Court of Appeals No. 57246-0-II
Pierce County Superior Court Cause No. 19-2-07135-0

IN THE COURT OF APPEALS, DIVISON II
FOR THE STATE OF WASHINGTON

THOMAS McCARTHY *et al.*,

Appellants,

v.

CITY OF TACOMA,

Respondent.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

OPENING BRIEF OF APPELLANT CHRISTOPHER T. ANDERSON

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INTRODUCTION

After spending millions of dollars of public funds to construct a substantial municipal asset, and after the City of Tacoma ("the City") won a lawsuit to fund the construction of this public utility, the City then unilaterally decided to lease this state of the art, carrier grade, hybrid fiber coaxial telecommunications network ("Click!") to a private third party without a vote of the people. But, before the City could dispose of Click! a vote of the people was required under both Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter. The City never held any such vote.

In 1996, the City passed Ordinance No. 25930, which created one of the nation's first municipally owned and operated telecommunications systems. This ordinance established Click! as part of Tacoma Power, which operated under the Tacoma Public Utilities ("TPU") umbrella. When the City decided to create Click!, the City issued revenue bonds without a vote of the people, since revenue bonds for public utility systems are not subject to the voting requirements established for general indebtedness. This

issue was litigated in *City of Tacoma v. The Taxpayers and the Ratepayers of the City of Tacoma*, Pierce County Superior Court Cause No. 96-2-09938-0. Based on the City's own arguments that Click! was a public utility system, the trial court concluded that the people did not have a right to vote on the City's issuance of these revenue bonds, since RCW 39.46.150 contains an exemption from the vote requirement for public utility systems.

Using these funds, the City then built Click!. Click! consists of over 1,400 miles of fiber and cable plant, which was constructed by TPU. Nearly 66% of the homes in Tacoma Power's service area were covered by Click!. Click! had more than 20,000 wholesale high-speed internet service customers and 100 wholesale broadband transport circuits. As soon as Click! became operational, Click!'s internet access rates were set and approved by the Public Utility Board and the Tacoma City Council, and these rates were published in Title 12 of the Tacoma Municipal Code, which governs public utilities.

In 2019, the City Council decided that it no longer wanted to operate Click!. The Tacoma City Council and the Public Utilities Board then directed the Director of TPU to execute a letter of agreement with Rainer Connect, by which the City would lease Click! to Rainier Connect and TPU would no longer provide wholesale internet access and data transport services (among others) to those within the Click! service area. To circumvent the voting requirement of Chapter 35.94 RCW, the City declared Click! to be "surplus" and entered into a lease agreement with Rainier Connect pursuant to the Click! Business Transaction Agreement ("the BTA").

Under the BTA, Rainier Connect acquired other assets used in the provision of broadband data services, which included equipment used to create and operate Click! and to deliver services to customers, including customer accounts, inventory of spare parts and equipment, vehicles, prepaid items, and material contracts. The BTA did not contain any ability for the Tacoma City Council or the PUB to control or oversee Click!'s internet rates.

On April 1, 2020, the City formally transferred operational control of Click! to Rainier Connect.

The Appellants submit that under Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, the City did not have the authority to lease Click! to Rainier Connect without first submitting the issue to a vote of the people. The trial court entertained competing motions for summary judgment below. The City argued Click! is **not** a public utility subject to Chapter 35.94 RCW or Section 4.6 of the Tacoma City Charter, and therefore the vote requirements set forth in RCW 35.94.020 and Section 4.6 of the City Charter do not apply. The trial court erroneously agreed with the City.

The trial court erroneously ruled that Chapter 35.94 RCW did not apply, concluding that Click! was not a public utility, since Revised Remington Statute Sec. 9512 (which is presently codified at RCW 35.94.010) and binding precedent from the Washington State Supreme Court interpreting the same no longer apply. The trial court also erroneously concluded that Section 4.6 of the

Tacoma City Charter did not apply, since Click! was not a public utility.

Appellant Anderson respectfully submits that the trial court erred by ruling that the City's decision to hand Click! over to a private party is not subject to the voting requirements set forth in Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter. Appellant Anderson respectfully requests this Court confirm Click! is a public utility subject to the vote requirements in Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, enter judgment for the Appellants, and remand this matter to the Pierce County Superior Court for the limited purpose of overseeing a municipal election on the sole issue of whether the City may lease Click! to Rainer Connect under the BTA and IRU.

