

AN ORDINANCE OF THE HAINES BOROUGH AUTHORIZING THE BOROUGH MANAGER TO NEGOTIATE AND EXECUTE A NEW LEASE WITH GOAT LAKE HYDRO, INC., A SUBSIDIARY OF ALASKA POWER & TELEPHONE, FOR THE SPECIFIED PARCEL OF BOROUGH PROPERTY FOR THE GOAT LAKE HYDRO PLANT AT LUTAK.

WHEREAS, Goat Lake Hydro, Inc., as subsidiary of Alaska Power & Telephone has asked to continue to lease borough property described as Parcel A – a parcel within Lot 4, Section 10, T30S, R59E, CRM, Haines Recording District (totaling 5,237.5 square feet), and all easement appurtenants thereto; and

WHEREAS, this new lease (“the Lease”) will replace the original 20-year lease, which commenced May 5, 1988 and ended at midnight on May 4, 2008; and

WHEREAS, Section 16.5 of the original lease provided for holding over Goat Lake Hydro, Inc.’s possession of the premises on a month-to-month tenancy until the execution of a subsequent or amended lease agreement; and

WHEREAS, Goat Lake Hydro, Inc. has continued to maintain possession of the premises and has continued to pay the original rent payment plus 18% as required by Section 16.5 of the original lease (see Item 3 of this agreement); and

WHEREAS, the holding over annual total of \$656.08 has been paid for each year of the following period: May 5, 2008 through May 4, 2015, and any increase in the annual rental amount for the current lease year ending May 4, 2015 would be prorated from the date of execution of the new lease and remitted by Goat Lake Hydro, Inc.; and

WHEREAS, the lease premises were professionally appraised in April 2010 and again in August 2011, and the borough’s assistant assessor also assessed the property value within the past six months, all three with differing values; and

WHEREAS, Haines Borough Code (“HBC”) 14.16.090 provides that, “[no land shall be leased for an annual rent less than \$500.00 or 10 percent of the appraised value of the land and any improvements thereon owned by the borough, whichever is more]; and

WHEREAS, Goat Lake Hydro, Inc. has requested an opportunity to negotiate the lease amount because of the dissimilar appraisals; and

WHEREAS, HBC 14.16.160 provides that upon authorization by the assembly by noncode ordinance, the manager may commence negotiations for the lease of borough land, and the final terms of a negotiated lease are subject to approval by the assembly unless the minimum essential terms and the authority of the manager to execute the lease are set forth in the ordinance authorizing negotiations; and

WHEREAS, the borough attorney drafted a replacement lease for consideration by both parties containing the essential terms outlined in HBC 14.16.180, and the negotiations would be for the purpose of determining the value of the lease premises; and

WHEREAS, HBC 14.16.080 states that a lease of borough land may be issued for not more than 35 years, and the borough manager recommends a new 25-year lease as being in the best interest of the borough; and

WHEREAS, the borough Comprehensive Plan, Objective 15M(4) recommends the borough "support and protect energy production at existing hydro facilities including Lutak Hydro (AP&T),

NOW THEREFORE BE IT ENACTED, by the Haines Borough Assembly, that it is hereby determined to be for a public purpose and in the public interest of the Haines Borough to authorize the borough manager to negotiate and execute a new lease with Goat Lake Hydro, Inc., a subsidiary of Alaska Power & Telephone, for the specified parcel of borough property for the Goat Lake Hydro plant at Lutak under the conditions of the attached lease agreement, and for a period of 25 years.

Section 1. Classification. This ordinance is a non-code ordinance.

Section 2. Severability. If any provision of this ordinance or any application thereof to any person or circumstance is held to be invalid, the remainder of this ordinance and the application to other persons or circumstances shall not be affected thereby.

Section 3. Effective Date. This ordinance shall become effective immediately upon adoption.

ADOPTED BY A DULY CONSTITUTED QUORUM OF THE HAINES BOROUGH ASSEMBLY THIS 10th DAY OF JUNE, 2014.

