

KPU

Your Community, Your Utility

General Manager334 Front Street
Ketchikan, AK. 99901

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TRANSMITTAL MEMORANDUM

TO: The Honorable Mayor and City Council

FROM: Lacey G. Simpson, Acting General Manager

DATE: December 6, 2021

RE: **Exempting Procurement of Programming Content for KPU TV from Competitive Bidding – Vision Alaska II LLC**

The motion detailed below was prepared at the request of Telecommunications Division Manager Ed Cushing, who asked that it be placed before the City Council for consideration at its meeting of December 16, 2021. If adopted, the motion provides for exempting the purchase of programming content from Vision Alaska II LLC for KPU TV from competitive bidding requirements of the Ketchikan Municipal Code. Mr. Cushing's transmittal memorandum is attached and requires little elaboration on the part of the General Manager's office.

Section 3.12.050(a)(2) of the Ketchikan Municipal Code states that the following may be purchased or contracted for without competitive bidding or soliciting quotations:

“Supplies, materials, equipment or contractual services which can be furnished only by a single dealer, which have a uniform price wherever purchased or which are telecommunications supplies, materials, or equipment purchased by KPU for retail sale or lease;”

The purchase of IPTV programming content from Vision Alaska II LLC falls within this provision of the KMC. The details of this transaction and the associated contract are summarized in Mr. Cushing's report. Since the agreement contains proprietary information, it is staff's intent to review the details of the proposed programming procurement with the City Council in executive session [see agenda statement 15b(1)].

Mr. Cushing will be attending the City Council meeting of December 16, 2021, in order to address any questions and/or concerns that Councilmembers may have.

A motion has been prepared for City Council consideration.

RECOMMENDATION

Pursuant to Section 3.12.050(a)(2) of the Ketchikan Municipal Code, it is recommended that the City Council adopt the motion exempting the procurement of KPU TV programming content from competitive bidding requirements of the Ketchikan Municipal Code; authorizing the Acting General Manager to purchase programming content from Vision Alaska II LLC; and authorizing funding from the 2022 Telecommunications Division's Broadcast Content Fees account (Account No. 630.04).

Recommended Motion: Pursuant to Section 3.12.050(a)(2) of the Ketchikan Municipal Code, I move the City Council exempt the procurement of KPU TV programming content from competitive bidding requirements of the Ketchikan Municipal Code; authorize the Acting General Manager to purchase programming content from Vision Alaska II LLC; and authorize funding from the 2022 Telecommunications Division's Broadcast Content Fees account (Account No. 630.04).



KPU Telecommunications

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Ketchikan, AK 99901

Phone (907) 225-1000

FAX (907) 225-1788

Memorandum

To: Lacey Simpson, Acting KPU General Manager

From: Ed Cushing, KPU Telecommunications Division Manager

Date: December 6, 2021

Subject: **Exempt from Competitive Bidding the Purchase of Programming Content from Vision Alaska II LLC per Section 3.12.050(a)(2) Supplies, materials, equipment, or contractual services which can be furnished only by a single dealer, which have a uniform price wherever purchased or which are telecommunications supplies, materials, or equipment purchased by KPU for retail sale or lease.**

The purpose of this memorandum is to request that the KPU General Manager seek City Council approval to exempt from competitive bid the procurement of KPU TV programming content from Vision Alaska II LLC and authorize the KPU General Manager to execute the Retransmission Consent Agreement between City of Ketchikan d.b.a. KPU TV and Vision Alaska II LLC.

Background

KPUTel contracts with Vision Alaska II LLC for authorization to rebroadcast the FOX, ABC, and CW broadcast stations covering the Juneau Designated Market Area (DMA). The Juneau DMA includes Ketchikan. This content may only be purchased from Vision Alaska as they are the designated broadcaster for these channels in the Juneau DMA. The content on these channels is popular and is necessary for KPU TV to offer a competitive television service (including popular programming such as sports content including the Seattle Seahawks and other programming such as Family Guy, The Simpsons, Modern Family, Greys Anatomy, Designated Survivor, Super Girl and local news, weather and other special programming).

