



General Manager
334 Front Street
Ketchikan, AK 99901

Phone (907) 228-5603
Fax (907) 225-5075

TRANSMITTAL MEMORANDUM

TO: The Honorable Mayor and City Council

FROM: Lacey G. Simpson, Acting General Manager

DATE: April 27, 2022

RE: **Approving Agreement for 2021-2024 Joint Use of Ketchikan Public Utilities System Poles – GCI Communication Corp.**

As indicated in the attached memorandum from Electric Operations Manager Mark Adams, the Utility and GCI Communication Corp. have been operating under a two-year Pole Attachment Agreement, which expired September 30, 2021. Negotiations for a new agreement have now been completed and are summarized in the Electric Operations Manager's report. The standard attachment cost is \$22.37 (up from \$21.50) per pole and \$268.44 (up from \$258.00) per load center box. The term of the agreement is for three years. The initial annual value of this successor agreement is \$72,009.

A motion has been prepared for City Council consideration.

RECOMMENDATION

It is recommended that the City Council adopt the motion approving the 2021-2024 Joint Use of Ketchikan Public Utilities System Poles Agreement between GCI Communication Corp. and the City of Ketchikan d/b/a Ketchikan Public Utilities and authorizing the Acting General Manager to execute the contract on behalf of the City Council.

Recommended Motion: I move that the City Council approve the 2021-2024 Joint Use of Ketchikan Public Utilities System Poles Agreement between GCI Communication Corp. and the City of Ketchikan d/b/a Ketchikan Public Utilities and authorize the Acting General Manager to execute the contract on behalf of the City Council.



Electric Division
1065 Fair Street
Ketchikan, AK 99901

Phone: (907) 225-5505
Fax: (907) 247-0755

Memorandum

To: Lacey G. Simpson, Acting KPU General Manager

From: Mark Adams, Electric Operations Manager

Date: April 21, 2022

Subject: **Agreement for 2021-2024 Joint Use of Ketchikan Public Utilities System Poles, with GCI**

In June 2002, KPU entered into an FCC-required agreement with GCI that provided for joint use of Ketchikan Public Utilities Electric Division system poles relative to the installation of GCI telecommunications and television attachments. The original agreement had a term of two years, effective April 8, 2002. Successor two-year agreements have been approved by the City Council and GCI, with the most recent successor agreement having expired on September 30, 2021.

Attached for review is the 2021-2024 successor agreement. The terms and conditions are essentially the same as the 2019-2021 agreement. However, in an effort to standardize all joint pole use attachment agreements that KPU maintains, including with KPU Telecommunications and AT&T, this new GCI agreement has been changed to be valid through December 31, 2024. Additionally there has been a slight upward adjustment to the rates charged. The new rate is \$22.37 per attachment (previously \$21.50 per attachment), and \$268.44 per load center box (previously \$258.00 per box). The initial annual value of the 2021-2024 agreement is \$72,009.

Recommendation: It is recommended that the City Council approve the 2021-2024 Joint Use of Ketchikan Public Utilities System Poles Agreement between GCI Communication Corporation and Ketchikan Public Utilities, and authorize the Acting General Manager to execute the agreement on behalf of the City Council.

Attachment: Agreement for 2021-2024 Joint Use of Ketchikan Public Utilities System Poles

cc: Jeremy Bynum PE, Acting Electric Division Manager

**AGREEMENT
FOR
2021-2024 JOINT USE OF KETCHIKAN PUBLIC UTILITIES SYSTEM POLES**

THIS AGREEMENT made and entered into this _____ of 20____, by and between the **CITY OF KETCHIKAN**, a municipal corporation, d/b/a **KETCHIKAN PUBLIC UTILITIES ELECTRIC DIVISION** of Ketchikan, Alaska, hereinafter referred to as "KPU", and GCI Communication Corp. (GCICC), organized and existing under the laws of the State of Alaska and qualified to do business in the State of Alaska, hereinafter referred to as "GCI", witnesseth:

RECITALS

- (a) KPU-Telecommunications Division and GCI have negotiated an Interconnection Agreement relative to telecommunications services and facilities. The Interconnection Agreement recognizes that each organization will contract separately with KPU for the joint use of utility poles owned by the electric division; and
- (b) GCI has furnished cable television service to residents of the Ketchikan Gateway Borough, Alaska, and has erected and maintained aerial cables, wires and associated facilities utilizing KPU's utility poles and desires to continue to utilize said utility poles; and
- (c) KPU is willing to permit the use of KPU utility poles when such use, in KPU's reasonable judgment, will not interfere with KPU's own service requirements and needs, including consideration of economy and of safety, subject to all of the terms, conditions, and provisions herein contained.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants, terms and conditions herein provided the parties hereto agree as follows:

Section 1: Term. The term of this agreement shall commence on the effective date hereof and continue in effect through December 31, 2024.

