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KEVIN STOCK  
COUNTY CLERK  
NO: 19-2-11506-3

The Honorable Judge Shelly K. Speir  
Hearing Date: January 10, 2019  
Oral Argument Requested

**IN THE SUPERIOR COURT OF PIERCE COUNTY  
OF THE STATE OF WASHINGTON**

DARREL BOWMAN,

Plaintiff,

v.

CITY OF TACOMA,

Defendant.

**NO. 19-2-11506-3**

**PLAINTIFF MITCHELL SHOOK'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

MITCHELL SHOOK,

Plaintiff Pro Se,

v.

CITY OF TACOMA,

Defendant.

**I. Nature of The Action and Summary of Argument**

This lawsuit is about privatization of Click! Network ("Click!"), Tacoma Public Utilities' fiber-optic municipal telecommunications system, without voter approval, as explicitly required by state law and Tacoma's City Charter. Privatization conveys the municipal utility's entire

1 public broadband infrastructure and enterprise, as a going concern, including all proprietary  
2 operational control and authority over the municipal utility's rate setting functions.<sup>1</sup>

3 Click! (the "System") is an advanced telecommunication system, owned and operated by  
4 Tacoma Public Utilities ("TPU"), serving over 35,000 active utility customer accounts. The  
5 System's revenues exceeded \$25 million in 2018. (Shook Decl. 10/30/19 Ex. 9).

6 TPU's website describes Click!'s commercial telecommunications operations as, "one of the  
7 largest municipally owned telecommunications systems in the country and part of the City of  
8 Tacoma's Department of Public Utilities" (Shook Decl. 10/30/19 Ex. 1, Pg. 5).<sup>2</sup>

9 Article I, Section I of the Washington Constitution provides: "All political power is inherent  
10 in the people, and governments derive their just powers from the consent of the governed."

11 The people have reserved full power and exclusive authority to provide final approval over  
12 privatization of their telecommunications system. Council's role, essentially, is that of the  
13 people's trustee, limited to negotiating the agreement and presenting the contract to voters.

14 Chapter 35.94 RCW requires voter approval for disposal of any public utility works, plant,  
15 or system owned by it or any part thereof, or any equipment or appurtenances.

16 Tacoma's City Charter's ("Charter" or "the Charter") contains a similar directive, requiring  
17 approval by "a majority vote of the electors." (Shook Decl. 10/30/19 Ex. 5).

18 The City shall never sell, lease, or dispose of any utility system, or parts thereof  
19 essential to continued effective utility service, unless and until such disposal is  
20 approved by a majority vote of the electors voting thereon at a municipal election.

21 The City has circumvented the voter approval process and declared Click!'s entire system  
22 "surplus," under RCW 35.94.040. Tacoma City Council ("Council" or "City") approved a  
23 Declaration of Surplus Property ("DSP") and conveyance of ownership and control is set to  
24 occur in March of 2020. (Shook Decl 10/30/19 Ex. 2).

25 The City also approved the "Click! Business Transaction Agreement" ("CBTA"), privatizing  
26 Click!'s enterprise and conveying the utilities' customer accounts, Mr. Shook's home services  
included. All public control over operation and rate setting for the System is lost for 40 years.

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<sup>1</sup> RCW 43.330.530(3) "Broadband infrastructure" means networks of deployed telecommunications equipment and technologies necessary to provide high-speed internet access and other advanced telecommunications services to end users.

<sup>2</sup> RCW 43.330.530 (2) "Broadband" or "broadband service" means any service providing advanced telecommunications capability and internet access with transmission speeds that, at a minimum, provide twenty-five megabits per second download and three megabits per second upload.

1 Ironically, the City acknowledges lack of authority for disposal absent voter approval. The  
2 City has admitted voters alone are vested with express power to approve separation of the  
3 municipal utility's public broadband enterprise. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, Ln 20)

4 Despite knowing<sup>3</sup> it lacked authority, the City nevertheless abrogated voters' rights, with an  
5 ultra vires declaration of surplus designed to circumvent the requirements of Chapter 35.94 RCW  
6 and Charter Section 4.6. (Shook Decl. 12/12/19 Ex. 32, Pg. 1, "Whereas 4.6 Requires a vote. . .")

7 The statutory definition of surplus, as "not required for providing continued public utility  
8 service," was simply ignored. Vested turnkey, as a going concern, Click! will continue providing  
9 the same proprietary services, to the same utility customers, under the same brand, over the same  
10 infrastructure, only with a private company controlling rates and cashing customers' checks.<sup>4 5</sup>

11 The utility System is not surplus. The System's assets, trademarks and customers are simply  
12 "changing hands," lock, stock, barrel and brand. A state-of-the-art fiber optic municipal utility  
13 system, delivering essential public utility services, continuing to providing the same services to  
14 the same loyal utility customers, does not reflect the Legislature's intent for "surplus."<sup>6</sup>

15 Voters of Tacoma granted the City a privilege of operating the Department of Public  
16 Utilities, they were not content to divest themselves of every managerial function normally  
17 associated with the operation of a business concern. By charter, the people retain express power  
18 over disposal of their proprietary interest in the community's municipal public utility property.

19 Disposal of Click!'s equipment, infrastructure and enterprise, all acquired for the purpose of  
20 providing telecommunication services, and required for continuing those same services, violates  
21 section Charter 4.6. Such a sale is ultra vires and void, unless approved by the voters.

22 In privatizing the community's public broadband system, essential assets are separated,  
23 including "last mile infrastructure," that single wire or "data pipeline" to a customer's home or  
24 business,<sup>7</sup> and the public's "middle mile infrastructure," of over 1,500 miles of fiber, cable,

25 <sup>3</sup> "Knowingly" is a statutorily defined term. RCW 9A.08.010(1)(b)(i) states a person "acts knowingly . . .  
26 when . . . he [or she] is aware of a fact, facts, or circumstances

<sup>4</sup> A buyer that is one of the mayor's largest campaign contributors!~ Shook Decl. 12/12/19, Ex. 47, Pg. 6.

<sup>5</sup> The Business Transaction Agreement provides "WHEREAS, the Parties have mutually agreed to  
cooperate to ensure a smooth and seamless transition of the Click! Business." Shook Decl. 11/1/19 Pg. 6

<sup>6</sup> The transaction includes use of the Click! trademark and brand name. Shook Decl. 10/30/19 Ex. 2.

<sup>7</sup> (5) "Last mile infrastructure" means broadband infrastructure that serves as the final connection from a  
broadband service provider's network to the end-use customer's on-premises telecommunications  
equipment.

1 conduits, vaults, easements and equipment, all required for accessing the services and  
2 applications critical for modern society.<sup>8 9</sup>

3 Recognizing the monopolistic nature of the industry, with huge fixed costs and barriers to  
4 entry, federal, state and local laws have fiercely protected consumers from anti-competitive  
5 consolidation of assets and ownership in the telecommunications industry for over 100 years.<sup>10</sup>

6 For over 20 years, the City has owned, operated and regulated Click! as a municipal-utility,  
7 establishing service levels, rates and even setting net neutrality policies. State laws and federal  
8 policies support and encourage such public, non-profit, “municipal” utility systems. Many such  
9 systems operate in Washington, across the USA and around the world.<sup>11</sup>

10 As the modern extension of telegraph and telephone, Click! is a utility system.  
11 Telecommunications has been a public utility since the Pacific Telegraph Act of 1860.<sup>12</sup>

12 No material issues of fact exist. This matter is properly resolved on summary judgment.<sup>13</sup>

## 13 **II. Relief Requested and Statement of the Issue**

14 This motion seeks partial summary judgment for declaratory relief, pursuant to CR 54(b).  
15 Plaintiff asks the Court to rule, as a matter of law, on the following questions:

- 16 1. Are telecommunication assets of a municipal utility governed by Chapter 35.94 RCW or  
17 Tacoma City Charter 4.6 ?
- 18 2. Does a surplus resolution facilitating privatization of an operational municipal utility  
19 telecommunication enterprise defeat the legislative intent for “surplus” in RCW 35.94.040, when  
20 the enterprise and its assets continue providing the same telecommunication services, to the same  
21 public utility customers, post-privatization?

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22 <sup>8</sup> (7) "Middle mile infrastructure" means broadband infrastructure that links a broadband service  
23 provider's core network infrastructure to last mile infrastructure.

24 <sup>9</sup> RCW 43.330.532 Findings: "The legislature finds that: (1) Access to broadband is critical to full  
25 participation in society and the modern economy"

26 <sup>10</sup> See 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81 n.134 (“data suggests that meaningful  
alternative broadband options may be largely unavailable to many Americans, further limiting the ability  
to switch providers. Based on the submissions from various commenters, it appears that between 65% and  
70% of households have at most two options for high speed Internet access.”); see also 2010 Open  
Internet Order, 25 FCC Rcd at 17923, para. 32; Appendix C, Section II.A.1., Table 1 (showing that,  
nationwide, 97 percent of households have two or fewer providers of BIAS at download speeds of 25  
Mbps).

<sup>11</sup> Council even has its own bright-line (net neutrality) regulation. Shook Decl. 12/12/19 Ex. 34

<sup>12</sup> Regulation over such communication was transferred from the Interstate Commerce Commission to  
Federal Communications Commission in 1934, 47 U.S. Code § 151, § 601.

<sup>13</sup> Affirmation of electorates’ right to vote is curative of all ills and eliminates unnecessary litigation.

1 3. When the legislative authority of a city deems it advisable to lease, sell or dispose of a  
2 municipal utility's operational telecommunications enterprise and system, or useful and  
3 functional in-service equipment, appurtenances, betterments and essential parts thereof, does  
4 RCW 35.94.020 or Charter 4.6 require voter approval of the proposed transaction?

### 5 **III. Background Facts**

6 The following facts are in the declarations of Plaintiff, Mitchell Shook ("Mr. Shook"), a  
7 taxpayer of the City, ratepayer of TPU and Click! customer, with standing to bring this action.

#### 8 **A. Tacoma Public Utilities Ownership and Creation of Click! Network**

9 The Department of Public Utilities was established under City Charter ("Charter") Section  
10 4.1. TPU is one of the largest municipally owned utilities in the Pacific Northwest.<sup>14 15</sup>

11 The Utility provides four distinct public services; water, power, rail and telecommunications  
12 under four brand names: Tacoma Water, Tacoma Power, Tacoma Rail and Click! Network.

13 TPU's website prominently displays Click! as one of "Our Services: Power, Water, Rail,  
14 Click!." *see* Shook Decl. 10/30/19, Ex. 1, Pg. 7 -about TPU.