Attest:


Julie Cozzi, MMC, Borough Clerk




Stephanie Scott, Mayor

Date Introduced: 05/13/14
Date of First Public Hearing: 05/27/14
Date of Second Public Hearing: 06/10/14

LEASE AGREEMENT
GOAT LAKE HYDRO, INC.
AND
HAINES BOROUGH

THIS AGREEMENT is entered into between **GOAT LAKE HYDRO, INC.** (a subsidiary of Alaska Power & Telephone) as grantee ("Grantee"), and **HAINES BOROUGH** as grantor ("Grantor"). Grantor and Grantee are sometimes collectively referred to as "Parties."

RECITALS:

THIS AGREEMENT is a new lease ("the Lease") and replaces the original 20-year lease, which commenced May 5, 1988 and ended at midnight on May 4, 2008.

WHEREAS, Section 16.5 of the original lease provided for holding over the Grantee's possession of the premises on a month-to-month tenancy until the execution of a subsequent or amended lease agreement; and

WHEREAS, Grantee has continued to maintain possession of the premises and has continued to pay the original rent payment plus 18% as required by Section 16.5 of the original lease (see Item 3 of this agreement); and

WHEREAS, the holding over annual total of \$656.08 was paid for each year of the following period: May 5, 2008 through May 4, 2014; and

WHEREAS, an advance holding over payment of \$656.08 will be paid for the current year through May 4, 2015, and any additional prorated amount shall be due and payable upon execution of a new lease; and

WHEREAS, Section 14.16.080 of the Haines Borough Code ("HBC") states that a lease of Borough land may be issued for not more than 35 years; and

WHEREAS, Grantee has asked to continue to lease the premises, and the borough Comprehensive Plan, Objective 15M(4) recommends the borough "*support and protect energy production at existing hydro facilities including Lutak Hydro (AP&T)*"; and

WHEREAS, the property was professionally appraised in April 2010 and again in August 2011, and the borough's former staff assessor and current assistant assessor have both reviewed the property values; and

WHEREAS, the value is determined to be \$_____ per square foot for 5,237.5 square foot for a total of \$_____, and HBC 14.16.090 provides that, "[no land shall be leased for an annual rent less than \$500.00 or 10 percent of the appraised value of the land and any improvements thereon owned by the borough, whichever is more],

NOW, THEREFORE, for good, valuable and sufficient consideration received and to be received, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. **PREMISES.** Grantor hereby grants to the Grantee and Grantee hereby accepts from Grantor, the right to exclusive use of the premises described, as follows, in Haines, Alaska:

Parcel A - a parcel within Lot 4, Section 10, T30S, R59E, CRM, Haines Recording District, more particularly described as:

Commencing at a point, which the Southwest corner of said Lot 4 bears 58° 23' 42" W, 152.34 feet; thence N 19° 32' 50" E, 82.48 feet to the Southerly Right of Way of Lutak Road; thence along Right of Way S 70° 27' 10" E, 29.44 feet; thence along a curve to the Right with a radius of 691.20 feet, through an arc length of 30.85 feet, with a delta of 2° 33' 27", and a chord of 30.85 feet, (S 62° 33' 51" E); thence S 19° 32' 50" W, 90.03 feet; thence N 59° 20' 39" W, 61.15 feet; to the point of beginning, records of the Haines Recording District, First Judicial District, state of Alaska

containing approximately five-thousand, nine-hundred and eighty six (5,237.5) square feet ("Leased Premises") and a non-exclusive right to use all rights-of-way and easements appurtenant thereto and in particular a non-exclusive right to use the following easements and rights-of-way:

A. An easement twenty feet (20') in width and approximately five-hundred and sixty-five feet in length centered on the existing waterline for the placement, operation and maintenance of a water line across Lot 4, and the SW1/2, NW1/4, SW1/4, of Sec. 10, T30S, R59 E., Haines Recording District, First Judicial District State of Alaska ("Waterline Easement").

B. An easement twenty feet (20') in width and approximately twenty-five feet in length centered on the existing outfall line for the placement, operation and maintenance of an outfall line across ATS 1194 ("Outfall Easement").

C. An access easement twenty feet in width and totaling approximately nine hundred square feet along an existing roadway adjacent to the Leased Premises ("Access Right-of-Way").

All as depicted on the drawing attached hereto and labeled Exhibit A.