I. ASSIGNMENTS OF ERROR

Appellant Anderson respectfully assigns error to the Pierce County Superior Court's Order Denying Plaintiff's [*sic*] Motions for Summary Judgment and Granting Defendant City of Tacoma's Motion for Summary Judgment. CP 2694-96. Appellant

Anderson's specific assignments of error include that the trial court erred by denying the Plaintiffs' Motions for Summary Judgment and granting the City's Motion for Summary Judgment, since:

A. Click! Network is a public utility system and/or a part thereof subject to the provisions of Chapter 35.94 RCW.

B. Click! Network is a public utility system and/or an essential part thereof subject to the provisions of Section 4.6 of the Tacoma City Charter.

While the trial court stated its ruling was specifically based on the foregoing points, VRP 54-55, to the extent the trial court considered other issues presented below, Appellant Anderson submits that the trial court also would have erred, since:

C. Click! Network is not, and cannot be, "surplus" as contemplated by RCW 35.94.040;

D. The City's declaration of Click! Network to be "surplus" was arbitrary and capricious;

E. The City should have been equitably estopped from now arguing that Click! is not a public utility; and,

F. The trial court failed to consider the facts and all reasonable inferences in a light most favorable to the nonmoving parties.

Issues pertaining to the foregoing assignments of error include:

1. Did the trial court err by ruling Click! Network is not a public utility or part thereof subject to the vote requirements set forth in RCW 35.94.010 and RCW 35.94.020?

2. Did the trial court err by refusing to consider RRS § 9512 and the case of *Bremerton Municipal Leauge v. Bremer*, when construing and applying RCW 35.94.010 and RCW 35.94.020?

3. Did the trial court err by ruling Click! Network is not a public utility or essential part thereof subject to the vote requirement set forth in Section 4.6 of the Tacoma City Charter?

4. Did the trial court err by failing to conclude that Click! Network is not and cannot be "surplus" as contemplated by RCW 35.94.040?

5. Did the trial court err by failing to conclude that the City's declaration of Click! Network to be "surplus" was arbitrary and capricious?

6. Even if the City's declaration of Click! Network to be "surplus" was lawful and proper, which it was not, did the trial court err by failing to conclude that disposition of Click! Network is still subject to the vote requirement set forth in Section 4.6 of the Tacoma City Charter?

7. Did the trial court err by failing to conclude that the City should be equitably estopped from arguing that Click! Network is not a public utility or part thereof subject to RCW 35.94.020 and Section 4.6 of the Tacoma City Charter?

8. Did the trial court err by failing to consider all of the facts and reasonable inferences drawn therefrom in a light most favorable to the Appellants?

II. STATEMENT OF FACTS

In 1996, the Tacoma City Council passed Ordinance No. 25930, which established Click! as part of Tacoma Public Utilities

("TPU"). CP 464-90. In doing so, the City relied on its powers to create a public utility system, stating *inter alia*:

> WHEREAS, the Ordinance provides that the City may create a separate system as part of the Electric System and pledge that that income of such a separate system be paid unto the Revenue Fund; and
>
> WHEREAS RCW 35A.11.020 authorizes the City to operate and supply **utility and municipal services** commonly or conveniently rendered by cities or towns.
>
> . . .
>
> WHEREAS, the City has determined that it should create a telecommunications system as part of the Electric System in order to construct these telecommunications improvements.

CP 468-69 (emphasis supplied). The City determined it was "prudent and economical" to provide broadband Internet access and Ethernet transport services to residential and business customers. CP 2320. The System was also created for "revenue diversification" for Tacoma Power "through new business lines (i.e., internet transport, ...)" CP 294. The ordinance also anticipated other benefits including "automated meter reading and billing, appliance control and load shaping". CP 468. Ordinance

No. 25930 further clarified:

> Establishment of Telecommunication System. The City hereby creates a separate system of the City's Light Division to be known as the telecommunications system ("the Telecommunications System"). The public interest, welfare, convenience and necessity require the creation of the Telecommunications System, . . .