Section 2: Compensation.

- 2.1** The compensation to be paid by GCI to KPU for use of KPU's poles shall be based on the number of KPU Electric Division poles with GCI attachments on the poles multiplied by \$22.37 per attachment, adjusted every two years with each subsequent agreement. As of September 7, 2021, the number of KPU Electric Division poles contacted by GCI apparatus is 2,799. The addition and retirement of poles during the term of this agreement shall be adjusted on October 1st and April 1st of each year.
- 2.2** As of September 7, 2021 GCI has placed Load Center boxes on 35 (thirty-five) poles. Such power boxes and the accompanying conduit

and associated apparatus occupy far more of the pole than the FCC formula allows for cable TV attachments. The compensation to be paid by GCI to KPU shall be \$268.44 per pole (\$22.37 multiplied by 12 feet per pole as averaged).

Payment shall be made on a semi-annually, in advance, with the first payment due upon execution of this Agreement by GCI.

Section 3: Joint Use of Poles-Scope. This agreement applies to the geographic area in which KPU renders service and shall cover all existing KPU poles, and such additional KPU poles as are hereafter installed. GCI may attach its cables and associated facilities to KPU poles, subject, however, to the terms and conditions of this Agreement. GCI shall keep its cables and facilities in good and safe conditions.

This agreement specifically excludes those poles known as "Pony poles" that are owned and controlled by KPU Telecommunications Division. As provided in Paragraph 10.3.1.1, Paragraph 10.3.3.4.1, and Exhibit A of the KPU-GCI Interconnection Agreement, KPU Telecommunications will provide GCI with access to those poles at a rate established in the interconnection Agreement.

Section 4: Exclusion of Joint Use of Poles. KPU reserves the unconditional right to exclude any of KPU poles or facilities from joint use by GCI. In the event that KPU decides to exclude any of KPU's poles or facilities from joint use by GCI, KPU will give reasonable consideration to replacing the pole or facilities so as to accommodate joint use by the GCI provided, however, that the GCI shall pay all costs for design and construction of all poles and facilities and all utility attachments and lines and further provided that the poles or facility will provide for equal or better use by each and all of the utilities. KPU makes no warranties or represents that the poles used under this Agreement are safe or suitable for GCI's use. GCI uses KPU poles at its sole risk.

Section 5: Easements and Right-of-Way. Each party shall be responsible for obtaining their own easements and right-of-way. KPU cannot and does not assure or warrant to GCI the existence, availability, or adequacy of any easements or right-of-way, and in the event GCI is at any time prevented from placing or maintaining GCI attachments on KPU's poles, no liability by reason thereof shall attach to KPU.

Section 6: Relocation of Poles. Whenever in KPU's judgment relocation of a pole is necessary, each party shall bear the cost of transferring their own pole attachments. Before making any pole replacement or relocation, KPU will provide not less than thirty (30) days prior written notice thereof (except in case of an emergency, in which event verbal notice will be given and subsequently confirmed in writing) to GCI, specifying in such notice the time of the proposed replacement or relocation. KPU will provide a five (5) day notice of actual construction before moving or relocating any GCI equipment (except in case of an emergency, in which event verbal notice will be given and subsequently confirmed in writing). GCI shall at the time specified transfer its pole attachments to the new or relocated joint pole. In the event GCI fails to transfer its attachments to the new or relocated joint pole by the time specified for such transfer of attachments, KPU may elect to accomplish the transfer and GCI agrees to pay KPU for all of the costs and expense incurred therefore by KPU not later than thirty (30) days after billing therefore.

Section 7: Future Construction. So that the parties may effectively coordinate their efforts and plans regarding joint use of poles or pole lines to be constructed in the future, the parties shall, insofar as practicable, make known to each other their plans for future expansion and construction involving poles. The parties agree to cooperate in the planning of such construction so that joint use may be accomplished, to the extent possible, in a manner mutually satisfactory to both parties.

Section 8: Ownership of Poles. All poles jointly used under this agreement shall remain the sole and exclusive property of KPU and payments made by GCI under this agreement shall in no manner be construed as entitling GCI to any ownership or other interest or privilege in or to any such KPU poles, except as expressly set forth in this contract.