The Grantor reserves an easement for light, air, and view for its property adjoining the leased premises.

2. **TERM.** This lease shall be for a period of 25 (25) years, commencing on _____, 2014, ("Commencement Date") and ending at midnight on _____, 2039 unless otherwise terminated earlier pursuant to the provisions of Section 5 of this Agreement. The term of this lease may be extended by mutual consent for two (2) additional terms of five (5) years as long as Grantee is not in default of the lease terms and provided the rental amount for the extended term is fixed in compliance with HBC 14.16.080.

3. **RENT.**

A. Initial Lump Sum Payment. At the time this Agreement is signed Grantee shall make a lump sum payment of \$_____ to reimburse Grantor for appraisal costs and

administrative costs.

B. Annual Rental Payment. Rent shall be due and payable in advance on May 5th of each year, in the amount of \$_____ per year, beginning upon execution of this lease.

C. Rent Adjustment. Per HBC 14.16.180(B), the annual rental payable pursuant to this lease shall be subject to adjustment by the assembly effective the fifth anniversary of the commencement date of this lease in an amount equal to 10 percent of the fair market value of the land and improvements owned by the borough and leased hereunder. Such value shall be determined by an appraisal made by the assessor or land manager or a certified appraiser hired by the borough and reviewed by the assembly, whose decision is final. The new rental amount shall be effective at the beginning of the five-year interval to which it applies.

4. **ALLOWED USES.**

A. Leased Premises, Waterline and Outfall Easements. Grantee may use the premises solely for hydroelectric generation, waterline, and related uses. Grantee shall have the authority to post the leased premises restricting public access to assure protection. All deposits of stone, earth, gravel, oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils valuable for extraction or utilization are reserved by the Grantor and shall not be removed from the land by the Grantee. Grantee shall not sell or remove for use elsewhere any of the surface resources of the leased premises, for example, timber, stone, sand, gravel, peat moss, topsoil or any other material valuable for building or commercial purposes; provided, however, that material required for development or maintenance of the leasehold may be used if its use is first approved by the Borough Assembly.

B. Access Easement. The Grantee is authorized to use the access easement for ingress, egress, installation, and maintenance of the hydroelectric generation facility, waterline, and related equipment. The rights of access granted in this Agreement shall remain in effect for the initial term and any renewal terms of this lease.

5. **IMPROVEMENTS.**

5.1 Improvements.

A. Grantee shall, throughout the term of this Lease, at its own cost, and without any expense to Grantor, keep and maintain the premises, including all Grantee's improvements of any kind which may be or become a part thereof, in good, neat, clean, safe and sanitary order, condition, including replacements of any kind, nature or description whatsoever, to the demised premises or to any improvements thereon.

B. Such improvements shall be subject to any building, zoning or similar code requirements or restrictions, and to other laws, regulations or permit requirements as may be imposed by any governmental agency.

5.2 Damage to and Destruction of Improvements.

The damage, destruction or partial destruction of any improvement on the demised premises shall not release Grantee from any obligation hereunder, except as

hereinafter expressly provided. In the event the improvements on the demised premises are destroyed to such an extent as to be rendered untenable by fire, storm, earthquake or other casualty for which Grantee is not responsible hereunder, Grantee may elect to terminate this lease by providing Grantor with a written notice within thirty (30) days of the destruction of the improvements. Should Grantee elect to so terminate this lease, such termination shall be effective thirty (30) days after such notice.

5.3. Removal or Reversal of Improvements Upon Termination. Improvements and/or personal property located on the demised premises and owned by Grantee shall, within sixty (60) calendar days after termination of this lease, be removed by Grantee; provided, that the Assembly may extend the time for removing improvements in cases where hardship is proven. All periods of time granted to remove improvements and/or personal property are subject to Grantee's payment to the Grantor of pro rata lease rentals for said periods. If any improvements and/or personal property are not removed within the time allowed, such improvements and/or personal property shall revert to, and absolute title shall vest in, the Grantor. At Grantor's option, Grantor may cause removal of Grantee's improvements and Grantee shall reimburse Grantor for actual costs associated herewith.