CP 472. The City also authorized the issuance and sale of the City's Electric System Revenue Bonds to provide part of the funds " . . . necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system." CP 2317. This resulted in a lawsuit, *City of Tacoma v. The Taxpayers and the Ratepayers of the City of Tacoma*, Pierce County Superior Court Cause No. 96-2-09938-0, in which the defendants claimed that a vote of the people was required before the City could incur general indebtedness for Click! Network. CP 1713. But, the City successfully argued that under the Tacoma City Charter, "no vote of the people is required for **utility system** acquisitions unless 'general indebtedness is incurred by the city.'" CP 523. The City further highlighted that the bonds would not be obligations of the general fund, since they were

issued under RCW 39.46.150, *id.*, which states in relevant part:

> The governing body may obligate the local government to set aside and pay into a special fund or funds created under subsection (2) of this section a proportion or a fixed amount of the revenues from the following: . . . or (b) the public utility or system, or an addition or extension to the public utility or system, where the improvements, projects, or facilities financed by the revenue bonds are a portion of the public utility or system; . . .

RCW 39.46.150(3). The trial court agreed, and therefore, the City successfully argued that since the revenue bonds were for a public utility or system, that no vote of the people was required for the bonds to issue. *See* CP 516-17.

In 1998, following the *Taxpayers and Ratepayers* lawsuit, Tacoma Public Utilities' commercial telecommunications services were launched under the brand name Click! Network, as a business unit of Tacoma Power. CP 981. Click! is a sprawling physical plant consisting of a state-of-the-art, carrier-grade, hybrid fiber coaxial telecommunications network offering gigabit speed internet access, Fiber To The Home, and cable modem services to the municipalities of Tacoma, University Place, Fircrest, Lakewood, and Fife, as well as

part of unincorporated Pierce County. *Id.* Click! consists of over 1,400 miles of fiber and cable plant constructed by TPU. *Id.* Click! covers approximately 66% of the homes in Tacoma Power's service area. *Id.* Click! had more than 20,000 wholesale high-speed internet service customers and more than 100 wholesale broadband transport circuits. CP 982.

Prior to the City's transfer of operational control of Click! Network to Rainier Connect, Click!'s internet access rates were approved by the Public Utility Board and the Tacoma City Council, and these rates were published in Title 12 of the Tacoma Municipal Code ("TMC"), which governs utilities. *See*, Title 12 TMC. Then, on March 5, 2019, term sheets for the private operation and use of Click! were presented at a joint study session of the Council and PUB. CP 852. One of the term sheets was submitted by Rainier Connect. *Id.* The Council and PUB directed the Public Utilities Director to execute a letter of agreement with Rainier Connect, which would allow the City to retain ownership of the HFC Network, shift the capital and operating expenses to Rainier Connect, and TPU would

cease to provide wholesale internet access and data transport services (among others) to those in Click!'s service area. *Id.*

On November 5, 2019, the Council passed Resolution Nos. 40467 and 40468. CP 845-73. Resolution No. 40467 determined that Click! and its related assets are not required for continued public utility service, and formally declared Click! and its related assets surplus pursuant to RCW 35.94.040. CP 845-65. Resolution No. 40468 authorized city officials to execute the IRU and APA—renamed the "Click! Business Transaction Agreement" ("BTA")—once conditions precedent to transfer of operational control of Click! in the BTA have been met. CP 866-73; 1815-2023. Resolution No. 40468 did not provide for a municipal election prior to final execution of the BTA. CP 866-73. The City, through TPU, then signed and entered into the BTA with Rainier Connect. CP 1815-2023. No vote of the people was ever held.

Under the BTA, Rainier Connect acquired other assets then used by Click! in the provision of broadband data services referred to as including: equipment used to create and operate the Click! and

deliver services to customers, customer accounts, inventory of spare parts and equipment, vehicles, prepaid items, material contracts, and IP addresses. *Id.* Under the BTA, the Tacoma City Council and the PUB no longer have any right or ability to control or oversee internet rates established by Rainier Connect. *Id.* On April 1, 2020, the City formally transferred operational control of Click! over to Rainier Connect under to the BTA. *Id.*; CP 2025.

III. ARGUMENT

A. Standard of Review; Summary Judgment Standard.

This Court reviews summary judgment decisions *de novo*. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed *de novo* and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant County, Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

Summary judgment is appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to

judgment as a matter of law."' *Walston v. The Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating a material fact. Summary Judgment is appropriate if the nonmoving party fails to do so." *Walston*, 181 Wn.2d at 395-96 (citations omitted). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243, *review denied*, 180 Wn.2d 1011, 325 P.3d 913 (2014).

B. The City's Disposition of Click! is Subject to Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter Based Upon the Plain Language of the Same.

Under the plain language of Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, Click! is a "utility system" subject to the vote requirements of the same.