15 Owned and operated by TPU, Click! is an "advanced telecommunication system," delivering  
16 commercial services under its own organizational structure, to approximately 35,000 TPU  
17 customer accounts. The System's services were launched in 1998.<sup>16</sup>

18 Click!'s state-of-the-art, carrier-grade, telecommunications system, delivers Gigabit speed  
19 BIAS, ("Broadband Internet Access Service") over Fiber To The Home ("FTTH") technology,  
20 VoIP prioritized DOCSIS 3.1 cable modem service, commercial "Metro Ethernet" data-transport  
21 services and cable television to customers in the in Tacoma, Fircrest, Fife, University Place,  
22 Lakewood and unincorporated Pierce County.<sup>17 18</sup>

23 The System passes 66% of the homes in Tacoma Power's service area with 1,500 miles of fiber  
24 and cable plant.<sup>19</sup> The City describes Click! as: "This state-of-the-art technology for modern  
25 network architecture enables reliable and cost-efficient delivery of Gigabit internet services".<sup>20</sup>

26 <sup>14</sup> Shook Decl. 10/30/19, Ex. 5.

<sup>15</sup> Official Statement: City of Tacoma Series 2017 Electric System Revenue Bond, p.1.

<sup>16</sup> "Broadband" is defined as "advanced telecommunications services" by RCW 54.16.420.

<sup>17</sup> TPU Annual Report p. 26 (Shook Decl. 12/12/19, Ex. 48, Also shows continues investment.

<sup>18</sup> Defendant's Answer ¶23, admits point-to-point metro Ethernet broadband services.

<sup>19</sup> Defendant's Answer ¶19. Pg. 4. Total mileage, admits 1,800.

<sup>20</sup> Admitted in Defendant's Answer, Pg. 5, ¶22. Shook Decl. 10/30/19, Ex. 7 Click! Network 2018 Cable  
TV Annual Report -Pam Burgess to Jeff Leuders 2/28/19. See Shook Decl. 12/12/19, Ex. 57 for FTTH.

1 Like the City's water and power utilities, Click!'s rates are set by Council and published under  
2 Title 12, the "Utilities" section of the Tacoma Municipal Code. Charter 4.3 allows Council to  
3 "revise such rates and charges as it may deem advisable for supplying such utility services."<sup>21</sup>

4 Revenues and expenses for the System are accounted for separately, from other TPU  
5 operations, and appear as "Telecommunications" on TPU financial statements.

6 **B. Purpose in Creation of Click! Network -The Community's Need For Broadband.**

7 In 1996, TPU commissioned a "Telecommunications Study." The "study team" set out to  
8 determine if TPU might benefit from establishing "a modern telecommunications infrastructure."  
9 The study asked if the greater Tacoma area has the "telecommunications resources necessary for  
10 business that may want to locate in the area?" It even cited "telecommuting" and asked, "How  
11 will the explosion in the Internet be handled?" Shook Decl 10/30/19 Ex. 10, Pg. 92 of 389.<sup>22</sup>

12 The Study explained why the System would be built:

13 One of the most significant ways a community and its *economic base* are intertwined is  
14 through an area's infrastructure, As a result, the evolution of a community's economy  
15 often depends upon the investments it makes in its transportation system, power  
16 system, and-given the *shift to the information age-its telecommunication system*, This  
study was therefore commissioned to investigate Tacoma's potential *economic futures*  
and the inter-relationship between its *economic development* and potential  
*telecommunication system investments*, (emphasis added).<sup>23</sup>

17 A "Telecommunications Business Plan" was part of the study and proposed:

18 Three types of **telecommunications services** would be offered by Tacoma City Light  
19 - wholesale high-speed telephony and **data transport, Internet data transport**, and  
cable television. Each of these services meet the **growing telecommunications needs**  
in the greater Tacoma area. . . . (emphasis added)

20 The conclusion lamented, "one could hope *that other companies would step forward.*"<sup>24</sup>

21 [T]he local market has a *growing need for better telecommunications access*. Despite  
22 growing local demand, the incumbent wire line service providers have stated that their  
23 investments in the local infrastructure will either slow without significant rate  
24 increases or be halted all together. *One could hope that other companies would step  
forward* and create a modem telecommunications system through out (*sic*) our  
community *but the prospects for that occurring appear dim.* (emphasis added)<sup>25</sup>

25 On June 21, 1996, TPU issued a "Request for Ordinance or Resolution" seeking to:  
26

<sup>21</sup> Defendant's Answer, Pg. 4, ¶21 -City Council approve rates. *Also see* Shook Decl. 10/30/19, Ex. 8.

<sup>22</sup> The Purpose and Conclusion is *at* Shook Decl. 12/12/19, Ex. 50.

<sup>23</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 142 of 398 in PDF.

<sup>24</sup> Local Telecommunications Business Plan. Shook Decl. 10/30/19. Ex. 10, at Pg. 142 of 398

<sup>25</sup> Shook Decl. 10/30/19, Ex. 10, at Pg. 186 of 398 in PDF.

1 Authorize a Bond Ordinance for City of Tacoma, Washington, Department of Public  
2 Utilities, Light Division to clarify its legal authority to develop telecommunication  
capacity for . . . certain telecommunications services,<sup>26</sup>

3 On June 26, 1996, the Board approved funding the telecommunication business plan.<sup>27</sup> On July  
4 23, 1996, Council approved Ordinance 25930 establishing a "A SEPARATE SYSTEM."

5 Ordinance 25930 included Article II: "Establishment Of The Telecommunications Project As A  
6 Separate System; And Adoption Of Plan And System":<sup>28</sup>

7 Section 2.1. Establishment of **Telecommunication System**. The City hereby creates *a*  
8 *separate system* of the City's Light Division to be known as the telecommunications  
9 system (the "**Telecommunications System**"). The public interest, welfare, convenience  
10 and necessity require the creation of the **Telecommunications System**, contemplated by  
the plan adopted by Section 2.2 hereof, for the purposes set forth in **Exhibit A**. The City  
11 hereby covenants that all revenues received from the **Telecommunications System**  
shall be deposited into the Revenue Fund. (emphasis added).

12 This "Exhibit A" of the Ordinance, included commercial broadband "Internet Access Service"  
and "high speed data" transport services.

13 **C. Summary Judgements Confirmed Authority to Establish Telecommunication System.**

14 In July of 1996, prior to funding construction of the System, the City sought declaratory  
15 judgement in Pierce County Superior Court to confirm authority for TPU to establish a  
16 telecommunication system to provide commercial telecommunications services. Two Orders  
17 were issued, confirming TPU's authority to do so.<sup>29 30</sup>

18 In the City's November 1996 Memorandum In Support of Summary Judgment", the City  
19 cited RCW 35.96.030, which provides authority for municipal funding of communication utilities,  
20 as authority for the City's proposed municipal utility telecommunication system.

21 In creating Click!, the City also cited authority for commercial BIAS services in the policy  
22 statement of RCW 80.36.300 (5), to "Promote diversity in the supply of telecommunications  
23 services and products in telecommunications markets throughout the state."

24 <sup>26</sup> Signed by Superintendent Klein Shook Decl. 10/30/19, Ex. 11, Pg. 28, at 224 of 389 in PDF.

25 <sup>27</sup> Resolution U-9198. Shook Decl. 10/30/19 Ex. 11, Pg. 31 or Pg. 227 of 389 total pages in PDF.

26 <sup>28</sup> See Ordinance 25930 Shook Decl. 10/30/19, Ex. 11, Pg. 197 of 389 A "Separate System."

<sup>29</sup> The 12/13/96 Order determined Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.

The 5/9/97 Order approved authority to fund the System and carry out the business plan for offering  
wholesale telecommunication service, including retail cable tv services. Shook Decl. 10/30/19 Ex. 12, 13.

<sup>30</sup> The 5/20/97 Request for Ordinance stated: "Authorize the development of a broad band  
telecommunications network to improve electric utility service and improve the telecommunications  
infrastructure available to the community. This would include the business plan for a broad band  
telecommunications system and the implementation of the telecommunications system.

1 On March 20, 1997, in support of Res# 33668 to establish the System, TPU Director Mark  
2 Crisson wrote Council, outlining the System's goals, saying the "Telecommunications System"  
3 would "Provide additional revenue to the Light Division and General Government through  
4 expansion of the market for telecommunications services."<sup>31</sup>

5 "Significantly enhances regional economic development and quality of life by creating  
6 state-of-the-art telecommunications infrastructure and providing it to all businesses and  
7 residences throughout the community."

8 On April 8, 1997, Council approved Res. 33668. The Board followed with Resolution U-  
9 9258, finding provision of broadband Internet to be "prudent and economical," stating:

10 WHEREAS the Light Division has retained consultants to review and analyze the  
11 feasibility of a **broad band telecommunications systems** for the Light Division's  
12 service area, and a **business plan** has been prepared for this purpose.

13 WHEREAS, the Public Utility Board hereby finds and determines that the Light  
14 Division's proposal for a **broad band telecommunications system** is in the best  
15 interests of the City, **will serve as a public purpose**, and should be approved.

16 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD.

17 That the Board hereby **approves the Light Division's proposal** including the  
18 Business Plan for a **broad band telecommunications system**, and the Board  
19 recommends that the City Council approve a resolution to authorize the Light  
20 Division to proceed to implement said proposal for a **broad band  
21 telecommunications system..** (emphasis added). (Shook Decl. 12/12/19, Ex. 75)

22 Resolution 33668 identified other "utility purposes," or benefits, that would be accomplished  
23 by creating Click!'s broadband system. These included revenue diversification and economic  
24 development, both having an important "nexus" to Tacoma Power's role of producing energy.<sup>32</sup>

25 One year later, as the project gained national attention, TPU Director Mark Crisson proudly  
26 wrote the Tacoma City Manager, and forwarded a national news article and stating:

"MSNBC has written a very informative piece about Tacoma Power's Click! Network.  
It was written complete with slides of our work in progress. I know the City Council,  
as well as the Board, will be proud of this national coverage."<sup>33</sup>

**D. Click! Network's Commercial Telecommunication System and Operations Today**

In 2018 Click!'s total revenue exceeded \$25 Million. In August 2019, Click!'s monthly  
sales were \$2,116,912, with a \$40,070 profit after all allocations, taxes and depreciation.<sup>34</sup>

<sup>31</sup> Shook Decl. 10/30/19, Ex. 10, Pg. 4. (or Pg. 50, of 389 in PDF).

<sup>32</sup> Shook Decl. 12/12/19, Ex. 75. See first "Whereas" in Amended Resolution U-9258.

<sup>33</sup> Shook Decl. 10/30/19, Ex. 14 Pg.2 -Importantly, see the quote on Pg. 6: "The system is not being built  
as a cable system. We have got a multilayered business model." - Deb Stewart Click Network.

<sup>34</sup> Shook Decl. 10/30/19, Ex. 9, Tacoma Power Statement 12/31/18, Click! Operational Summary 8/19

1 Click! is an FCC registered telecommunications provider, with Federal Registration Number  
2 (“FRN”) FRN 0007466642,<sup>35</sup> filing Form 499 and Form 477,<sup>36</sup> and publishing a “Transparency  
3 Disclosure,” as mandated by the FCC.<sup>37</sup> Click! provides gigabit data “*transport only*” services  
4 to the Tacoma City Library System and files FCC Form 471, allowing libraries participate in the  
5 Universal Service Administrative Company (“USAC”) “E-rate Program.” Click!’s USAC  
6 Service Provider Number (“SPN”) is SPN 143035981.<sup>38</sup> See Shook Decl. 12/12/19 Ex. 64.