Vision Alaska II LLC and KPU TV have negotiated a new agreement which allows KPU TV to continue carrying FOX, ABC, and The CW. The agreement establishes the per-subscriber fees for the channel. Based on our calculation of fees (per channel rate multiplied by the estimated number of KPU TV customers), the total estimated expenditures for this agreement over the life of the agreement exceeds \$50,000 and requires City Council approval.

Section 3.12.050(a)(2) of the Ketchikan Municipal Code allows "supplies, materials, equipment, or contractual services which can be furnished only by a single dealer, which have a uniform price wherever purchased or which are telecommunications supplies, materials, or equipment

purchased by KPU for retail sale or lease” in excess of \$50,000 to be purchased with approval by the City Council. Vision Alaska II LLC is the only company (single dealer) that can provide FOX, ABC and the CW to KPU TV.

To address the confidentiality terms in the agreement as well as Vision Alaska II LLC “Trade Secrets” relative to the overall Retransmission Consent Agreement, we are recommending that the KPU General Manager establish an executive session so that the City Council Members have an opportunity to peruse the un-redacted Retransmission Consent Agreement prior to voting on the item.

Recommended Motion:

Pursuant to section 3.12.050(a)(2) of the Ketchikan Municipal Code, I move the City Council authorize the General Manager to sign the Retransmission Consent Agreement with Vision Alaska II LLC, exempt the procurement of KPU TV programming content from Vision Alaska II LLC; and approve funding from the KPU Telecommunications Annual Budgets for Licenses and Fees - Broadcast Content Fees (account 630-04).

Cc: Michelle Johansen, KPU Finance Director

2022 AMENDMENT TO RETRANSMISSION CONSENT AGREEMENT

This 2022 AMENDMENT (“**2022 Amendment**”) to the Retransmission Consent Agreement, including any amendments thereto, (the “**Agreement**”) by and between Vision Alaska I LLC (“**Broadcaster**”), owner and operator of the television station(s) listed in Exhibit A hereto (the “**Station(s)**”), and City of Ketchikan, d.b.a. KPU TV (“**Operator**”), is made and effective as of January 1, 2022 (the “**2022 Amendment Effective Date**”).

Broadcaster and Operator, intending to be bound legally, agree as follows:

1. Subject to the terms and conditions of the Agreement, Broadcaster hereby grants to Operator the non-exclusive right to retransmit each Broadcast Signal, each in its entirety, to each Television Receiver or each Set Top Box of each Subscriber that is connected to a System as defined herein. Operator shall have no right or obligation to retransmit any portion of the Broadcast Signal to any receiver to which Broadcaster has not granted consent in the foregoing sentence. Broadcaster and Operator acknowledge that Broadcaster elected retransmission consent with respect to each portion of the System and each portion of the Broadcast Signal for the election cycle that includes the 2022 Amendment Effective Date.
2. The Term of the Agreement is extended from January 1, 2022, through December 31, 2023, and, during the extended Term, the Rate shall be that set forth in Exhibit A hereto.
3. Exhibit A of the Agreement is hereby replaced with the Exhibit A attached hereto.
4. Section 1 of Exhibit B to the Agreement is hereby amended as follows:
 - a. Section 1(a) of Exhibit B to the Agreement is amended to read as follows:

“(a) “**Broadcast Signal**” or “**Signal**” means, in each case, the digital broadcast signal of the applicable Station (including video, accompanying audio, and Program Related Material) in a form compliant with Advanced Television Systems Committee (“**ATSC**”) standards, which may include at least one channel containing high-definition format (as defined by the ATSC) video and audio programming, and, at Broadcaster’s sole discretion, also may include one or more channels of video and audio programming, whether in high-definition format or otherwise (each, a “**Multicast Channel**”).”
 - b. Section 1(c) of Exhibit B to the Agreement is amended to read as follows:

“(c) “**Primary Channel**” means any program transport feed within a Broadcast Signal that has been designated by Broadcaster as such Station’s “primary channel” consistent with FCC and industry standards.”
 - c. Section 1(d) of Exhibit B to the Agreement is amended to read as follows:

“(d) “**Program-Related Material**” means (i) closed-captioning information and video description; (ii) program identification codes, watermark(s); redistribution control information and/or copy control information; (iii) program ratings information; (iv) up to one second language audio for the program then being broadcast; (v) such other material as may be essential to or necessary for the delivery or distribution of the Broadcast Signal; (vi) information and material directly associated with specific programming and/or commercial advertisements contained in a Station’s broadcast program schedule, if such information or material is transmitted concurrently or substantially concurrently with its associated programming and/or commercial advertisement; and (vii) any material that Operator is required to retransmit by the FCC or other applicable law.”

d. Section 1(e) of Exhibit B to the Agreement is amended to read as follows:

“(e) **“Retransmitted Feed”** means each program stream within a Broadcast Signal that is, or that is required to be retransmitted by a System.”

e. Section 1(g) of Exhibit B to the Agreement is amended to read as follows:

“(g) **“System”** means each video programming distribution system owned and/or operated by Operator at any time during the Term hereof (as may be modified or extended) that (i) makes available “multiple channels of video programming” (as defined in Section 602 of the Communications Act of 1934, as amended, and in applicable FCC rules and policies) through traditional cable, MMDS, MDS, SMATV, DSL and/or internet protocol technology to residential and/or commercial locations via closed signal paths to the Operator’s customers; (ii) qualifies as a “cable system” under 17 U.S.C. § 111(f); and (iii) serves areas located within (1) a Station’s DMA; or (2) areas located within the State of Alaska that are outside of any DMA. Notwithstanding anything to the contrary, the term “System” shall not include any distribution system (whether now existing or hereinafter invented) that is not included in the foregoing definition or any distribution system reliant on a Subscriber having access to, or that involves distribution over, mobile wireless infrastructure, a virtual private network or the Internet. Operator warrants that each System that retransmits or is required to retransmit any portion of a Broadcast Signal as of the 2021 Amendment Effective Date is listed, along with the franchise or operating areas it serves, on **Exhibit A** hereto.”

f. The following sections 1(k) through 1(q) are hereby added to the Agreement:

“(k) **“FCC”** means the Federal Communications Commission.

(l) **“MVPD”** means a multichannel video programming distributor as defined in 47 C.F.R. §76.1200 and the rules, policies, and orders of the FCC.

(m) **“MVPS”** means multichannel video programming system as defined in 47 C.F.R. §76.1200 and the rules, policies, and orders of the FCC.

(n) **“Internet”** means the public network commonly known as the “internet,” comprised of a collection of interconnected networks utilizing TCP/IP protocols to establish communications between devices (or such other generally accepted successor or replacement protocol(s) used to establish such communications), which network(s) provide access to most publicly available websites.

(o) **“Television Receiver”** means a device that: (i) is capable of receiving and displaying over-the-air signals broadcast by television stations; (ii) is intended primarily for the reception and simultaneous viewing of such signals, and of programming delivered by an MVPD; (iii) has a built-in, over the air tuner not meant to be removed; and (iv) is capable of audience measurement by Nielsen Media Research with methodologies currently in use. For the avoidance of doubt, “Television Receiver” does not include portable devices such as laptops, iPads or other tablets, iTouch, or smartphones unless such devices satisfy the foregoing clauses (i)-(iv).