RCW 35.94.020 outlines the process required for a City to "lease for any term of years or sell and convey any public utility

works, plant, or system owned by it or any part thereof, together with all or any equipment and appurtenances thereof." RCW 35.94.020; *See also*, RCW 35.94.010. RCW 35.94.020 first requires the adoption of a resolution stating the desire to lease or sell the utility, or any part thereof, which resolution must be published for four weeks in the official newspaper of the city. RCW 35.94.020. After two-thirds of the elected members of the legislative authority vote in favor of a resolution making a declaration that it is advisable to accept any bid received, an ordinance accepting the bid and directing the execution of the lease or conveyance must be submitted to the voters of the city for their approval to take effect. RCW 35.94.020. RCW 35.94.020 specifically states, in relevant part:

> The ordinance shall not take effect until it has been submitted to the voters of the city for their approval or rejection at the next general election or at a special election called for that purpose, and a majority of the voters voting thereon have approved it. If approved it shall take effect as soon as the result of the vote is proclaimed by the mayor. If it is so submitted and fails of approval, it shall be rejected and annulled. The mayor shall proclaim the vote as soon as it is properly certified.

RCW 35.94.020.

Section 4.6 of the Tacoma City Charter echoes RCW 35.94.010 and RCW 35.94.020, and states:

> The City shall never sell, lease, or dispose of any utility system, or parts thereof essential to continued effective utility service, unless and until such disposal is approved by a majority vote of the electors voting thereon at a municipal election in the manner provided in this charter and in the laws of this state.

Tacoma City Charter, Section 4.6.

Since "utility system" is not defined under either the City Charter or Chapter 35.94 RCW, application of the standard rules of statutory construction is required. *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998) (to determine meaning of a statute, courts apply general principles of statutory construction); *see also City of Seattle v. Auto Sheet Metal Workers Local 387*, 27 Wn. App. 669, 679, 620 P.2d 119 (1980) (the "[r]ules of statutory construction [are] used in determining [a city] charter's meaning"). Under the rules of statutory construction, "Courts generally accord terms their most plain and ordinary meaning." *Eyman v. McGehee*, 173 Wn. App. 684, 689, 294 P.3d 847

(2013). To determine the ordinary meaning of an undefined term, "courts look to standard English language dictionaries." *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001).

The relevant Merriam-Webster definitions for "utility" include (1) "fitness for some purpose or worth to some end" (2) "something useful or designed for use" or (3)(a)" public utility," (b) (1) "a service (such as light, power, or water) provided by a public utility" and (2) "equipment or a piece of equipment to provide such service or comparable service." *"Utility" Definition*, MERRIAM-WEBSTER.COM.[1] "Public utility" is further defined as "a business organization (such as an electric company) performing a public service and subject to special governmental regulation." "*Public Utility" Definition*, MERRIAM-WEBSTER.COM.[2] "Public service" is further defined as "the business of supplying a commodity (as electricity or gas) or service (as transportation) to any or all

[1] https://www.merriam-webster.com/dictionary/utility (last visited January 7, 2023) (which is the same definition considered by the trial court).
[2] https://www.merriam-webster.com/dictionary/public%20utility (last visited January 7, 2023) (which is the same definition considered by the trial court).

members of a community." *Public Service Definition*, MERRIAM-WEBSTER.COM.[3]

Thus, read together, a public utility is defined as: a business organization performing the business of supplying a commodity or service to any or all members of a community and subject to special governmental regulation. Click! fits squarely within this definition. Click! was a TPU brand and business organization that supplied wholesale high-speed Internet and data transport services to any TPU ratepayer who purchased Click!'s services and was subject to special governmental regulation both at the local and state levels. CP 167-227; 228-239 (detailing Click!'s cable TV and high-speed internet services); CP 280; Chapter 12.13 TMC (listing Click!'s services and regulating rates of same); RCW 54.16.330-.340 (providing authorization for public utility districts to create separate utility systems, to provide telecommunications services like Click!, and containing provisions for petitions to challenge the rates,

[3] https://www.merriam-webster.com/dictionary/public%20service (last visited January 7, 2023) (which is the same definition considered by the trial court).

terms, and conditions of same); RCW 80.01.110 (authorizing utilities and transportation commission to oversee petitions challenging rates, terms, and conditions of wholesale telecommunications services). Therefore, by the plain language of the Tacoma City Charter and Chapter 35.94 RCW, Click! is a public utility system subject to the same, and the trial court erred by concluding otherwise.