Section 9: Abandonment of Joint Poles. If KPU elects at any time to abandon any jointly used pole, it will give GCI notice in writing to that effect not less than thirty (30) days prior to the date on which KPU intends to abandon the pole. If, upon the date of abandonment, KPU has no attachments on such pole and GCI has failed to remove all of GCI's attachments from the pole, the pole shall thereupon become the property of GCI, and GCI shall appear and defend, and save KPU, its officers and employees harmless from all obligations, liabilities, claims, damages, costs, expense, or charges thereafter incurred, or which arise with respect to such pole, and shall in addition thereto pay KPU for such pole at the current value of a similar pole on the KPU system. KPU will evidence transfer of such pole to the GCI by means of a bill of sale.

Section 10: Request to Relocate, Replace or Remove Facilities. GCI shall, at its cost, and not later than thirty (30) days after receipt of a written request therefore from KPU, relocate, replace or remove GCI's cable or other facilities from any pole as reasonably requested and specified by KPU. In case of an emergency KPU may arrange to relocate, replace or remove the cable or other facilities of GCI from any of KPU's poles or perform any other work in connection with such facilities as KPU determines may be required for the services needs of KPU and GCI shall, on demand, reimburse KPU for the costs and expense incurred thereby.

In the event of an emergency KPU will make a best effort attempt to notify GCI's duty supervisor. Upon execution of this agreement, GCI shall provide KPU with a current means of contact for GCI's duty supervisor.

GCI may at any time and for any reason request that a pole be replaced. GCI shall pay for removal and disposal of the old pole, design and installation of the new pole.

Section 11: Climbing Space. Effective upon the execution of this agreement, when communication lines are installed on cross-arms, the lines shall be placed a minimum of 14-inches from the centerline of the pole. When telecommunication lines are installed directly on the pole, without the use of a cross-arm, all telecommunication lines shall be placed on the same side of the pole. If another telecommunication company has already installed their lines directly to the pole, GCI[CM1] shall install its lines on the same side of the pole as the other telecommunication company. All riser conduit, equipment boxes, etc. that are attached to a pole shall be located on the same side of the pole to keep one side free for climbing. All riser conduit, equipment boxes, etc. shall be stood off a minimum of 6-inches from the edge of the pole. Pad-mounted gear, pedestals, etc. shall be installed no closer than 5-feet from the base of the pole.

Section 12: Quarterly Attachment Report. Effective upon GCI execution of this agreement, GCI shall submit to the KPU General Manager, a report that indicates by pole number or by address, new GCI pole contacts and deleted pole contacts completed during the previous quarter. Said report will be provided to the KPU General Manager within the month following the previous quarter.

Section 13: Presentation and Payment of Invoices. KPU shall submit an invoice to GCI each month for any costs or expenses incurred pursuant to Sections 6, 9 and 10, above, and payment shall be due not later than thirty (30) days after the date of the invoice. Invoices shall reference this Agreement and be submitted to:

GCI Accounts Payable
2550 Denali Street Suite 1000
Anchorage, AK 99503

Section 14: Disputed Invoices. In the event GCI disputes in good faith any portion of an invoice, the undisputed amount of the invoice shall be paid when due. Upon determination of the correct amount, the remainder of the amount invoiced, if any, plus interest accrued at the rate of eight percent (8.0%) per annum shall be paid promptly by GCI.

Section 15: New Pole Attachments. If in the reasonable judgment of KPU joint use of a pole is undesirable, KPU shall have the right to deny a new pole attachment. However, KPU shall not unreasonably withhold authorization from GCI to attach to a new pole.

Section 16: Specifications. All cables, wires, appliances, or equipment of GCI attached at any location to a KPU pole shall be installed, connected, and maintained by GCI at no cost or expense to KPU and in accordance with the requirements of the latest edition of the National Electric Safety Code and any subsequent amendments or revisions thereto, and any other applicable rules, regulations, orders, laws or ordinances. All cable and other facilities attached by GCI shall be made and accomplished in a manner that is acceptable to KPU and in such manner as to prevent any conflict with the use of the pole by KPU, and to avoid any interference with the working use of KPU's present or future facilities located on the pole.

Section 17: Conferring Rights to Others. In the event KPU has prior to the execution of this agreement granted, or hereafter grants, by contract or otherwise, any rights or privileges to use any KPU utility poles covered by this agreement to any third party, nothing herein contained shall be construed as affecting any such rights or privileges, and KPU shall have the absolute right, by contract or otherwise, to continue to extend, or to further extend or grant, such rights or privileges, it being expressly understood, however, that for the purposes of this agreement, any pole attachments of any such third party shall be treated as attachments belonging to KPU, and the rights hereunder of KPU with respect to such attachment shall be the same as if it were the actual owner thereof.

