town and MaXess from and against any and all such liabilities, and MaXess shall supply a certificate of such insurance to the Town from time to time during the duration of this Agreement.
24. MaXess acknowledges and agrees that it is solely responsible for complying with any and all legislation and regulations regarding the construction and installation of the plant and other such works, and without limiting the generality of the foregoing is responsible to comply with the *Occupational Health and Safety Act* and other related Acts in that regard.

Notices

25. All notices, demands or requests which may be or are required to be given under the provisions of this Agreement by any party to the other may be mailed by first class prepaid post, delivered or sent by facsimile to the parties hereto as follows:

The Corporation of the Town of Amherstburg
 271 Sandwich Street South,
 Amherstburg, Ontario N9V 2A5
 Attention: Town Engineer
 Fax: 519-736-9859

MaXess Networx®
 787 Ouellette Avenue
 P.O. Box 1625
 Station A
 Windsor, Ontario N9A 5T7
 Attention: V.P. Telecommunications
 Fax: 519-255-2865

IN WITNESS whereof the parties have hereunto affixed their corporate seals under the hands of their appropriate officers duly authorized on their behalf.

**MAXESS NETWORKX®,
A DIVISION OF ENWIN ENERGY LTD.**

**THE CORPORATION OF
THE TOWN OF AMHERSTBURG**

Per: Phil Partington
Title: V.P. Telecommunications
I have the authority to bind the Corporation

Mayor – Wayne Hurst

Clerk – Pam Malott