

- f. Agreement for 2024 Joint Pole Use of Ketchikan Public Utilities System Poles with Alaska Power & Telephone Wireless

TRANSMITTAL MEMORANDUM

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TO: The Honorable Mayor & City Council

FROM: Delilah A. Walsh, General Manager Initials: 

DATE: May 9, 2024 File #: MGR24-323

RE: **Agreement for 2024 Joint Pole Use of Ketchikan Public Utilities System Poles with Alaska Power & Telephone Wireless**

The motion detailed below was prepared at the request of Electric Division Director Jeremy Bynum, who asked that it be placed before the City Council for consideration at its meeting of May 16, 2024. If adopted, the motion approves the agreement between Ketchikan Public Utilities and Alaska Power & Telephone Wireless (AP&T) for the attachment of AP&T lines to KPU Electric poles.

As detailed in the attached memorandum from Mr. Bynum, this is a standard agreement that meets the request for AP&T fiber line installation from a new subsea cable to their local Ketchikan offices. As this is our standard agreement, and Mr. Bynum will be presenting all updated agreements before the end of the calendar year, I concur with his recommendation.

A motion has been prepared for City Council consideration.

Recommended Motion: I move the City Council approve the Agreement for 2024 Joint Use of Ketchikan Public Utilities System Poles with Alaska Power & Telephone; and authorize the General Manager to execute the contract on its behalf.



Electric Division
1065 Fair Street
Ketchikan, AK 99901

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

Memorandum

TO: Delilah Walsh, KPU General Manager

FROM: Jeremy T. Bynum PE, Electric Division Manager

DATE: May 7, 2024

SUBJECT: Agreement for 2024 Joint Pole Use of Ketchikan Public Utilities System Poles with Alaska Power & Telephone Wireless

KPU Electric (KPU) maintains pole attachment agreements with KPU Telecommunications, GCI, and New Cingular Wireless PCS, LLC (AT&T) in accordance with Federal Communication Commission (FCC) requirements. Alaska Power & Telephone Wireless (AP&T) has plans to install a fiber line from a new subsea cable landing near Peninsula Point to their offices on Misty Marie Lane.

This agreement is valid through 2024. It, along with KPU's other pole attachment agreements, will be brought back to Council before the end of the year for consideration of renewal for 2025-2028, to better align the terms of the various agreements.

Recommendation:

It is recommended that the City Council approve the Agreement for 2024 Joint Use of Ketchikan Public Utilities System Poles with Alaska Power & Telephone; and authorize the General Manager to execute the contract on its behalf.

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

**AGREEMENT FOR
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 **ALASKA POWER & TELEPHONE WIRELESS**, 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 "APTW", witnesseth:

RECITALS

(a) 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 APTW to KPU for use of KPU's poles shall be based on the number of KPU Electric Division poles with APTW attachments on the poles multiplied by \$22.37 per attachment, adjusted every two years with each subsequent agreement. As of September 7, 2024, the number of KPU Electric Division poles contacted by APTW apparatus is 13. 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 Payment shall be made semi-annually, in advance, with the first payment due upon execution of this Agreement by APTW

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. APTW may attach its cables and associated facilities to KPU poles, subject, however, to the terms and conditions of this Agreement. APTW shall keep its cables and facilities in good and safe conditions.

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 APTW. In the event that KPU decides to exclude any of KPU's poles or facilities from joint use by APTW, KPU will give reasonable consideration to replacing the pole or facilities so as to accommodate joint use by the APTW provided, however, that the APTW 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 APTW's use. APTW 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 APTW the existence, availability, or adequacy of any easements or right-of-way, and in the event APTW is at any time prevented from placing or maintaining APTW 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 APTW, 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 APTW equipment (except in case of an emergency, in which event verbal notice will be given and subsequently confirmed in writing). APTW shall at the time specified transfer its pole attachments to the new or relocated joint pole. In the event APTW 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 APTW 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 APTW under this agreement shall in no manner be construed as entitling APTW 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 APTW 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 APTW has failed to remove all of APTW's attachments from the pole, the pole shall thereupon become the property of APTW, and APTW 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 APTW by means of a bill of sale.

Section 10: Request to Relocate, Replace or Remove Facilities. APTW shall, at its cost, and not later than thirty (30) days after receipt of a written request therefore from KPU, relocate, replace, or remove APTW'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 APTW 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 APTW 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 APTW's duty supervisor. Upon execution of this agreement, APTW shall provide KPU with a current means of contact for APTW's duty supervisor.

APTW may at any time and for any reason request that a pole be replaced. APTW 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,

APTW 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 APTW execution of this agreement, APTW shall submit to the KPU General Manager, a report that indicates by pole number or by address, new APTW 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 APTW 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:

APTW
PO Box 3222
Port Townsend WA 98368

Section 14: Disputed Invoices. In the event APTW 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 APTW

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 APT to attach to a new pole.

Section 16: Specifications. All cables, wires, appliances, or equipment of APTW attached at any location to a KPU pole shall be installed, connected, and maintained by APTW 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 APTW 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, lightning, 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. APTW 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 APTW, or for any damage to property including but not limited to property of KPU or APTW, 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 APTW; APTW 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) APTW agrees at all times during the term hereof, at APTW'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 APTW 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 APTW'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 APTW'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. APTW 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 APTW of a notice spelling out the specific performance or condition required to be remedied, and APTW fails to take steps in good faith to promptly rectify and remedy the condition or complete the required performance. In the event of APTW'S default KPU, in addition to all other remedies available at law or equity, may terminate this Agreement and require APTW 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 APTW 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. APTW 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 APTW 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 APTW's contractors the right to perform attachment, detachment and maintenance of APTW'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.

(a) Words of 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:

Delilah A. Walsh
General Manager
Ketchikan Public Utilities 334 Front Street
Ketchikan, AK 99901

(2) APTW:

Bruce Messerschmidt, Director Telecom
OSP Engineering & Construction.
PO Box 34195
Juneau Alaska 99803

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 August 1, 2024.

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: _____
Delilah A. Walsh
General Manager

ATTEST:

Kim Stanker, City Clerk

Alaska Power Telephone Wireless.

Date: _____

By: _____
Bruce Messerschmidt
Director Telecom
OSP Engineering & Construction

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 **Delilah A. Walsh** 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: _____

Alaska Power Telephone Wireless. 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 Bruce Messerschmidt, to me known to be the Director Telecom OSP Engineering and Construction, 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 ALASKA
My Commission Expires: _____