7 Click! enters into “Master Service Agreements” (“MSA”) to install “dedicated transport  
8 services” over the System’s municipal “communications facilities,” often in large commercial  
9 buildings. Examples, including CenturyTel’s, are provided in Shook Decl. 12/12/19, Ex. 62.

10 “Telecommunications Installation and Service Agreements,” with multifamily dwellings,  
11 allow installation of “Telecommunications System” for providing “telecommunication services.”

12 Owner grants Click! the right to enter and access the Premises for the **purpose of**  
13 **installing telecommunications facilities** in, at and upon the Premises including, but not  
14 limited to, all wiring, cables, conduits, electronic and other equipment, antennae,  
15 switches, amplifiers, filters, traps, signal receiving/scrambling/decoding equipment, key  
16 lock box(es) and key(s), and any additional equipment that may be requested for  
17 provision of . . .telecommunication services at the Premises (“Facilities” and collectively  
18 “**Telecommunication System**”). (emphasis added) (Shook Decl.10/30/19, Ex. 17).

19 Click! holds a Franchise Agreements for Pierce County and the Cities of Tacoma, Fife,  
20 Lakewood, Fircrest, University Place and Puyallup. (Shook Decl. 12/12/19, Ex. 30).

21 Click!’s Pierce County “Telecommunications Franchise” is Ordinance No. 2004-43:  
22 Telecommunication Franchise To The City Of Tacoma, . . . Light Division, For A  
23 Telecommunications Network In Pierce County To Be In The Public Interest;

24 The Puyallup Telecommunications Ordinance grants City of Tacoma rights:

25 To Construct, Maintain, Operate, Replace And Repair A Telecommunications  
26 Network, In, Across, Over, Along, Under, Designated Public Rights-Of-Way.<sup>39</sup>

27 **E. Planned Conveyance of Click! Network’s Commercial Telecommunication System.**

28 On Nov. 5, 2019, Council approved the CBTA and Indefeasible Right of Use (“IRU”)

29 <sup>35</sup> Click! Network Disclosure and FRN, *se*, Pg. 283/389 of PDF.

30 <sup>36</sup> Shook Decl. 10/30/19, Ex. 15 All facilities-based providers are required to file data with the FCC twice  
31 a year (Form 477) on where they offer Internet access service at speeds exceeding 200 kbps in at least one  
32 direction. See Who Files What: *available at* <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477>

33 <sup>37</sup> Click! FCC Form 477 *see* Shook Decl 10/30/19 Ex. 15, *also available at* <https://perma.cc/9T9T-L4FL>

34 <sup>38</sup> Shook Decl. 10/30/19 Ex. 15, Pg. 7, Library Funding info *at* <https://www.usac.org/sl/default.aspx>

35 <sup>39</sup> Shook Decl. 12/??/2019 Ex. 79

1 agreement (the “Agreements”) to privatize Click! by transferring ownership and operations of the  
2 enterprise to Rainier Connect, a private company.<sup>40</sup> *see* Shook Decl. 12/12/19 Ex. 39.

3 Privatization transfers an active, in-service, municipal utility enterprise. It vests all proprietary  
4 operational interests in the System. Assets essential for continued provision of BIAS services to  
5 TPU’s customers would be separated and conveyed for up to 40 years.

6 All franchises agreements, contracts, warranties, operating rights, active customer account  
7 information, billing and bank payment details would be vested. All electronic equipment, software,  
8 provisioning systems, DNS servers, DHCP servers,<sup>41</sup> Caching servers, routers, hubs, nodes,  
9 trademarks, IP addresses, head end equipment, customer premise equipment, trucks, brand name,  
10 other critical assets and infrastructure are included. (Shook Decl. 11/1/19, Pg. 12)

11 It is undisputed that privatization removes all Council control over the System’s rates going  
12 forward, leaving the System’s customers without protection from future rate increases.

#### 13 **IV. Argument**

14 This motion is based on the pleadings, declarations and evidence filed under this cause.

15 **Summary Judgement Standard:** With only questions of law, summary judgment is appropriate  
16 under CR 56(b). When moving party shows “no issue as to a material fact,” *Scott v. Pacific West*  
17 *Mountain Resort*, 119 Wn.2d 484, 502-03 (1992), “the burden shifts to the non-moving party” to  
18 establish facts to be proven at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225  
19 (1989). The non-moving party must offer specific facts, not bare allegations. *Baldwin v. Sisters*  
20 *of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory assertions do not preclude summary  
21 judgment. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

#### 22 **A. Click! is A Municipal Utility System Providing Municipal Utility Service.**

23 By resorting to RCW 35.95.040, to surplus Click!, the City admits the System is a municipal  
24 utility, regulated by Chapter 35.94. The plain meaning of the terms “utility” and “system” seem  
25 obvious; but, if further definition is desired, courts may “look to standard English language  
26 dictionaries.” *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001)

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<sup>40</sup> Ironically, to say the least, Rainier opposed Click!’s creation in 1996. Shook Decl. 12/12/19 Ex. 47. Also, a hearing on an Ordinance to convey the Click! Franchise Agreement was held on 12/10/19. Shook Decl. 12/12/19, Ex. 63

<sup>41</sup> DNS is Domain Name Service and Domain Name Servers, DHCP, Dynamic Host Configuration Protocol) The automatic assigning of IP addresses

1 Black's Law Dictionary's defines "*public utility*" as, "a company that provides necessary  
2 services to the public, such as telephone lines and service, electricity and water."<sup>42 43</sup>

3 Merriam Webster provides, "*system*" is "a regularly interacting or interdependent group of  
4 items forming a unified whole." Click! assets, represented by over 2000 pages in the CBTA and  
5 IRU Agreements,<sup>44</sup> constitute a telecommunication system. Click! is a "Public Utility System."

6 U.S. Code and Washington State statutory definitions confirm Click! is a municipal "utility"  
7 The 1996 Telecommunications Act provides, at 47 USC § 224(a)(1): "Utility."

8 The term "utility" means any person who is a local exchange carrier or an electric,  
9 gas, water, steam, or other public utility, and who owns, or controls poles, ducts,  
10 conduits, or rights-of-way used, in whole or in part, for any wire communications.

11 Our State Supreme Court's defines "public utility" as a service that will "subserve a public  
12 use." Also, "The crucial and final test is, does the use--utility--subserve a public purpose; does it  
13 furnish a natural need of the city or its citizens; does it contribute to his comfort, prosperity, or  
14 happiness?" *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873, (1958). Under  
15 *Winkenwerder's* "crucial and final test," Click! is undoubtedly a utility.

16 In *Bremer*, the high court defines utility:

17 [T]he statute specifically names a long list of utilities, but does not specifically  
18 mention wharves and docks. But the statute also says, '*or any similar or  
19 dissimilar utility or system.*' This, we think includes any kind of utility in whose  
20 operations the public has an interest, that is to say, any public utility"  
21 see *Bremerton v Bremer*, supra

## 22 **B. Creation of Municipal Utility's Telecommunication System and Service.**

23 The term "Telecommunications" replaced "telephone" and "telegraph" in Title 80 RCW  
24 under the Laws of 1985. *See* Ch. 450, Sec. 13, Pgs. 1978 -1995, *or* Shook Decl. 12/12/19 Ex. 61.

25 Click!'s municipal telecommunications system<sup>45</sup> was carefully conceived, constructed and  
26 paid for by TPU, for the express purpose of providing broadband services to TPU customers.

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27 <sup>42</sup> *Black's Law Dictionary* Eleventh Edition 2019 P. 1859

28 <sup>43</sup> Click! enables "telephone service." The transmitting and receiving ordinary-language messages is  
29 widely accomplished with Voice Over IP Protocol (VoIP) service, a disruptive technology rapidly  
30 replacing traditional switched telephone technologies. Click! offers a "Voice Package", or VoIP with QoS  
31 ("quality or service" features). that prioritize "data packets." Click!'s telecommunication system allows  
32 services that are the modern equivalent of the "telephone." Shook Decl. 12/12/19, Ex. 44

33 <sup>44</sup> Shook Decl. 11/1/2019, Ex. 29

34 <sup>45</sup> Click! is a "telecommunication system" *see* Shook Decl 12/12/19 Ex. 59 Decl. of Terry Dillon.

1 City's Ordinance No. 25930 created Click! upon municipal authority to supply "utility  
2 services." The City intended to establish utility services. The Ordinance provides, "WHEREAS  
3 RCW 35A.11.020 authorizes the City to operate and supply utility and municipal services  
4 commonly or conveniently rendered by cities or towns." <sup>46</sup> (Shook Decl. 10/30/19, Ex. 11, Pg. 4)

5 Prior to constructing Click!, to confirm legal authority for commercial municipal utility  
6 telecommunication services, the City brought suit for declaratory judgement in Pierce County  
7 Superior Court and succeeded, in 1996 and 1997, in obtaining two approving Orders. <sup>47 48</sup>

8 In all the briefing supporting the proposed system, City cited federal, state, and local  
9 statutory and judicial authority, as allowing construction and operation of a municipal utility  
10 "Telecommunications System" The "Introduction" of the City's brief stated:

11 The City of Tacoma (the "City") brought this declaratory judgment class action  
12 under RCW 7.24 and 7.25 and CR 23(8)(2) to confirm its authority to issue bonds  
13 for the purpose of constructing and operating a telecommunications system  
14 consisting of a hybrid fiber coaxial network (the "Telecommunications System").

15 The City's April 14, 1997 Memorandum in Support of Summary Judgment shows the City  
16 created a "Telecommunication System" as a municipal utility. *See* Shook Decl. 12/12/19 Ex. 30

17 Click!'s a "Telecommunications Company," operating a municipal **telecommunication**  
18 **system**, providing **telecommunication services**. RCW 80.04.010 (27). A "Telecommunications  
19 Company" is "every city or town owning, operating or managing any facilities used to provide  
20 telecommunications for hire, sale, or resale to the public". *See* RCW 80.04.010 (28). <sup>49 50</sup>

21 Thus, any city or town operating facilities used for transmission of information by wire, or  
22 optical cable, is a telecommunications company. This is exactly what Click! Network is: "*a*  
23 *facility for transmission of information by optical cable or similar means.*" <sup>51</sup>

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24 <sup>46</sup> The bond was payable solely by TPU (not general government). Shook Decl. 10/30/19 Ex.11

25 <sup>47</sup> Pierce County Case No. 96-2-09938-0, City Of Tacoma v Taxpayers and Ratepayers of Tacoma.

26 <sup>48</sup> City's 11/5/96 Memorandum In Support Of Motion For Summary Judgment. Shook Decl 10/30/19, Ex. 12, Ex. 13. *See* Section I, of the City's brief. These Summary Judgement Orders confirmed City's authority to establish a "Telecommunication System."