(p) **“Set-Top Box”** means (i) any integrated receiver decoder hardware device located in the premises of the applicable subscriber that (A) is CableLabs-certified, (B) is designed primarily for the reception by an authorized Subscriber of MVPD services delivered via an MVPS, and (C) over which such MVPD has the technology to control the authorization and de-authorization of a given subscriber’s access to specific video programming services distributed by such MVPD over such

MVPS (“Conditional Access and Control”); and (ii) any software application that has been approved by a Big 4 Network embedded in a Television Receiver and such software complies with the foregoing clauses (B) and (C). A CableLabs-certified CableCARD host device equipped with a CableCARD which is primarily designed for the reception and viewing of MVPD Services by an authorized subscriber shall be deemed a Set-Top Box hereunder, but only if and for so long as such MVPD has Conditional Access and Control via such CableCARD.

(q) “**Program Transport Stream**” refers to each individual channel of programming included in a Broadcast Signal.”

5. Section 2 (**Retransmission of Broadcast Signal**) of Exhibit B to the Agreement shall be amended as follows:

(a) Section 2(c) of Exhibit B to the Agreement shall be amended to read as follows:

“(c) *Digital Tier.* A System that then retransmits any other broadcast station’s programming in digital format shall comply with each of the following requirements:

(i) A System that retransmits in high definition digital format any HD Broadcast Stream shall retransmit in high definition format each program stream within a Broadcast Signal that is broadcast in high definition format by a Station.

(ii) A System that retransmits in standard definition digital format any HD Broadcast Stream shall down-convert each Program Transport Stream within a Broadcast Signal that is broadcast in high definition format and retransmit in standard definition format such down-converted program stream. For the avoidance of doubt, this down-conversion obligation shall be in addition to, and not in lieu of, Operator’s obligation (if any) in Section 2(c)(i).

(iii) A System that then retransmits in standard definition digital format any SD Broadcast Stream shall retransmit in standard definition format each program stream within a Broadcast Signal that is broadcast entirely in standard definition format.

(iv) Operator shall retransmit each Retransmitted Feed in standard definition format on the channel position specified in Exhibit A, which position shall be, as of the date of this Agreement, in the same channel neighborhood as other comparable (*e.g.*, same genre) Program Transport Streams of other retransmitted television stations that are broadcast in the same format (*i.e.*, standard definition or high definition). In the event that Operator reconfigures its channel lineup such that the channel assigned to a Retransmitted Feed is no longer in the same channel neighborhood and level of service as other comparable Program Transport Streams of other retransmitted television stations, then Operator shall notify Broadcaster and propose an alternative channel position that is within an applicable channel neighborhood. Operator may not reassign the channel of a Retransmitted Feed until Broadcaster has consented to such reassignment. Each Retransmitted Feed shall appear on a channel selected by the System in a manner that is comparable to and non-discriminatory with respect to the manner in which such System selects channel positions for other comparable local broadcast program streams.”

(b) Section 2(d) of Exhibit B to the Agreement shall be amended to read as follows:

“(d) *Exceptions.* Notwithstanding anything to the contrary herein, Operator shall have no obligation to retransmit any Multicast Channel that contains content that substantially duplicates the content of a then-existing cable television programming service retransmitted on the System. Notwithstanding any other provisions of this Agreement, this Agreement does not grant Operator consent for (1) retransmission of any Program Transport Stream that is a simulcast of a Program Transport Stream broadcast over the air by another local television station assigned to the same DMA as Station; or (2) retransmission of any Program Transport Stream of a Station affiliated with the ION network.”

(c) The following section 2(f) is hereby added to Exhibit B to the Agreement:

“(f) *ATSC 3.0.* In the event that a Station commences transmission of the programming included in a Signal in ATSC 3.0 format (an “ATSC 3.0 Signal”), Operator and Broadcaster will negotiate in good faith to ensure that such programming is retransmitted by Operator. If a Station distributes its ATSC 3.0 Signal as a simulcast of Broadcaster’s Signal broadcast in ATSC 1.0 format (an “ATSC 1.0 Signal”), then at all times during the Term Operator shall retransmit at least one of such Station’s ATSC 3.0 Signal or ATSC 1.0 Signal to all Subscribers for any System on which such Station is retransmitted. In the event that Broadcaster distributes a Station’s Signal exclusively in ATSC 3.0 format, Operator shall retransmit such Station’s ATSC 3.0 Signal to all Subscribers for any System on which such Station is retransmitted.”