Section 18: Street Lighting, Fire Alarm, Police. Where regulations or policies of the City of Ketchikan require or permit use of KPU utility poles for street lighting, fire alarms, police alarms, or any other signal systems, such pole use will continue.

Section 19: Force Majeure. Neither party shall be in breach of this agreement by reason of a failure of performance due to a force majeure including flood, earthquake, storm,

fire, lighting, epidemic, war, riot, civil disturbance, sabotage, strike, labor slowdown or labor stoppage or breakdown of the system or any facilities or equipment.

Section 20: Indemnification. GCI agrees to defend, hold harmless, and indemnify KPU, its officers and employees from and against any and all claims, loss, damage, cost, expense, fee (including attorney's fees) or liability resulting from any injury to or death of any person or persons including but not limited to employees of KPU or GCI, or for any damage to property including but not limited to property of KPU or GCI, resulting from or arising out of or in any way connected or associated with the installation, inspection, maintenance, testing or use of any equipment owned, installed or operated by GCI; GCI shall reimburse KPU for all costs and expenses, including attorney's fees, incurred as a result of any such claims, demands or causes of action.

Section 21: Insurance. (a) GCI agrees at all times during the term hereof, at GCI's own expense, to maintain, keep in effect, furnish and deliver to KPU during the term of this agreement insurance policies in the amount and with the type of coverage shown below:

1. Commercial general liability insurance on an occurrence basis with limits of liability not less than \$2,000,000 per occurrence combined single-limit bodily injury and property damage. KPU shall be named as an additional insured by policy endorsement and GCI shall deliver a certificate of insurance evidencing such to KPU on the effective date of this agreement.
2. Workers compensation insurance in the form and amount required by applicable law (s). The policy shall contain a clause or endorsement pursuant to which the insurance companies waive subrogation or consent to a waiver of right to recovery against KPU.

(b) All insurance shall provide for a minimum of 10 days written notice to KPU prior to lapsing or cancellation

Section 22: Disclaimer. KPU's consent to GCI's use of any equipment, materials, or method shall not be construed as approving or endorsing the design or effectiveness of the equipment, materials, or methods, installation or GCI's plan for use thereof, or as any warranty as to the safety, durability or reliability of the equipment, or materials and KPU expressly disclaims any such express or implied warranties or approvals.

Section 23: Default. GCI shall be in default if it fails to make any payment as hereinabove required when due or fails to perform any other obligation or condition required to be performed for a period of ten (10) days after service on GCI of a notice spelling out the specific performance or condition required to be remedied, and GCI fails to take steps in good faith to promptly rectify and remedy the condition or complete the required performance. In the event of GCI'S default KPU, in addition to all other remedies available at law or equity, may terminate this Agreement and require GCI to remove its cable within thirty (30) days of notice or to pay KPU for all costs and expenses incurred for removing said cable if GCI fails to timely do so.

Section 24: Non-Waiver. The failure of the parties to strictly enforce at any time any of the provisions of this agreement, or to require at any time performance by another party of any of the provisions hereof, shall not be construed to be a waiver thereof, nor in any way affect

the validity of this agreement, or any part thereof, or the right of the party thereafter to strictly enforce the same.

Section 25: Entire Agreement. This agreement and all schedules, appendices and exhibits hereto, if any, sets forth all the covenants, promises, agreements, conditions and understandings between the parties hereto, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than as herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this agreement, or any schedule, appendix, exhibit or attachments thereto shall be binding upon the parties hereto unless reduced to writing and signed by them. These presents constitute a final, complete and exclusive statement of this agreement.

Section 26: Assignment and Subletting. GCI shall not assign, transfer, convey, pledge, hypothecate, sublet, subcontract or otherwise dispose of or encumber this contract, or any of the rights or privileges hereunder, nor shall GCI delegate any of its duties hereunder without the prior written consent of KPU. Any such attempted assignment, transfer, conveyance, pledge, hypothecation, subletting or other disposition, or the attempted assignment, disposition or delegation of any duties or rights shall be null and void and of no force or effect and shall be grounds for cause for immediate termination of the agreement by and at the option of KPU.

KPU will not unreasonably deny GCI's contractors the right to perform attachment, detachment and maintenance of GCI's facilities provided, however, that the contractors agree to indemnify, defend and hold KPU harmless; provide certificates of insurance in the amounts and forms described in Section 20 with KPU as an additional insured; and are in KPU's reasonable opinion qualified to perform the work.