C. The Legislative History of RCW 35.94.010 Confirms That Chapter 35.94 RCW Applies, Since RRS § 9512 and *Bremerton Municipal League v. Bremer* Still Control.

With all due respect, the trial court erred most egregiously by wholly refusing to consider RRS § 9512 and the Washington State Supreme Court's decision in *Bremerton Municipal League v. Bremer* when it construed and applied RCW 35.94.010 and RCW 35.94.020. VRP 24 ("The Court: "As I say that created some kind of subterranean law in the State of Washington that is not reflected in this code. People will then have to go back to the original Remmington [*sic*] statute and try and figure out what's still here and

what isn't here.").[4] Contrary to the trial court's decision below, RRS § 9512 still applies and the case of *Bremerton Municipal League v. Bremer* is binding precedent that commanded a different decision from the trial court below.

A review of the history and origin of RCW 35.94.010 reveals that Click! is a utility system envisioned by Chapter 35.94 RCW. As explained below, the text of Remington's Revised Statutes ("RRS") §§ 9512–14, the historical precursor to the modern-day Chapter 35.94 RCW, informs and controls the meaning and application of RCW 35.94.010. As a result, under Chapter 35.94 RCW, as informed by RRS § 9512, Click! is clearly a utility system subject to the vote requirements of RCW 35.94.020.

1. RCW 35.94.010 was Recodified into the Revised Code of Washington in 1951 from RRS § 9512 as Part of the Process of Converting the Previously Existing Laws of the State of Washington into a Single, Revised, Consolidated, and Codified Form.

In 1917, The Washington Legislature enacted House Bill 337,

[4] There is absolutely no basis in law to support the contention that because a statutory provision may be difficult to find it no longer has any legal effect.

entitled "Sale or Lease of Public Utilities Owned by Cities or Towns" ("1917 Law"). *See* CP 1618-19. The 1917 Law was codified in Remington's Revised Statutes at §§ 9512–14. RRS §§ 9512, 9513, and 9514 are the predecessors to the modern-day RCW 35.94.010, .020, and .030.[5] CP 1621-22. RRS § 9512 provided, in relevant part:

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

RRS § 9512 (emphasis supplied); *See* CP 1621. Thus, the text of RRS § 9512 was similar to the current day RCW 35.94.010 – but even broader – as it contained a nonexclusive illustrative list of utilities, which included "telephone [and] telegraph plant[s] and lines" and even "any similar or dissimilar utility or system." *Id.*

In the mid-1940s, the Washington Legislature established and

[5] RCW 35.94.040 and .050 were adopted in 1973 and 1986, respectively.

tasked the State Revision and Recompilation Committee ("Code Committee") with proposing and submitting to the Legislature changes, revisions, and recodifications of the existing laws of the State for the purpose of creating the Revised Code of Washington. *See* CP 1624-1630. As part of the Code Committee's review and revision of the existing laws, in 1946 the Code Committee proposed that RRS § 9512 be codified at RCW 80.12.010, with the following rewritten language:

> A city may lease for any term of years or sell and convey any public utility works, plant, or system owned by it or any part thereof, together with all or any equipment and appurtenances thereof.

CP 1630 (Proposed Revised Code of Washington, Volume 2, Title 46 to End (1946), at 80–47). Proposed RCW 80.12.010 is identical to the current RCW 35.94.010.[6] As clearly indicated in the applicable reviser's notes, the Code Committee's change was "rewritten for brevity;" not a substantive change to the existing law. CP 1627-29 (Reviser's Notes for Volume 2, Revised Code of Washington (1946),

[6] Notably, proposed RCW 80.12.020 is identical to the current RCW 35.94.020.

at 80–7 (stating that RRS § 9512 was "**rewritten for brevity**" CP 1629) (emphasis supplied).

In 1951, the Legislature adopted the Code Committee's proposed changes, revisions, and codifications of the existing laws of the State, and enacted for the first time the Revised Code of Washington. *See* RCW 1.04.010. RRS § 9512 was recodified as RCW 80.48.010, using the Code Committee's proposed language for brevity. RCW 80.48.010; CP 1633. Subsequently, in 1965, RCW 80.48.010 was recodified without amendment to its current location at RCW 35.94.010. *See*, 35.94.010.

Thus, to summarize the history of modern-day RCW 35.94.010: it was adopted first in 1917, editorially rewritten for brevity and re-codified in its current form at RCW 80.48.010 in 1951, and then recodified again without change into RCW 35.94.010 in 1965.