6. Section 5 (**Fees**) of Exhibit B to the Agreement is amended to add the following Section 5(e):

“(e) In the event that Operator determines that it has overpaid Broadcaster for any payment made under this Agreement, Operator shall notify Broadcaster and provide documentation of such overpayment. Operator’s right to recover such overpayment shall be limited to the six months preceding Operator’s provision of notice and appropriate documentation under the preceding sentence.”

7. Section 6(d) of Exhibit B to the Agreement is amended to read as follows:

“(c) Except as otherwise set forth in this Agreement, Operator shall not, for pay or otherwise, record, copy, duplicate and/or knowingly authorize the recording, copying, duplication or retransmission of any portion of the Broadcast Signal or any other programming provided to Operator hereunder without Broadcaster’s prior written permission. Operator shall notify Broadcaster if it becomes aware of a third party performing such unauthorized recording, copying, duplication or retransmission, other than for private home use. Nothing in this Agreement shall restrict or be deemed to approve of Operator’s practice of providing Subscribers with set-top boxes, digital video recorders and other devices and cable network functionalities and/or establishing connections to Subscribers’ consumer electronics devices, including without limitation those that are intended for duplication of video or audio programming, or to provide subscribers with VCR-like functionality to the extent permitted by then-existing law without any license from Broadcaster, its program suppliers or any other party, which licenses are expressly not granted herein. For the avoidance of doubt, nothing in this Agreement shall be construed as granting to Operator any license from Broadcaster, its program suppliers, or any other party, with respect to any personal recording or incidental caching or storage of any portion of the Broadcast Signals. Notwithstanding anything herein to the contrary, in no event shall Operator authorize, provide, or facilitate any feature that (i) permits or enables the automatic skipping (e.g., without the need to press a “fast-forward” button) of commercial advertisements in a Station’s Broadcast Signal; (ii) allows end users to receive one or more program transport streams from a Station via an individual antenna at a remote location (*i.e.*, a site other than the customer’s premises) that is then transported via the Internet to the end

user's premises; or (iii) allows end users to receive one or more program transport streams of a Station from a third party through an application hosted on Operator's set-top box or other mechanism facilitated by Operator that delivers local television broadcast stations without such third party having obtained consent from such broadcast stations for such delivery."

8. Section 8 (**Representations and Warranties**) of the Agreement is amended to read as follows:

"8. Representations and Warranties. Broadcaster and Operator each represent, warrant and covenant to the other that they have the power and authority, and the rights, to enter into this Agreement and to fully perform their respective obligations to the other, and that they each will comply with all applicable laws, rules and regulations. Operator further represents, warrants, and covenants that (1) it is and will remain throughout the term an MVPD and that all facilities used to distribute a Station Signal qualify as an MVPS; (2) it has, together with the rights granted to it hereunder, acquired all necessary rights, licenses, consents, permissions and authorizations, including copyrights, patents, trademarks, service marks and trade names necessary for Operator to perform its obligations under this Agreement; and (3) during the Term it shall continue to maintain or obtain same, it being understood that the obligation for licensing of copyrighted programming shall be in accordance with Section 6(b).

This 2022 Amendment shall be a legally valid and binding agreement enforceable in accordance with its terms upon its execution by Broadcaster and Operator (in any number of counterparts). Except as modified by the express terms of this 2022 Amendment, all provisions of the Agreement shall remain in full force and effect. In the event of a conflict between the provisions of this 2022 Amendment and the provisions of the Agreement, the provisions of this 2022 Amendment shall control. Any reference to the Agreement shall be deemed to be a reference to the Agreement as amended in accordance herewith. All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Agreement.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be duly executed as of the date first written above.