<sup>49</sup> The Public Service Commission, now the UTC, regulates utilities with strong police powers under RCW 80.04.470: "Commission to enforce public service laws. Police power."

<sup>50</sup> *see* RCW 54.16.005 "Telecommunications" has the same meaning as contained in RCW 80.04.010.

<sup>51</sup> RCW 35.99.010 "**Telecommunication Systems**" are not cable service or cable television systems.. Telecommunication systems are operated under Master Permits. Section (3) "Master permit" "A master permit does not include cable television franchises" (7) "Telecommunications service" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means.

1. Telecommunications Companies are Public Utilities.

Common law and statutory definitions of “Public utilities” are synonymous with “public service.” By all definitions, Click! is a “public utility” and a “public service company.”

Click! is a "public utility" under RCW 36.87.140:

The term "public utility" as used in this section shall include utilities owned, operated, or maintained by every gas company, electrical company, telephone company, telegraph company, and water company whether or not such company is privately owned or owned by a governmental entity.

Public utility and “public service company” share the same definition:

RCW 80.04.010 (23) ““Public service company" includes every gas company, electrical company, telecommunications company, wastewater company, and water company.”<sup>52</sup>

The Public Service Commission Law, defined a “public service company.”<sup>53</sup>

Rem.Rev.Stat. §10344, **The term 'service' is used in its broadest and most inclusive sense.** The term 'public service company' includes every common carrier, gas company, electrical company, water company, **telephone company, telegraph company, wharfinger and warehouseman**, as such terms are further defined . . .

*Inland Empire Rural Electrification . v. Department of Public Service*, 199 Wash. 527, (1939)

Click! is a “utility,” as a “communications utility, with its vast underground infrastructure:

"Communication utility" means any utility engaged in the business of affording telephonic, telegraphic, cable television or other communication service to the public in all or part of the conversion area and includes telephone companies and telegraph companies as defined by RCW 80.04.010. (Quoting RCW 35.96.020)

3. Telecommunications Has Been Defined as A Public Utility in Washington Since 1909.

Railroads were the first regulated utility in Washington State, in 1905, under the Railroad Commission.<sup>54</sup> Telecommunication was the second utility to be regulated, in 1909, also under the Railroad Commission.<sup>55</sup>

The Railroad Commission became the “Public Service Commission” in 1911, with a "Public service company" including every “gas company, electrical company, water company, telephone company, telegraph company.” *See* Session Laws of 1911, Ch. 117, Pg.538.<sup>56</sup>

<sup>52</sup> Municipal utilities are except from Title 80 RCW -“Public Utilities” Tacoma enjoys “home-rule.”

<sup>53</sup> 1911, Ch. 117, Pg 546, *also* Shook Decl. 12/12/19 Ex. 35, Pg 5.

<sup>54</sup> Railroad Commission was established by the Session Laws of 1905, Ch. 81, Pg. 145.

<sup>55</sup> The U.S. Interstate Commerce Act of 1887 regulated railroads and preceded Washington state’s Laws of 1909, Ch. 93. Sec. 3 Pg. 192, 196, which did: “authorize the commission to regulate telephone and telegraph companies and their rates and charges, to prevent discrimination and extortion by such companies; and to authorize the Railroad Commission of Washington to make all necessary rules.””

<sup>56</sup> Since 1961 UTC has regulated utilities an under Title 80. RCW. *See* 1961 c 14 § 80.01.010

1 As an advanced “telecommunication system” and “enterprise” of TPU, generating over \$25  
2 million in revenue, providing a necessary “public service” to over 35,000 TPU utility accounts,  
3 Click! meets every definition of a “*public utility system.*”

4 4. An Attorney General’s Opinion, Professor Brown’s Definition and Eminent Domain.

5 The AGO finds “Telecommunications businesses are public utilities.” See Authority Of  
6 Cities, Towns, And Counties To Provide Telecommunications Services. AGO 2003 No. 11<sup>57</sup>

7 Consider Professor Richard E. Brown’s definition of public utilities. He wrote the book on  
8 public utilities, Business Essentials for Utility Engineers, and is a Fellow of the Institute of  
9 Electrical and Electronics Engineers (IEEE), with BSEE, MSEE and PhD degrees from the  
10 University of Washington in Seattle, an MBA degree from the University of North Carolina at  
11 Chapel Hill, and as a registered professional engineer, Prof. Brown defines “public utility” as:

12 *Public utilities* provide essential services to society. Because of their  
13 importance, legal precedent has upheld the need for specialized government  
oversight of these businesses to ensure that safe and reliable utility services  
are widely available for rates that are reasonable and non-discriminatory.<sup>58</sup>

14 Public utility services are often established via eminent domain and possess natural  
15 monopoly characteristics, with “pricing power,” thus creating a need for regulation.<sup>59 60 61</sup>

16 Click! fits the definition of “public utility,” with a brand is organized as a “system,” holding  
17 itself out<sup>62</sup> to supply telecommunication and data transport services to a class of TPU ratepayers,  
18 subject to special governmental regulation, both at the local and state levels.<sup>63 64</sup>

19 <sup>57</sup> Attorney General Opinions are “entitled to great weight.” See *Five Corners Family Farmers v. State*,  
173 Wn.2d 296, 308, 268 P.3d 892 (2011)

20 <sup>58</sup> Dr. Brown has provided consulting services to most major utilities in the United States and many  
around the world, is a frequent instructor, having taught courses in eleven countries, and is an adjunct  
21 professor at North Carolina State University. Shook Decl. 12/12/19 Ex. 40 Pg. 4

22 <sup>59</sup> Large fixed costs are associated with establishing public-utilities, like a telecommunication system, act  
as a barrier to entry, creating a “natural monopoly” with “pricing power” -or the ability to unfairly raise  
rates, since demand is “inelastic.” Buyers, needing the service, have little choice but to pay .

23 <sup>60</sup> Telecommunication companies are regulated in Washington State under Chapter 80.36 RCW; however,  
in deference to municipal control, RCW 80.04.500 expressly provides Tacoma with home-rule authority  
24 for most of the provisions of Title 80 RCW. As a result, rates and policy for Click! are set by Council.

25 <sup>61</sup> Broadband service is generally a monopoly in the USA. Shook Decl. 12/12/19, Ex. 46, *also* “market for  
local access to broadband tends to be a “natural monopoly.” See WI-FI Everywhere: Universal  
26 Broadband Access as Antitrust and Telecommunications Policy Hannibal Travis American University  
Law Review, Vol.55 Issue 6 (2006) Shook Decl. 12/12/19, Ex. 51

<sup>62</sup> See Shook Decl. 12/12/19 Ex. 42 Click! holds itself out as providing Broadband Telecommunications  
services. Also see RCW 54.16.005 (4) as “the provision of telecommunications services or facilities for  
resale by an entity authorized to provide telecommunications services to the general public and internet  
service providers.”

<sup>63</sup> Council fixes Click! rates and policies. The State also regulates broadband under RCW 19.385.020.

1 Constructed upon 140 years of the City’s municipal infrastructure, established under broad  
2 eminent domain authority, as represented in the many easements, conduits, vaults and facilities  
3 underlying the utility system, Click! further fits the definition of a utility.<sup>65</sup>

4 The City has broad power, “to condemn land and other property and damage the same for  
5 such and for any other public use.” As a utility, City “may acquire, construct, purchase, condemn  
6 and purchase, own, operate, control, add to and maintain lands, easements, rights-of-way.” As a  
7 telecommunication company, “The right of eminent domain is hereby extended to all  
8 telecommunications companies organized or doing business in this state.”<sup>66</sup>

9 To sum it up, a “municipal public-utility” is a non-profit enterprise, holding itself out under a  
10 brand or system to supply a “public service” to a specific class of customers, subject to special  
11 governmental regulations that insure equitable, non-discriminatory, prices and practices.<sup>67</sup>

## 12 5. Invention of Broadband and Reemergence of Municipal Communications Utilities.

13 At the dawn of the telecommunication age, municipal communication utilities were very  
14 commonplace. In 1907 the U.S. Census Bureau did a Special Report on Telephones and found  
15 over 580,000 non-profit community lines operated by “Mutual Systems,” “Cooperative  
16 Associations” and “Farmer Lines” across the nation.<sup>68</sup> History shows AT&T crushed such  
17 competition and monopolized this industry, but was broken up in 1984. With subsequent federal,  
18 state and local governmental support, the public is regaining control of essential communication  
19 facilities.<sup>69</sup> A revival of municipal ownership of telecommunication utilities is unfolding.<sup>70</sup>

20 Anacortes, Washington, is an example of a municipal telecommunication utility regaining  
21 control of such services. Anacortes now offers retail broadband utility service alongside their  
22 water utility. Their first customer was recently installed. (Shook Decl. 12/12/19 Ex. 58, Pg. 8)

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24 <sup>64</sup> Answer, Pg. 6 ¶33. Admits Click! “partners” with local ISP “partners” to provide internet service.

25 <sup>65</sup> Transferring City’s “police power” of eminent domain, *juris privati*, is likely unconstitutional.

26 <sup>66</sup> Eminent domain authority for a City is found in the Session Laws of 1893, Ch. 84, Sec.1, Pg. 189, now  
RCW 8.12.030, for a utility in RCW 35.84.020, and a “telecommunications company,” RCW 80.36.010.

<sup>67</sup> A “public service” is a service “holding itself out, expressly or impliedly, to supply its service or  
product for use either by the public as a class or by that portion of it that can be served by the utility”  
*Inland Empire Rural Elect. v. Dept. of Public Service of Wash.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)

<sup>68</sup> Shook Decl. Ex. 58, Pg.1 Department Of Commerce: The Census on Telephones: 1907

<sup>69</sup> Shook Decl. 12/12/19, Ex. 49. A Brief History of American Telecommunications Regulation.

<sup>70</sup> The Telecommunications Act of 1996 created broad opportunities for municipal ownership.

1 Click! is a public utility, by common language definitions, regulatory statutes, numerous  
2 municipal utility examples, the Attorney General’s opinion, 500 years of case/common law, all  
3 of which confirm that a municipal telecommunications business, affected with a public interest,  
4 subserving a public need, exercising police power of eminent domain and rate setting, standing at  
5 the gateway of commerce, subject to public regulation, holding itself out expressly for supplying  
6 essential public services, devoted to public use and operated for the common good and benefit of  
7 Tacoma Public Utility ratepayers, is subject to an approving vote of the people. As the high court  
8 found, in *State v. Kuykendall*, 137 Wash. 602, 243 P. 834, (1926)<sup>71</sup>

9 [I]f in the beginning or during its subsequent operation the pipe line was devoted  
10 by its owner to public use, and if the right thus extended to the public has not  
11 been withdrawn, there can be no doubt that the pipe line is a public utility.

12 6. Additional Utility Functions, Utility Purpose and Utility Benefits.