5.4. Repair of Premises. Upon removal of any improvements and/or personal property from the demised premises upon termination of this lease, Grantee shall, at its own expense, repair any damage or injury to the premises or to Grantor's adjacent property resulting from such removal.

5.5. Grantee's Duty to Keep Premises Free of Liens. Grantee shall keep the demised premises and every part thereof, and all improvements at any time located thereon free and clear of any and all mechanics', materialmen's and other liens arising out of or in connection with work or labor done, services performed, or repairs or additions which Grantee may make or permit or cause to be made, or any work or construction, by, for or permitted by Grantee on or about the premises, or any obligations of any kind incurred by Grantee, and Grantee agrees, at all times promptly and fully to pay and discharge any and all claims on which any such lien may or could be based. By this provision the parties do not in any way recognize or acknowledge the authority or right of any person to impose any such lien.

6. TERMINATION AND HOLDING OVER.

6.1. Either party may terminate this Agreement for cause, where the other party fails in any material way to perform its obligation under this Agreement. Termination under this subsection is subject to the condition that the terminating party notifies the other party of its intent to terminate stating with reasonable specificity the grounds therefore, and the other party fails to cure the default within thirty (30) days after receiving the written notice.

6.2. Holding Over. Upon failure of the Grantee to surrender possession of the demised premises upon the termination of this lease, the Grantee's possession of the demised premises shall continue on a month-to-month tenancy at the yearly rental rate charged in the last year of the last term of the agreement, on a monthly pro-rata basis, plus eighteen percent (18%) of such monthly amount, for each month that the Grantee retains possession of the demised premises after termination and prior to execution of a subsequent or amended lease agreement. The Grantee shall acquire no additional rights to, or interest in the demised premises by holding over after termination of this lease, and shall be subject to legal action by the Grantor to require the surrender of the demised premises. All terms of this agreement shall apply during the hold-over period. The receipt by Grantor of any rent or any other sum

of money after the termination in any manner of the term demised, or after the giving by Grantor of any notice hereunder to effect such termination, shall not reinstate, continue or extend the resultant term herein demised, or destroy or in any manner impair the efficacy of any such notice or termination as may have been given hereunder by Grantor to Grantee prior to receipt of any such money or other consideration, unless so agreed to in writing and signed by the Grantor.

7. **SURVEY.** A survey and plat of the Leased Premises, Waterline Easement, Access Right-of-Way and Outfall Easement are attached hereto as Exhibit A. It shall be conclusive as to the location of the Leased Premises, Waterline Easement, Access Right-of-Way and Outfall Easement. If the Grantee requests a change to the premises during the course of the lease period, Grantee shall pay the cost of said survey and platting, and it shall be billed to Grantee as additional rent. Any changes to the Leased Premises or the easements change in size as a result of said survey, rent shall be adjusted pro rata.

8. **LIABILITY.** Grantee shall indemnify, defend and hold harmless Grantor, its agents, parent, affiliates, subsidiaries, officers, directors and employees from and against:

(a) any and all liability for loss, damage, expenses, claims or fees which arise out of, or are related to, any act or omission by Grantee; and

(b) any and all liability (including voluntary response costs, penalties, fines and attorney's fees) arising from the presence of hazardous materials upon, about or beneath the premises or any of the easement and access areas used by Grantee under this Agreement or migrating to or from the premises or beneath the premises or any of the easement and access areas used by Grantee under this Agreement arising in any manner whatsoever out of the activities of Grantor, whether or not Grantor has been negligent. This obligation shall include, but not be limited to, the expense of defending all third-party claims, suits or administrative proceedings, even if such claims, suits and proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against Grantee.

(c) As used in this Section 7 and in this Agreement; the following terms have the following meanings:

(i) "Hazardous Substance" means one or more of (A) any hazardous or toxic substance, material or waste, including but not limited to (1) those substances, materials and waste listed in the U.S. Department of Transportation Hazardous Materials Table at 49 C.F.R. § 172.101, (2) those substances listed by the U.S. Environmental Protection Agency as hazardous substances at 40 C.F.R. Part 302, or (3) those substances listed by the State of Alaska as hazardous substances at AS 46.03.826(5), (B) amendments to those collective provisions of (A) above of state and federal law, or such substances, materials and wastes that are or become regulated under any applicable local, state or federal law, or (C) Petroleum Products.