BROADCASTER

OPERATOR

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

EXHIBIT A

A. Notices:

	BROADCASTER	OPERATOR
COMPANY	Vision Alaska I, LLC	City of Ketchikan dba KPU TV
ADDRESS	4101 Lake Boone Trail, Suite 300	2970 Tongass Ave.
CITY, STATE, ZIP	Raleigh, NC 27607	Ketchikan, AK 99901
CONTACT NAME	Stephen C. Brissette	KPU Telecom Division Manager
CONTACT PHONE	(919) 781-4000	907-225-1000

B. Rate (per subscriber per month):

Primary Affiliation of Retransmitted Feed	2022	2023
Big 4 Network		
CW Network		
MyNetwork		
Independent Channel		
Other		

1. **“Big Four Network”** shall mean the ABC, NBC, CBS, and FOX television networks.
2. **“Independent Channel”** shall mean the Primary Channel for a Station if such Primary Channel is not affiliated with a Big Four Network or the CW or MyNetworkTV.
3. **“Other”** shall include each Retransmitted Feed that is not affiliated with a Big Four Network, the CW network, or the MyNetwork network and is not an Independent Channel.
4. As used in this Agreement, each reference to a network shall include any successor or replacement networks thereto.
5. For the avoidance of doubt, a Subscriber who receives from a System the same Retransmitted Feed in multiple formats (e.g., SD and HD) shall count as a single Subscriber with respect to that Retransmitted Feed. Each Subscriber that receives multiple, different Retransmitted Feeds shall be counted separately for each distinct Retransmitted Feed. For example, a Subscriber who receives two Retransmitted Feeds from the System, one affiliated with CBS and one affiliated with Fox, shall count as a Subscriber with respect to the CBS Retransmitted Feed and shall count as a Subscriber with respect to the Fox Retransmitted Feed.

C. Station(s) and System(s):

1. Unless the context requires otherwise, references to a Station or the Stations shall refer only to those particular Stations that are assigned to the same Designated Market Area (“**DMA**”) as a

System (or portion of a System) or, in the event a System is located in a portion of the State of Alaska not assigned to any DMA, to a DMA located in the State of Alaska.

2. If during the Term (i) Operator acquires, manages, builds or otherwise controls a system that would qualify as a System pursuant to this Agreement had it been owned and/or operated by Operator as of the 2021 Amendment Effective Date (a “**Subsequently Acquired System**”); or (ii) Broadcaster acquires, manages, or otherwise obtains the right to grant retransmission consent a television station (a “**Subsequently Acquired Station**”), Broadcaster shall have the right to add such Subsequently Acquired System or Subsequently Acquired Station to this Agreement as a System or a Station, as appropriate, effective upon the date that such System or Station first qualified as a Subsequently Acquired System or Subsequently Acquired Station. If a Subsequently Acquired System or Subsequently Acquired Station is added to this Agreement any preexisting retransmission agreement for such Subsequently Acquired System or Subsequently Acquired Station shall be terminated with respect to such Subsequently Acquired System or Subsequently Acquired Station, notwithstanding anything to the contrary in such agreement.

3. The System(s) and Station(s) covered by this Agreement, as of the date hereof, are listed below:

STATION	DMA	STATION VIRTUAL CHANNEL	SYSTEM	CURRENT NUMBER OF SUBSCRIBERS	CHANNEL	
					ANALOG/ SD TIER	HD TIER
KJUD	Juneau and all geographic areas of Alaska outside of any DMA.	[8]-D1 / [ABC]	KPU TV	[REDACTED]	7	1007
		[8] D2 / [CW]			3	1003
KJUD-FOX	Juneau and all geographic areas of Alaska outside of any DMA.	[8]-D3 / [FOX]	KPU TV	[REDACTED]	9	1009