13 Click! offsets TPU’s telecommunication costs, provides revenue diversification,<sup>72</sup> and spurs  
14 economic development, all of which increases revenues for TPU’s other utilities,<sup>73</sup> increasing  
15 profits and lowering rates for all Power customers. Click! is a utility with a true nexus to Tacoma  
16 Power’s primary purpose.<sup>74 75</sup>

17 The community, at large, benefits from lower broadband rates due to competition in the  
18 market for broadband services. Competition between Click!’s Internet Service Providers  
19 (“ISPs”) partners, over Click!’s open access system, results in fierce competition for Comcast.  
20 This results in lower rates for the region. All of which spurs economic growth and serves to  
21 benefit TPU’s other utility purposes.<sup>76 77 78</sup>

22 <sup>71</sup> Drawing on *Budd v. People*, 12 S.Ct. 468, 143 U.S. 517, 36 L.Ed. 247 (1892), quoting *Munn v. Illinois*,  
23 94 U.S. 113, 24 L.Ed. (1877).

24 <sup>72</sup> Similarly, Chattanooga’s Electric Power Board (“EPB”) experiences savings. In the 2017 annual report,  
25 EPB announced: “Lower Power Rates: Because EPB Fiber Optics pays such substantial allocations and  
26 access fees to EPB Electric Power, the electric system has been able to avoid a significant electric rate  
increase. As a result, all electric customers are enjoying lower electric rates regardless of whether they are  
EPB Fiber Optics customers or not.” Shook Decl 12/12/19 Ex. 38.

<sup>73</sup> This provides a “sufficiently close nexus to the purpose and object” of TPU’s non-telecommunication  
utilities, water and power. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 696 (1987).

<sup>74</sup> The threshold for nexus is quite low. Utility buying art to beautify its own facilities was sufficient nexus;  
but, utility could not buy art to benefit the general public. “Such projects beautify employee workspaces and  
customer service areas and thereby helped increase the efficiency of workplace operations and acted to the  
benefit of City Light.” *Okeson v. City of Seattle*, 130 Wash. App. 814, 125 P.3d 172 (2005) (Okeson II).

<sup>75</sup> Chattanooga, Tennessee operates an electric provider known as the Electric Power Board (EPB). In re  
City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2015 WL 1120113, at \*7 (2015)

<sup>76</sup> Shook Decl. 12/12/19, Ex. 52, see Harvard Study on Broadband confirming lower prices.

1 **C. Municipal Utilities Commonly Provide Telecommunication Utility Services**

2 “The municipal corporation is allowed to go into the business only on the theory that thereby  
3 the public welfare will be subserved.” *Springfield Gas & Elec. Co. v. Springfield*, 257 US 66 -  
4 Supreme Court 1921. Municipal communication systems, owned and operated by non-profit,  
5 community entities, commonly provide broadband services in the modern era.<sup>79</sup>

6 Mr. Shook’s report, A Sampling of Municipal Broadband Utilities in the USA (2019),  
7 reviews 25 such utilities, with a short “description” of each utility’s services, taken directly from  
8 each utility’s own website. *Please See Shook Decl.*10/30/19 Ex. 18.

9 Kansas Municipal Utilities (“KMU”) represents 178 cities and communities that have  
10 decided municipal utilities are the best choice for providing electricity, natural gas, water, sewer  
11 and telecommunications services. The KMU website states:

12 Kansas has a long history of municipal utility operation. When private business  
13 would not or could not serve the utility needs of its citizens, city governments  
14 stepped up to provide essential utility needs – electric, gas, water, wastewater,  
15 stormwater, **and telecommunication services**. These community-owned  
16 utilities are municipal by choice. (Emphasis added)<sup>80</sup>

15 1. Washington’s Public Utility Districts Operate Telecommunication Utilities.<sup>81</sup>

16 Courts may interpret a statute by looking to “other statutes dealing with the same subject  
17 matter.” The PUD statutes are related statutes and helpful when “read together and harmonized.”  
18 *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998)

19 Municipal ownership and operation of telecommunication systems is common in Washington  
20 State. Public Utility Districts (“PUDs”) are non-profit municipal corporations organized to

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23 <sup>77</sup> Defendant’s Answer, Pg. 6, ¶33. admits competition between local Internet Service Providers.

24 <sup>78</sup> See *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections*  
25 *160A-340 et seq. et al.*, Memorandum Opinion and Order, 30 FCC Rcd 2408, 2434, paras. 52-54 (2015)  
26 (*Municipal Broadband Preemption Order*) (finding Time Warner Cable’s rates lower in Wilson than in  
other areas of North Carolina and that Time Warner Cable improved its BIAS speed offerings after  
Wilson entered the market)

<sup>79</sup> The Executive Office of the President: Community-Based Broadband Solutions The Benefits Of  
Competition And Choice For Community Development And Highspeed Internet Access. (2015) Shook  
Decl. 10/30/19 Exhibit 21, Pg. 14, 15.

<sup>80</sup> KMU website, last accessed 11/19/19, available at <https://www.kmunet.org/page/Benefits?> Also  
available at Perma Link <https://perma.cc/8FDZ-XX8D> and as Shook Decl. 10/??/19 Ex.

<sup>81</sup> See RCW 54.04; also *Wash. Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 97, 459 P.2d 633 (1969).

1 provide public utility services. With less authority than charter cities like Tacoma, fourteen  
2 PUDs currently operate telecommunication “utility” systems across our state.<sup>82 83 84</sup>

3 Washington’s UTC considers broadband a “utility.”<sup>85</sup> (Shook Decl. 12/12/19 Ex. 41 Pg.1).

4 PUDs recognize broadband is “utility service,” vital to education, economic growth and  
5 employment.”<sup>86</sup> Kitsap County PUD calls “Broadband” a “utility.”

6 PUDs were formed in 1930 to provide equitable access to modern utilities for  
7 Washington's communities. Today, this **includes broadband**  
8 **telecommunications**. Watch our video to see how Kitsap PUD is continuing  
9 the mission and working to bring **this essential utility** to all of Kitsap's  
10 communities. (emphasis added).

11 Municipal broadband utilities are defined in Title 54, RCW -Public Utility Districts, in RCW  
12 54.16.420 “Retail internet service.” (1)(a) "Broadband" means high-speed internet access and  
13 other advanced telecommunications services.<sup>87</sup> (b) "Broadband network" means networks of  
14 deployed telecommunications equipment and technologies necessary to provide broadband.

15 PUDs are regulated, under RCW 54.16.420(15): “A public utility district providing retail  
16 internet service must separately account for any revenues and expenditures.” RCW 54.16.330,  
17 rates may not to be “discriminatory or preferential,” Provision of Telecommunications Services:

18 (2) A public utility district providing **wholesale or retail telecommunications services**  
19 shall ensure that rates, terms, and conditions for such services are not unduly or  
20 unreasonably discriminatory or preferential.

21 Regulation of PUD broadband utilities demonstrates Click! is also a utility, providing  
22 essential utility services. Chapter 35.94 RCW applies to such municipal utility assets.<sup>88</sup>

23 **D. The City’s Telecommunication System Provides Essential Utility Services.**

24 <sup>82</sup> See RCW 54.16.330(1)(a) A public utility district . . . may construct, purchase, acquire, develop . . .  
25 operate, and maintain any telecommunications facilities . . .

26 <sup>83</sup> First class cities conferred with an omnibus grant of power under RCW 35.22.570 .

<sup>84</sup> “district is publicly owned and operated and that it has no profit motive.” *Snohomish County Pub. Util.*  
*Dist. I v. Broadview Television.*, 91 Wn.2d 3, 8-9, 586 P.2d 851 (1978)

<sup>85</sup> The Australia’s Commonwealth has funded a National Broadband Network. Every Australian will have  
access to 100 Mbps service. 11 million homes are now ready to connect. Shook Decl. 12/12/19 Ex. 60.

<sup>86</sup> Shook Decl. 12/12/19 Ex. 38. Washington PUD Association (“WPUDA”) website, last accesses on  
11/23/19 “Widely available and reliable access to broadband service is important to our state’s economic  
health, access to education and essential services, and quality of life. Public utility districts play an  
important role in connecting communities by providing access to high-speed broadband service.”

<sup>87</sup> See 47 U.S. Code § 1302 (d)(1) The term “advanced telecommunications capability” is defined, without  
regard to any transmission media or technology, as high-speed, switched, broadband telecommunications  
capability that enables users to originate and receive high-quality voice, data, graphics, and video  
telecommunications using any technology.

<sup>88</sup> Click! services were conceived as a “utility purpose.” Shook Decl. 12/12/19, Ex. 30, Pg. 10, 11.

1 Broadband is commonly considered an essential utility.<sup>89</sup> State, federal and local public policy  
2 support broadband as a municipal utility service.<sup>90</sup> The City describes its own “Mission” in  
3 provision of these services as “vital to our quality of life.” (Shook Decl. 12/12/19, Ex 48, Pg. 8).

4 Washington state’s “Broadband Office,” established in 2019, with “AN ACT Relating to  
5 expanding affordable, resilient broadband service to enable economic development, public  
6 safety, health care, and education” *see* RCW 43.330.532 Broadband office—Established:<sup>91</sup>

7 The legislature finds that: (1) Access to broadband is critical to full participation in  
8 society and the modern economy provides a public benefit to the citizens of  
9 Washington by enabling access to health care, education, and essential services,  
10 providing economic opportunities, and enhancing public health and safety. *Id.*

11 In RCW 43.330.400 the Legislature found broadband technology advancements:

12 [E]nhance economic development and public safety . . . improved health care,  
13 access to consumer and legal services, increased educational and civic participation  
14 opportunities, and a better quality of life for the state's residents.

15 In July 2019, Pierce County Council passed a Resolution stating:

16 "Broadband" - forms the basis of an essential 21st Century infrastructure in our  
17 digital world and economy. It is vital to the economic development and quality of  
18 life for the residents, businesses and institutions of Pierce County and throughout  
19 Washington. (*see* Shook Decl. 12/12/2019 Ex. 37, and for Resolution *see* Ex. 54)

20 Pierce County Council’s 2019 Broadband Study concluded:

21 Broadband is essential, much like education, electricity, and water or sewer. It has  
22 become a primary enabler of economic mobility and prosperity, a “*fourth utility*” *Id*

23 Federal policy supports municipal communications.<sup>92</sup> Benefits are widely known and broadly  
24 promoted. Like roads, broadband is essential infrastructure for a modern economy. Broadband is  
25 a core utility for households, businesses and community institutions.<sup>93 94</sup>

26 <sup>89</sup> *See* 47 U.S. Code § 1301 (2) “Continued progress in the deployment . . . of broadband technology is  
vital to ensuring that our Nation . . . continues to create business and job growth.

<sup>90</sup> RCW 80.36.630 (c) "Broadband service" means any service providing advanced telecommunications  
capability, including internet access and access to high quality voice, data, graphics, or video.