Section 27: Miscellaneous.

(a) Unless this agreement otherwise requires, words in the singular include the plural, and in the plural include the singular. Words in the masculine gender include the feminine and the neuter, and when the sense so indicates, words in the neuter may refer to any gender.

(b) The captions, section numbers, and article numbers in this agreement are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of such sections or articles of this agreement, nor in any way affect the agreement.

(a) The laws of the State of Alaska shall govern the validity, interpretation, performance and enforcement of this agreement. The invalidity or unenforceability of any provisions of this agreement shall not affect or impair any other provisions. Venue as to any action, claim, or proceeding arising out of, or based upon this agreement, including, but not limited to, any action or declaratory or injunctive relief, shall be the appropriate Court sitting in the City of Ketchikan, First Judicial District, Alaska.

(b) Each provision contained herein shall be deemed to constitute both a covenant and condition of this agreement, the breach of which shall constitute a default.

(c) Time is of the essence of this agreement.

(d) Words or broad or general meaning shall in no way be limited because of their use in connection with words of more restricted significance.

Section 28: Notices. Any notice, demand, or request required or authorized by this agreement shall be deemed properly given if in writing and deposited in the United States mail, postage prepaid, certified, return receipt requested, addressed to the party at the following address:

(1) KPU:

General Manager
Ketchikan Public Utilities
334 Front Street
Ketchikan, AK 99901

(2) GCI:

Catherine Manka, Mgr. Lands and Leasing
GCI Communication Corp.
2550 Denali Street, Suite 1000
Anchorage, AK 99503

Either party may change the designation of the person to be notified, or the address of such party at any time, or from time to time, in writing in the manner herein provided. Notice given as herein provided shall be effective five (5) days after deposit.

Section 29: All existing agreements, if any, between the parties hereto for any joint use of KPU utility poles is by mutual consent hereby superseded by this agreement and shall be of no further force or effect.

Section 30: Nothing in this agreement shall preclude the parties to this agreement from preparing such written supplemental operating routines or working practices as they mutually agree to be necessary or appropriate to effectively administer the provisions of this agreement.

Section 31: This agreement shall be effective as of October 1, 2021.

WHEREFORE, the parties have executed the agreement which is effective as of the date above written at Ketchikan, Alaska.

City of Ketchikan d/b/a
KETCHIKAN PUBLIC UTILITIES

Date: _____

By: _____
Lacey G. Simpson, Assistant General Manager

ATTEST:

Kim Stanker, City Clerk

GCI Communication Corp.

Date: _____

By: _____
Christopher Burns, VP Network
Operations – Network Services

ACKNOWLEDGEMENTS

STATE OF ALASKA)
) ss:
FIRST JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, 20____, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared **Karl R. Amylon** to me known to be the **General Manager** of the **CITY OF KETCHIKAN d/b/a KETCHIKAN PUBLIC UTILITIES**, a municipal corporation, the corporation which executed the above and foregoing instrument; who on oath stated that he was duly authorized to execute said instrument and affix the corporate seal thereto on behalf of said corporation; who acknowledged to me that he signed and sealed the same freely and voluntarily on behalf of said corporation for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in the certificate first above written.

NOTARY PUBLIC FOR ALASKA

My Commission Expires: _____

KPU ACKNOWLEDGMENT

STATE OF ALASKA)
) ss:
FIRST JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, 20____, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared **Kim Stanker**, to me known to be the **City Clerk** of the **CITY OF KETCHIKAN d/b/a KETCHIKAN PUBLIC UTILITIES**, a municipal corporation, the corporation which executed the above and foregoing instrument; who on oath stated that she was duly authorized to execute said instrument and affix the corporate seal thereto on behalf of said corporation; who acknowledged to me that she signed and sealed the same freely and voluntarily on behalf of said corporation for the uses and purpose therein mentioned.

WITNESS my hand and official seal the day and year in the certificate first above written.

NOTARY PUBLIC FOR ALASKA

My Commission Expires: _____

GCI Communication Corp. ACKNOWLEDGEMENT

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, 20____, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn, personally appeared _____ known to be the Vice President, Network Operations for GCI Communication Corp., a corporation formed under the laws of the State of Alaska, the corporation which executed the above and foregoing instrument, and who on oath stated that he (she) (they) were duly authorized to execute said instrument and affix the corporate seal thereto on behalf of said corporation, and the seal affixed thereto is the corporate seal thereof, and acknowledged that he (she) (they) signed the same freely and voluntarily on behalf of said corporation for the purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR _____
My Commission Expires: _____