(ii) "Petroleum Products" means crude oil, petroleum, diesel fuel, marine fuel, heating oil, gasoline, kerosene, aviation fuel, jet fuel, motor oil, lubricants, hydraulic fluids and other petroleum-based substances, by-products, additives and derivatives.

9. **INSURANCE.** Grantee shall, at its own expense, maintain and keep in force

during the term of this Agreement, adequate insurance with an insurance company registered to do business in Alaska, to protect themselves, their agents, and Grantor against comprehensive public liability, property damage, and pollution liability. This insurance shall have a combined single limit coverage for bodily injury, including death, and property damage in the amount of at least one million dollars (\$1,000,000.00) per occurrence. Grantee shall also insure itself and its property from loss from any cause and shall secure business interruption expense, if available. All such insurance shall name Grantor as an additional insured party, contain a waiver of subrogation endorsement, as required by Section 10 of this Agreement, and provide that the other party shall be notified at least thirty (30) days prior to any termination, cancellation or material change that adversely affects Grantor in such insurance coverage. Grantee shall provide Grantor certificates of insurance coverage required by this Agreement with thirty (30) days of signing this Agreement. The failure of the Grantee to maintain this insurance coverage in full shall constitute a material breach of the Agreement. The failure of the Grantee to name the Grantor as an additional insured shall constitute a material breach of the Agreement.

10. **WAIVER OF SUBROGATION.** Grantee shall cause each insurance policy obtained by it to provide that the insurance carrier waives all right of recovery by way of subrogation against Grantor and Grantor's insurance.

11. **HAZARDOUS MATERIALS.** Grantee shall indemnify Grantor and protect Grantor's lands from damage or pollution caused by any spill or any release of hazardous materials onto Grantor's lands during the use, transport, or storage of such petroleum products, batteries, anti-freeze or chemicals as Grantee may utilize in the construction, maintenance, or eventual dismantling of the site, whether such a spill or release be sudden and accidental or gradual and imperceptible. Grantee shall be liable for the costs of any remediation activity at the site required by State and Federal regulations.

12. **TAXES AND ASSESSMENTS.** Grantee shall be liable for payment of any tariffs or similar fees, real and personal property taxes or assessments that may be levied on the land or on Grantee's fixtures, improvements, equipment or other Grantee property on the premise, additional costs or other levies imposed by the Haines Borough on all similar uses. Such additional fees are subject to change from time to time according to the borough ordinances then in effect, and nothing contained herein shall be construed as creating a contract right in favor of Grantee as to any such tax or fee, other than rental as specified herein. Grantee shall strictly comply with all sales tax provisions of the Haines Borough pertaining to sales of electricity made by Grantee or purchases made by Grantee on which a Borough sales tax is levied.

13. **ASSIGNMENT OR SUBLETTING.** Grantee may not assign this Agreement or sublet any interest in the premises without the prior written consent of the borough assembly. In the event of an approved request for assignment, or proposal to sublet a portion or all of the premises, Grantee and Grantor will negotiate a new rent fee schedule to reflect the value of the revised circumstances.

An approved assignment shall be subject to all of the terms and conditions of the lease and the assignor shall not be relieved of the assignor's obligations as Grantee thereunder.

An approved sublease shall be in writing and be subject to the terms and conditions of the original lease and such further terms and conditions as the borough assembly may deem appropriate.

A copy of the sublease shall be filed with the borough clerk's office. If the Grantee assigns or sublets the premises, or attempts to assign or sublet the premises, without the consent of the Grantor, shall make the Lease immediately voidable, at the sole option and discretion of the Grantor. The prohibition on assignment and subletting of the premises includes any assignment or sublease, or attempted assignment or sublease, to any company or entity affiliated with, or a subsidiary of, Alaska Power & Telephone Company.

14. **COMPLIANCE WITH LAW.** Grantee shall comply with and abide by all federal, state, municipal and other governmental statutes, laws, ordinances, rules and regulations of general applicability affecting the demised premises, the improvements thereon, or any activity or condition on such premises.