<sup>91</sup> *See* RCW 43.330.532 – Findings 2019 c 365 The legislature finds Broadband (2) “serves a fundamental  
governmental purpose and function and provides a public benefit to the citizens of Washington. Also,  
<sup>92</sup> *See* 47 U.S. Code § 1301 (4)”The Federal Government should also recognize and encourage

complementary State efforts to improve the quality and usefulness of broadband data and should  
encourage . . . the continued growth of broadband services . . . for the . . . the Nation.

<sup>93</sup> Shook Decl. 10/30/19, Ex. 21, *see generally* Report from the executive office of the president:  
Community-Based Broadband -The Benefits Of Competition And Choice For Community Development  
And Highspeed Internet Access. (January 2015).

<sup>94</sup> Shook Decl. 10/30/19 Ex. 22, Pg. 3 -*see generally* A Light in Digital Darkness: Public Broadband after  
Tennessee v. FCC 20 Yale J. L. & Tech. 311 (2018).

1 “Today, **broadband** is taking its place alongside water, sewer and electricity as essential  
2 infrastructure for communities”. Quoting USDA Report (Shook Decl. 10/30/19, Ex. 23).<sup>95</sup>

3 **Broadband is crucial for increased health, educational and economic opportunities,**  
4 **as well as for job and business creation and growth.** Broadband can help close the  
5 digital divide between rural and urban communities. (USDA Rural Development’s  
6 Rural Utilities Programs website, last visited 10/30/19)

7 **E. Click! is a Municipal Utility “System Requiring a Vote under Charter 4.6**

8 Charter 4.6 requires a vote upon disposal of a “System.” Click!’s services are not general,  
9 sovereign, government functions, provided for the common good of the general public at large,  
10 to customers who do not request service. Click! is a municipal utility enterprise, providing  
11 proprietary public utility services for the benefit of the Utility and its customers.

12 That Click! is a “System,” operating under an “organizational structure,” with a general  
13 manager providing oversight, is important to note.<sup>96</sup> The “proprietary” services Click! provides  
14 define Click! as an “enterprise.” An enterprise is a system.<sup>97</sup> (Shook Decl 12/12/19, Ex.26)

15 Click!’s services are provided, as a proprietary function, to the Utility’s customers.

16 In the context of utilities, the focus is on whether the utility "operates for the benefit of  
17 its customers, not the general public," or, stated differently, whether it "will [provide  
18 service] to a customer that does not request service." Okeson, 150 Wn.2d at 550. If it  
19 operates to serve customers, a utility is serving a proprietary function.

20 *City of Wenatchee v. Chelan County Public Utility District*, 181 Wn.App. 326, (Div. 3 2014)

21 Washington decisions have held that the operation of a water system or other utility  
22 serving billed customers is a proprietary function. *Russell v. City of Grandview*, 39  
23 Wn.2d 551, 553, 236 P.2d 1061 (1951)

24 **F. The City Confirms Click! is Part of a Utility by Taxing it as a Utility.**

25 Further admission is found in the City’s organization, labeling, treatment and Taxation of  
26 Click!, which show the City has consistently demonstrated its expressed intention that Click! is a  
27 public utility “system.”<sup>98</sup>

28 The Washington Constitution provides, in Article VII Section 5: Taxes, How Levied, that “  
29 every law imposing a tax shall state distinctly the object of the same to which only it shall be  
30

31 <sup>95</sup> Shook Decl. 10/30/19, Ex. 23. USDA Rural Utilities Service - Telecommunications Programs:

32 <sup>96</sup> Shook Decl. 10/30/2019, Ex. 9, Pg. 3

33 <sup>97</sup> “Enterprise” is a “a business organization,” also, “a systematic purposeful activity.” “Systematic” is  
34 “relating to or consisting of a system. Merriam-Webster.com Dictionary Accessed 11 December 2019

35 <sup>98</sup> Shook Decl. 10/30/19, Ex. 17, Showing the \$629,716. The City Website states: “City Utility Tax”  
36 refers to a tax on public service businesses, including businesses that engage in telecommunications

1 applied.” The City’s collects a 7.5% “utility tax” on Click! activities, including broadband  
2 revenue, as a “public utility.” In 2018 this tax amounted to \$629,716 on broadband alone.<sup>99</sup>

3 The City’s taxation of Click! as a public utility, shows an express intent that Click! is a  
4 public utility. The City’s taxation policy, City Charter 4.4, allows taxation “upon any of the City-  
5 operated utilities.” By collecting the City’s B&O “utility tax” on Click!’s broadband services,  
6 City demonstrates for the Court that Click! is a utility in Tacoma. (Shook Decl. 10/30/19, Ex. 9).

7 Tacoma’s utility tax rate increased, from 6% to 7.5%, by Proposition 3. It was a “utility tax  
8 increase,” and Click!’s tax rate increased accordingly. More evidence that Click! is seen as a  
9 utility. (Shook Decl. 12/12/19 Ex. 56, Pgs. 3, 4, 6) (Shook Decl. 10/30/19 Ex. 16).

10 Tacoma’s website provides: “Tax Classifications: Business income is reported under a tax  
11 classification *depending on the type of business activity*.” Click!’s “Business Activity” is a  
12 “*utility*” under the City Tax Code. (Shook Decl. 12/12/19 Ex. 56, Pg. 3).

13 **G. Laws of 1917 and Origin of Right To Vote on Separation of Municipal Utility Assets.**

14 Struggles between private and public interests over municipal utility assets are nothing new.  
15 The instant case is a good example of why the laws of 1917 were established. Private interests,  
16 who might benefit from privatizing municipal utilities, are held in check by the vote.

17 The contemporaneous events, surrounding enactment of the 1917 statute, inform the Court  
18 of the Legislature's intent in requiring voter approval for privatization. A central figure in the  
19 “public power struggles,” between public and private utilities, was the Honorable Homer T.  
20 Bone, Chairman of the 1925 Tacoma City Charter Committee that provided Charter 4.6’s  
21 protective vote. His speech, during his 1932 senate campaign, provides context for interpreting  
22 RCW 35.94 and Charter 4.6.<sup>100</sup> (Shook Decl. 12/12/19, Ex. 67, Pg. 6).

23 The power trust of this nation has junked every standard of decency in its dealing  
24 with the public. It has debauched our institutions of learning and our legislative  
25 bodies. It has brazenly gouged the pocketbooks of the people to maintain a flood  
26 of propaganda calculated to deceive the public mind. Its victims have been  
compelled to pay for the flood of corruption it has loosed upon the country. It has  
set up a long train of abuses and usurpation of power pursuing invariably the

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<sup>99</sup> Pursuant to City Charter 4.4, which permits tax “upon any of the City-operated utilities.” This defines Click! as a utility, given its taxation of as a utility. Res.# 39236 “earnings tax on utility companies.”

<sup>100</sup> Homer Truett Bone, In the early 1920s served as attorney for Port of Tacoma and Tacoma City Light, the city’s municipally owned utility. U.S. Senator, 1932-1944; judge, U.S. Circuit Court of Appeals, Ninth Circuit, San Francisco, 1945-1954.. Shook Decl. 12/12/19, Ex. 67 Pg. 12.

1 same object which is reducing the American people to a state of vassalage to the  
2 greatest instrument of plunder the world has yet produced.

3 The people must not only destroy the power of this insolent organization, but *write*  
4 *into the laws of the land* new guards for future security against such monstrous  
5 invasions of their rights.

6 One only need look at the record of the Washington State Legislature to perceive how  
7 completely a public body can be dominated by a power trust lobby. The thing has  
8 become a stench in the nostrils of decency in the state of Washington which *led to the*  
9 *people of this great state to rise in their wrath and pass the Grange Power measure*  
10 *by a big majority in 1930.* (emphasis added). (Shook Decl. 12/12/19 -Part II Ex. 67 )

11 RCW 35.94, the Laws of 1917, originally codified as Remington’s Revised Statutes (“RRS”)  
12 1917 c 137 §§ 9512–14, included “telephone or telegraph plant and lines, or any system  
13 embracing all or any one or more of such works or plants or *any similar or dissimilar utility or*  
14 *system.*” That legislative intent remains today, unchanged. (Shook Decl. 12/12/19 Ex. 33, Pg. 8)

15 The consequences of privatizing municipal utility property without an approving vote of the  
16 public was memorialized in 1942, by our high court’s finding that two wharves, which had been  
17 privatized, were “part of” a municipal utility. *Bremerton Municipal League v. Bremer*, 15 Wn.2d  
18 231, 237–39, 130 P.2d 367 (1942). *Bremer*, cited RRS § 9512 thus:

19 'It is and shall be lawful for any city or town in this state now or hereafter owning any  
20 water works, gasworks, electric light and power plant, steam plant, street railway line,  
21 street railway plant, telephone or telegraph plant and lines, or any system embracing  
22 all or any one or more of such works or plants or *any similar or dissimilar utility or*  
23 *system*, to lease for any term of years or to sell and convey the same or any part  
24 thereof, with the equipment and appurtenances, in the manner hereinafter prescribed.'

25 The appellants point out that the statute specifically names a long list of utilities, but  
26 does not specifically mention wharves and docks. But the statute also says, '*or any*  
*similar or dissimilar utility or system.*' This, we think includes any kind of utility in  
whose operations the public has an interest, that is to say, any public utility.<sup>101</sup>

In 1917, the legislature included a list of public services considered municipal utilities for  
protection under RCW 35.94. This list was left dramatically open. The Legislators could have  
simply said “not limited to,” instead, with the emphatic phrase of “*any similar or dissimilar*  
*utility or system*,” Legislators were assertive in issuing the inhabitants of a city the right to vote  
over disposal of their municipal utility property.

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<sup>101</sup> Such struggles continue, now between public broadband and private “broadband trusts,” to this day. Click! is target with equivalent tactics. Shook Decl. 12/12/19, Ex. 45. See Ms. Lachelle letter.

1 *Bremer* found a frivolous “abandonment,” done in anticipation of making the lease in  
2 question, had the “appearance of having *been made to circumvent the provisions* of sections  
3 9512-9514, inclusive, of the statutes.” (Emphasis added). As the *Bremer* court stated:

4 The appellants urge that the wharves had been abandoned. . . .As we read the  
5 record, the Front street wharf was not abandoned--or if so, only in anticipation of  
6 making the lease in question, for the ordinance approving the lease was passed on  
7 first reading by the city commission . . . it may well be doubted whether an  
8 abandonment would be approved which has the appearance of having been made  
9 to circumvent the provisions of sections 9512-9514, inclusive, of the statutes. *Id.*

10 The System telecommunication functionality is not just “similar or dissimilar” to the  
11 communication functionality contemplated in Chapter 35.94, it is identical. The System enables  
12 phone calls, using interconnected VoIP service. A lifesaving 911 call can be made over the  
13 System. The FCC’s Lifeline program subsidizes broadband as an advanced telecommunication  
14 service, with VoIP and broadband treated on the basis as traditional POTS service.<sup>102 103</sup>

15 Low-income consumers receive a standard \$9.25 monthly discount on Lifeline-supported  
16 VoIP or broadband Internet access service (Shook Decl. 12/12/19 Ex. 44).

17 1. Legislative Intent of Surplus and Plain Language of Municipal Utility Surplus Clause

18 RCW 35.94.040 was adopted in 1973, the legislative history shows the City was keenly  
19 interested in the bill. Senator “Slim” Rasmussen, 29<sup>th</sup> District, sponsored the bill, and  
20 Representative R. J. Kelley, Tacoma’s 28<sup>th</sup> District introduced it in the House.<sup>104</sup> TPU Director A. J.  
21 Benedetti, wrote supportive letters and testified on the need for the bill. In his March 5, 1973 letter  
22 to the House of Representatives, and his March 20, 1973 letter to the Chairman and Committee  
23 Members of the Senate Committee on Local Government, the Director acknowledged and agreed

24 <sup>102</sup> See 47 CFR § 54.400 (n) *Supported services*. Voice Telephony services and broadband Internet access  
25 services are supported services for the Lifeline program. The services are recognized equally under the  
26 FCC’s Lifeline program, providing subscribers a discount on monthly telephone service, broadband  
Internet access service, or voice-broadband bundled service. *Also* FCC Order 19-111 Released: November  
14, 2019 Bridging the Digital Divide. *also see* Shook Decl. 12/12/19 Ex. 44, Pg. 3

<sup>103</sup> See 47 CFR § 9.3 Interconnected VoIP service: Enables real-time, two-way voice communications and  
permits users generally to receive calls that originate on the public switched telephone network and to  
terminate calls to the public switched telephone network. VoIP capability includes *Automatic Number  
Identification* (“ANI”). A system that identifies the billing account for a call. For 911 systems, the ANI  
identifies the calling party and may be used as a call back number.

See 47 CFR § 54.400(m) Voice telephony service. “Voice telephony service” is defined as voice grade  
access to the public switched network or its functional equivalent; . . . access to the emergency services  
provided by local government or other public safety organizations, such as 911 and enhanced 911. . .

<sup>104</sup> House Bill 939, and Senate Bill 2835 Shook Decl. 12/12/19, Ex. 33, Pgs. 23, 31

1 with the importance of “*the confirming approval of the voters*” for surplus of “*operating*” utility  
2 assets.<sup>105</sup>

3 Director Benedetti assured Legislators that, “*Such procedure, of course, is desirable* when in  
4 fact all or *an integral part of an operating utility* is to be so disposed of.” The Director added:

5 This bill will accomplish procedural flexibility in such transactions without  
6 repealing the formalized procedures required in the situations involving utility  
operating plant and properties. (see Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6).

7 The Local Government Committee took up the matter. In an April 6, 1973 memo, Legislative  
8 Executive Secretary J.W. Gunther wrote Chairman Rep. Haussler, explaining the purpose of the bill.

9 Under the existing law, there is a long, detailed requirement for the calling of bids,  
10 passing of resolutions and all this appears to be rather cumbersome for the purpose  
of disposing of surplus properties. (see Shook Decl. 12/12/19, Ex. 33, Pg. 18)

11 At the first reading of the bill in the Senate, on March 14, 1973, surplus assets were defined by  
12 the term “*unusable property,*” and real estate defined as “unimproved lands.” In a hand written  
13 note, the terms “unusable” and “unimproved” were identified for removal as “*superfluous,*”  
14 indicating the word “surplus” was clear enough.<sup>106</sup> (Shook Decl. 12/12/19, Ex. 33, Pg. 3)

15 On March 16, 1973, Mr. Nolan, Deputy City Attorney for TPU, spoke to the House Local  
16 Government committee and assured Legislators this bill would simply allow TPU “*the same*  
17 *privileges*” for surplus enjoyed by Public Utility Districts. (Shook Decl. 12/12/19 Ex. 33, Pg. 38)

18 A direct comparison to the PUD “*privileges,*” and assurance of seeking identical limitations on  
19 surplus authority, was also cited in Director Benedetti’s letters. The Director confirmed for the  
20 Legislators, that the authority to surplus was “consistent with that *long enjoyed by the Public Utility*  
21 *Districts* under RCW 54.16.180.” (Shook Decl. 12/12/19 Ex. 33, Pg. 18 ).

22 The Director’s comparison was fair. PUDs and “cities and towns” are municipal corporations  
23 with “the same powers” and “same duties” for disposal of utility assets. RCW 54.16.180 (9)

24 ***Districts are municipal corporations for the purposes of this section.*** A commission  
25 shall be held to be the legislative body, a president and secretary shall have the same  
26 powers and perform the same duties as a mayor and city clerk, and the district resolutions  
shall be held to be ordinances ***within the meaning of statutes governing the sale, lease,  
or other disposal of public utilities owned by cities and towns.*** (emphasis added).

Which makes sense, given both surplus statutes, RCW 35.94.040 and RCW 54.16.180(2)(b),

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<sup>105</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 5, 6.

<sup>106</sup> Shook Decl. 12/12/19, Ex. 33, Pgs. 22. - terms “unusable” and “unimproved” as superfluous.

1 share a common origin, *in the Laws of 1917* and the same protective statues in RRS §§ 9512 -9514.

2 From 1945 to 1955, the City and PUDs shared identical statutory authority for disposal of their  
3 utility property. Surplus was regulated in *exactly the same way*, under *exactly the same laws*. The  
4 Laws of 1945. House Bill 342, Chapter 143, Section 6(m), Page 413, specifically linked PUD’s and  
5 the City’s process for the sale, lease or disposal of the people’s assets.<sup>107</sup>

6 It is, and shall be lawful for any public utility district organized hereunder to sell and  
7 convey, lease or otherwise dispose of all or any part of the works, plants, systems,  
8 utilities and properties authorized by this act and owned by it after proceedings and  
approval by the voters of the district as provided for in chapter 137, Laws of 1917,  
(sections 9512, 9513 and 9514 of Remnington's Revised Statutes of Washington).

9 Only two amendments have ever been made to the surplus language in the 1945 statute. The  
10 first came in 1955, when PUDs gained “flexibility in procedure,” with surplus authority, With the  
11 newly created RCW “chapter and section” numbering system, PUDs were regulated under Title 54,  
12 when Legislators first modified RRS §§ 9512 -9514’s cumbersome process for disposal of surplus  
13 utility property in the Laws of 1955, Senate Bill 367. Thus was created RCW 54.16.180.<sup>108</sup>

14 To this day, RCW 54.16.180 represents the unmistakable legislative intent regarding the term  
15 “surplus” in relationship to municipal utility property under RRS §§ 9512 -9514.

16 It would be 18 more years until Tacoma gained surplus authority. During that time, the PUDs  
17 surplus statue remained unchanged. In 1973 RCW 54.16.180 was the template for the same  
18 surplus authority Tacoma now sought for improving the same “rather cumbersome” process.<sup>109</sup>

19 The Tacoma Utility Director and two Tacoma City Attorneys testified that the surplus  
20 authority they sought was “the same privilege,” “consistent with that long enjoyed by the Public  
21 Utility Districts under RCW 54.16.180.”<sup>110</sup> Here is RCW 54.16.180 as it appeared in 1973. This  
22 is the surplus authority Tacoma sought. Legislative intent for surplus under RRS § 9512 is here.

23 That a district may sell, convey, lease, or otherwise dispose of all *or any part of the*  
24 *property owned by it*, may sell, convey, lease, or otherwise dispose of to any person or  
25 public body, any part, either within or without its boundaries, which has become  
unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
system and which is no longer necessary, material to, and useful in such operations,  
without the approval of the voters. (*see* Laws of 1955, Ch. 390, Pg. 1685.) (emph. added)

107 The Laws of 1945, Ch. 143 Pg. 413. Shook Decl. 12/12/19, Ex. 33, Pg. 5.

108 See the Laws of 1955, Ch. 390, S.B. 367, Section 19, Pg. 1685. Shook Decl. 12/12/19, Ex. 33, Pg. 4

109 Shook Decl. 12/12/19, Ex. 33, Pg. 18 – Legislative Executive Secretary J.W. Gunther wrote Chairman  
Rep. Haussler, explaining the purpose of the bill.

110 Quoting Director Benedetti’s letters, *surpa..* All of this represents legislative intent for surplus.

1 This 1973 version of RCW 54.16.180 shows the legislative intent for “surplus” under RCW  
2 35.94.040. This is the very statute which RCW 35.94.040 was intended to replicate. It was  
3 presented to Legislators, as a direct comparison and a basis for their unanimous adoption of  
4 RCW 35.94.040. It represents what Legislators intended to accomplish, in 1973, by modifying  
5 the 55-year old legacy of RRS §§ 9512 -9514. Legislative intent for “surplus” under RCW  
6 35.95.040 is revealed for the Court in this 1973 version of RCW 54.16.180.

7 Understanding the legislative intent behind RCW 35.94.040 provides context for statutory  
8 interpretation of “surplus” in the instant case. The statutes terms, such as “obsolete,” “worn out,”  
9 “unserviceable,” “no longer useful” or “unfit to be used” in the operation of the system, do not  
10 describe a state-of-the-art fiber optic system, earning \$25 million a year, and being “leased” for 40  
11 years, with a reversionary interest. The Court cannot substitute its judgement for that of the  
12 legislators. Click!’s status, as an operational enterprise, simply does not meet the Legislator’s intent  
13 of the term “surplus.” When considering the meaning of “surplus,” associated words placed in the  
14 statute control the meaning of a word. *Cito v. Rios*, 3 Wn. App. 2d 748, 759, 418 P.3d 811, review  
15 denied, 191 Wn.2d 1017, 426 P.3d 747 (2018).

16 Only one other change has ever been made to the 1955 version of RCW 54.16.180. That came  
17 in 2008, with the Laws of 2008, Ch. 198, Pg. 8, Sec. 5, and further confirms legislative intent over  
18 disposal of surplus assets. Legislators made “surplus” even clearer, by adding the emphatic phrase,  
19 “***no longer useful in such operations, to any person or public body.***” The statute reads today:<sup>111</sup>

20 RCW 54.16.180 (2) A district may, without the approval of the voters, sell, convey, lease,  
21 or otherwise dispose of all or any part of the property . . . which has become  
22 unserviceable, inadequate, obsolete, worn out or unfit to be used in the operations of the  
23 system and which is no longer necessary, material to, ***and useful in such operations, to  
any person or public body.*** (emphasis added).

24 The words, “***useful in such operations to any person or public body***” shows legislative intent to  
25 protect assets from “***any person***” that would use productive public utility assets to continue  
26 providing the same utility service, or “such operations.”<sup>112</sup> In Click!’s case, the System is absolutely  
“***useful.***” The private buyer will provide exactly the same “***operations,***” for the next 40 years.

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<sup>111</sup> Substitute House Bill 2639

<sup>112</sup> Consider a water pipeline, or water system, for example. The phrase “***useful in such operations***” would prohibit “surplus” from being applied to assets being sold to someone who would use them to continue supplying water. They pipeline could be salvaged for scrap, but not continue in public service.