15. **LESSOR RIGHT OF ENTRY.** Grantee shall permit Grantor, its agents, employees and other representatives, to enter into and upon the demised premises at all reasonable times for the purpose of inspecting the land and improvements thereon.

16. **EVENTS UPON TERMINATION.** Upon removal of Grantee's improvements, Grantee shall return the lease area to as near the original condition as is practicable. Such restoration must be completed to the satisfaction of Haines Borough. In the event that there has been a high likelihood of a spill or release of hazardous materials onto Grantor's lands, as determined by the Grantor in its discretion, Grantee will provide a Phase I environmental assessment covering affected lands upon the completion of clean-up and/or restoration.

17. **DEFAULT.** In the event that either party shall consider the other responsible for a breach of this Agreement, the complaining party agrees to give the other written notice by certified mail of the default or breach complained of, and the other party shall have thirty (30) days after receipt of such notice, unless circumstances beyond the other party's control prevent such correction within this period, within which to correct any default or breach of the Agreement. Failing such correction, this Agreement may be terminated by the complaining party. Termination of this Agreement for default does not relieve Grantee from its obligation to pay any lease payments due prior to the notice of default or to restore the site as specified in Section 16 of this Agreement.

18. **NOTICES.** Any notice by Grantee to Grantor will be served at Haines Borough Offices, and any notice by Grantor to Grantee will be served on Alaska Power & Telephone Company, P.O. Box 3222, Port Townsend, WA 98368, to the attention of Robert Grimm.

19. **MISCELLANEOUS.**

A. **Heirs & Successors.** This Agreement shall extend to and bind the respective heirs, personal representatives, successors and assigns of the parties to this Agreement. Nothing in this Agreement is intended to benefit any third party not a signatory hereto.

B. **Enforcement of Terms.** If any action shall be brought to recover any payment due under this lease, or on account of any breach of this lease, or to recover possession of the leased premises, the prevailing party shall be entitled to recover its attorney's fees and all costs and expenses reasonably incurred by it in connection with such action.

C. **Preparation and Execution.** Grantee shall reimburse the City for its actual attorneys' fees incurred in negotiation and preparation of this lease. City shall invoice Grantee for such fees, and Grantee shall pay the same in full within ten (10) days of receipt

of such invoice.

D. Recording of Lease. Grantor shall record at Grantee's expense a memorandum of this lease as soon as possible after its execution by both parties. Directly after recording the memorandum, Grantor shall provide Grantee with a copy stamped by the Recorder's Office showing the date and time of recording.

20. GOVERNING LAW. This Agreement shall be governed by the laws of the State of Alaska. Any agent or other person executing this Agreement on behalf of a party represents and warrants to the other party that he or she has full power and authority to execute this Agreement on the party's behalf. Venue for any legal action shall be in the state of Alaska District Court at Juneau, Alaska. Grantor and Grantee agree that any trial in any action filed related to this Agreement shall be held in Haines, Alaska.

21. WAIVER. Neither party shall be deemed to have waived any rights under this Agreement unless such waiver is in writing and signed by the party. No delay or omission on the part of either party in exercising any right shall operate as a waiver of such right or any other right. A waiver by either party of a provision of this Agreement shall not prejudice the party's rights to demand strict compliance with that provision in the future. Whenever consent by one party is required in this Agreement, the granting of such consent in any one instance shall not constitute continuing consent to subsequent instances where such consent is required.

22. MODIFICATION. This Agreement may not be modified, except in writing signed by both parties. Grantee acknowledges and understands that no employee, representative, or individual assembly member has any authority to modify this Agreement, or make any representations as to modifying the Agreement, and that only the Assembly as a body has the authority to approve a written modification of the Agreement.

23. INTEGRATION. This Agreement contains the entire Agreement between the parties and supersedes all previous negotiations, commitments and communications. It shall continue in effect for so long as either party owes any duty or obligation to the other. This Agreement will not be construed against the party which prepared it.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

GRANTOR: HAINES BOROUGH

GRANTEE: GOAT LAKE HYDRO, INC.
(A subsidiary of Alaska Power & Telephone)

By: _____
David B. Sosa
Borough Manager

By: _____
Greg Mickelson
Vice President of Power Operations

Date: _____

Date: _____