1 “In resolving the meaning of a statutory term, we adopt the interpretation that best advances the  
2 legislative purpose.” *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184  
3 Wn.2d 428, 437, 359 P.3d 753 (2015), and find the statutes plain meaning as “derived from the  
4 context of the entire act as well as any ‘related statutes which disclose legislative intent about the  
5 provision in question.’” *Jametsky*, 179 Wn.2d at 762 (quoting *Dep’t of Ecology v. Campbell &*  
6 *Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

7 **H. Click! Serves a Useful Purpose and Disposal by Surplus is Substantive Ultra Vires..**

8 Click!’s fiber optic cable is used for data transport. All of the “fiber” is sheathed within one  
9 “outer jacket.” It is essentially one pipe consisting of a number of “tubes,” with each tube having  
10 a specific number of fiber “strands.” See (Shook Decl. 12/12/19 Ex. 31, Pg. 3)

11 On Click!’s system, there are 12 fiber optic strands in each “tube.” ***Click! currently uses one***  
12 ***“tube” for all Click!’s commercial services.*** There are *15 additional* “tubes” of dark fiber,  
13 representing the communities’ potential for future use. Click!’s current use of this fiber optic  
14 “backbone” is shown in “purple” on the City’s slide presentation from October 29, 2019.<sup>113</sup>

15 Privatization not only transfers complete control over the twelve strands of fiber currently  
16 used by Click!, but also vests complete control all over the ***additional 9 tubes, or 108 additional***  
17 ***strands of dark fiber,*** needed for the community’s access to broadband services in the future.  
18 Explosive growth in data usage and broadband telecommunications is upon us. The community  
19 will require all this infrastructure and more. (Shook Decl. 12/12/19 Ex. 31, Pg. 14).

20 Equally as important are the DNS servers, DHCP servers, Caching servers, routers, switches,  
21 hubs, nodes, and intellectual property that enable the system. A most notable example an asset  
22 that is obviously not surplus is the IPv4 address, included in the CBTA. The agreement provides,  
23 in connection with the IRU, Tacoma Power will assign IPv4 addresses to Operator from CIDR  
24 131.191.0.0/17 and 192.173.160.0/20.”<sup>114</sup>

25 IP Addresses are numbers owned by the City and assigned to each customer device via  
26 Click!’s DHCP server, allowing devices to connect directly to the world wide web. The world

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<sup>113</sup> See Shook Decl. 12/12/19 Ex. 31, Pg. 3 All required in increasingly digital world, to connect with friends and family, access goods and services. The IDC predicts the Global Datasphere, estimated to be 33 ZB in 2018, will grow to 175 ZB by 2025.

<sup>114</sup> The City owns the valuable IPv4 addresses included in the IRU. These are not “surplus.” All devices that connect to the Internet require an Internet Protocol (IP) address and IP addresses are a valuable commodity. Demand has exhausted the global supply of IPv4 addresses.

1 supply of IPv4 address is exhausted. They are a precious and valuable commodity, with a long  
2 waiting list of over a year. *See* Shook Decl. 12/12/19 Ex. 65.<sup>115</sup>

3 Defendant admits Click! is part of a municipal utility, providing a public service. These  
4 services are “municipal utility services.” If portions of Click! qualify as the “works, plant, *or*  
5 *system* owned by it or **any part thereof**,” then vesting via surplus is ultra vires. A direct violation of  
6 statute. *Finch v. Matthews*, 74 Wash.2d 161, 172, 443 P.2d 833 (1968)

7 Property “originally acquired for public utility purposes” is not surplus, when that property  
8 continues providing “public utility service.” All the assets being conveyed were “originally  
9 acquired for public utility purposes.” The System was established to deliver telecommunication  
10 services to TPU customers, diversify TPU revenue, drive economic growth and offset costs for  
11 TPU. The property is not idle, or its operations discontinued. If privatized, the System would  
12 continue providing TPU customers with the same services. A property is not surplus, when  
13 continuing to provide the same municipal utility services.<sup>116 117</sup>

14 The City’s Resolution 40467, declaring surplus utility-owned property, inventory,  
15 equipment, and vehicles allocated to Click! Network, enables Resolution 40468, which  
16 authorizing execution of the CBTA to convey ownership of Click!. Together these Resolutions  
17 circumvent the public vote requirement in RCW 35.94.020. No bidding has been occurred in the  
18 surplus process, as is generally seen. (Shook Decl. 12/12/19, ¶ 1, and City Policy Ex. 54, Pg. 4)

19 A municipality does not have unbounded discretion to declare a utility surplus. *South Tacoma*  
20 *Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts without authority  
21 are *ultra vires*). A municipality’s action is void, if contrary to law.

22 City’s “Declaration of Surplus Property” does not meet the standard of “surplus” under RCW  
23 35.94.040, which applies to property “not required for providing continued public utility  
24 service.” Since Click!’s “surplus” property will continue providing the same public utility  
25 broadband services to the same public utility customers, Council’s surplus Resolutions is an ultra  
26 vires application of the statute. A “contract contrary to the terms and policy of a legislative  
enactment is illegal and unenforceable. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233

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<sup>115</sup> Cable modem customers receive 5 routable IP addresses with service, and FTTH users get 1,

<sup>116</sup> Imagine a public school being declared as “surplus” and privatized; but, in fact students still in attendance, only forced to pay whatever tuition of lunch program charges the private company requires.

<sup>117</sup> Under RCW 35.94.040, the System itself is required for “providing continued public utility service.”

1 P.3d 871 (2010) , *Hederman v. George*, 35 Wash.2d 357, 362, 212 P.2d 841 (1949); *State v. Nw.*  
2 *Magnesite Co.*, 28 Wash.2d 1, 26-27, 182 P.2d 643 (1947).

3 The City’s authority in exercising its proprietary power is limited. Tacoma may not act  
4 beyond the purposes of the statutory grant of power, *State ex rel. PUD 1 v. Wylie*, 28 Wash.2d  
5 113, 182 P.2d 706 (1947), or contrary to express statutory or constitutional limitations.  
6 *Metropolitan Seattle v. Seattle*, 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960);

7 "Ultra vires acts are those done wholly without legal authorization or in direct violation of  
8 existing statutes." *Metro. Park Dist. of Tacoma v. State*, 85 Wash.2d 821, 825, 539 P.2d 854 (1975)

9 Click!’s public broadband system provides a valuable and “effective” way for TPU customers  
10 to connect to the Internet. Without Click!, “continued effective utility service” is impossible.  
11 Circumventing this process is a substantive violation of the statue and *ultra vires* act,. rendering the  
12 contract void ab initio. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 499,  
13 886 P.2d 147 (1994) This “right to vote” prevents corrupt disposal of public assets. Failure to allow  
14 the vote is an ultra vires action.

15 “Historically, the unauthorized contracts of both corporate and governmental  
16 entities, which by their nature represent the interests of groups of individuals,  
17 have been rendered void and unenforceable under the ultra vires doctrine.” *Noel*  
18 *v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982).

19 Also, “where the procedure followed has not been in accordance with law, proceedings had  
20 thereunder must be held void,,” *Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3, (1930), and,  
21 “the lease here in question was void ab initio, and that the warrants issued in payment  
22 therefor are invalid, because both the making of the lease and the issuance of the  
23 warrants, without the assent of the voters, were ultra vires of the town council.” *See*  
24 *State v. Town of Newport*, 70 Wash. 286, 126 P. 637, (1912)

25 The doctrine of ultra vires applies to governmental action to "protect the citizens and taxpayers  
26 from unjust, ill-considered, or extortionate contracts, or those showing favoritism" see 10 E.  
*McQuillin*, Municipal Corporations § 29.02, at 200 (3d ed. 1981)

27 A municipal election cannot be avoided in conveying a going concern. Vesting a municipal  
28 utility’s telecommunications system, with in-service assets, active customer accounts, under  
29 surplus, is fundamentally a legal question of statutory interpretation. No factual issues require  
30 determination. Privatization removes all public oversight of operations and rates. As a sale,  
31 lease, and/or disposal of Click! Mr. Shook is entitled to the relief requested.

32 **I. Good Public Policy Prevents Ultra Vires Act Circumventing People Right to Vote.**

1 The right to vote is curative of all ills and the fundamental basis of all democracy.. *See*  
2 *Madison v. State*, 161 Wn.2d 85, 98, 163 P.3d 757 (2007). A vote is mandatory in this case.  
3 Preventing the ultra vires destruction of that right is good public policy.

4 Council’s authority is expressly limited, by extraordinary Charter and state statutory  
5 requirements for a public vote. Express authority is in the electorate. Circumventing the law  
6 cannot be validated. The matter must be “submitted to the voters of the city for their approval or  
7 rejection at the next general election.”

8 If Click! is surplus, any private company could pilfer the public treasury by deploying large  
9 campaign contributions to sway policymakers into privatizing utility assets. No such loophole  
10 should be opened by the Court. Protecting the people’s property from plunder and preserving  
11 them for the people who paid for them, is the purpose of the policies in RCW 35.94. The Court  
12 would be well informed by taking judicial notice of the fact that municipal utility ownership  
13 (“MO”) has always faced fierce opposition and criticism from entrenched powerful private  
14 interests facing municipal competition. <sup>118</sup> (Shook Decl. 12/12/19, -Part II, Ex. 67 )

15 When all the facts are considered together, the business plan, the Ordinance establishing  
16 Click!, the abundant statutory and judicial authority cited in City’s 1996 and 1997 Memorandum  
17 for the Summary Judgement, the legislative intent and history of RRS §9512 in Chapter 35.94  
18 RCW, the common definitions of “system,” “utility,” the bare fact Click! is owned and operated  
19 by a utility, taxed as a utility, provides essential service to 35,000 active accounts, earns \$25  
20 Million annually in revenue, has significant brand recognition, for all these reasons, Click! is  
21 obviously a municipal utility system providing the same services for which it was established.

22 The surplus resolution has every *appearance of having been made to circumvent the*  
23 *provision of Chapter 35.94 RCW*. It is procedurally *ultra vires*. The public’s investment in these  
24 assets must be protected, especially from the very same powerful private interests who opposed  
25 the creation of the system in the first place and would profit from privatization of these assets. <sup>119</sup>

26 <sup>118</sup> Consider the contemporary opposition, in 1917 and 1925, from private municipal rail, gas, telephone,  
water and power companies at the time Chapter 35.94 RCW and the Tacoma City Charter were written.  
Propaganda published at the time demonstrate the lobbying tactics, and motives, of those opposing to the  
hated “MO” (municipal ownership). For examples, *see* Shook Decl., 12/12/19 PART II Ex. 67.

<sup>119</sup> Thanks in large part to substantial lobbying efforts, twenty-one states have legislative barrier to  
municipal broadband networks Shook Decl. 12/12/19, Ex. 46, Pg. 601. Casting a Wider Net: How And  
Why State Laws Restricting Municipal Broadband Networks Must Be Modified. Many Communities see  
existing broadband offerings not meeting needs and are building municipal broadband networks.