2. The Recodification of RRS § 9512 into the RCW and Associated Revisions of the Provision were Solely for Brevity, and Explicitly Not Intended to Alter Its Meaning.

For two reasons, which the trial court erroneously rejected, the history of current RCW 35.94.010, and specifically the text of the

original RRS § 9512, are critical to correctly interpreting the term "public utility" used in RCW 35.94.010. First, the modification of RRS § 9512 to its current form was done purely to rewrite the statutory language for brevity; not to change its meaning. CP 1629. Second, when the RCW was first adopted in 1951, the Legislature adopted RCW 1.04.020, which provides:

> 1.04.020. Code as evidence of the law--Rule of construction--Effect of amendment
>
> The contents of the Revised Code of Washington…shall establish the laws of this state of a general and permanent nature in effect on January 1, 1951; **except, that nothing herein shall be construed as changing the meaning of any such laws and, as a rule of construction, in case of any omissions or any inconsistency between any of the provisions of the revised code as so supplemented or modified and the laws existing immediately preceding this enactment, the previously existing laws shall control.**

RCW 1.04.020 (emphasis supplied). Thus, the Legislature explicitly provided that the editorial revision and recodification of previously existing laws, such as RRS § 9512, into the RCW would not "chang[e] the meaning of any such laws." RCW 1.04.020. Further, the Legislature explicitly provided that for purposes of statutory

construction, any inconsistency between the formerly existing laws and the amended laws would be resolved in favor of the previously existing laws. *Id.* As a result, RCW 35.94.010's meaning explicitly did not change because of the editorial revision for brevity and recodification from RRS § 9512.

Therefore, the trial court erred by refusing to analyze RRS § 9512 to properly determine the meaning of "public utility" under RCW 35.94.010. *See*, VRP 23 ("The statute changed. The case law that you're talking about is perfectly fine except that it interpreted a statute that was worded far differently from this one."). The extreme risk of this Court affirming the trial court's decision is that it would bestow powers upon the Office of the Code Reviser that are expressly reserved for the Legislature. The Office of the Code Reviser does not have the authority to write and pass laws. Only the Legislature has the power to write and pass laws, and the trial court erred when it ruled that the Office of the Code Reviser also has that fundamental authority.

3. The Inclusion of Telegraph and Telephone Services in RRS § 9512 Demonstrates that Telecommunications

Services, Like Click!, are Public Utilities Under RCW 35.94.010.

As explained above, the text of RRS § 9512 (and particularly the illustrative examples of utilities that were included there), necessarily informs and controls the meaning of RCW 35.94.010. Under the broad language of RRS § 9512, Click! and its provision of broadband internet service is clearly a "similar or dissimilar utility or system" to a "telephone or telegraph plant and lines." RRS § 9512.

As an initial matter, broadband internet, telephone, and telegraph services are all telecommunications services that provide for two-way communication. *See* RCW 80.04.010(27) (defining telecommunications as the "transmission of information by wire…optical cable, electromagnetic, or other similar means."). In many ways, broadband internet is just the modern-day telecommunications evolution of the telegraph and telephone systems that have existed in this country for more than a century. In fact, when the Washington Legislature first adopted the Telecommunications Act in 1985, it removed all previous references to "Telephone" and "Telegraph" in Title 80 RCW and replaced them

with "Telecommunications"— a term which clearly encompasses broadband internet. *See* 1985 Wash. Sess. Laws 1978–79. Thus, broadband internet service is undoubtedly "similar or dissimilar" to telegraph and telephone services.

Even more importantly, and erroneously rejected by the trial court below, Click!'s status as a public utility under RCW 35.94.010, as informed by RRS § 9512, is confirmed by the binding precedent set forth in the Washington State Supreme Court's decision in *Bremerton Municipal League v. Bremer*, 15 Wn.2d 231, 130 P.2d 367 (1942). In *Bremer*, the Supreme Court was faced with the question of whether municipally owned wharves were a public utility subject to the provisions of RRS § 9512. *Bremer*, 15 Wn.2d at 237–39 (1942). Even though none of the illustrative examples of public utilities contained in RRS § 9512 are related to ports, docks, or wharves, the Supreme Court still determined that wharves were public utilities under RRS § 9512. Specifically, the Supreme Court broadly defined utilities subject to the provisions of the statute as follows:

> The appellants point out that the statute specifically names a long list of utilities, but 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.

Bremer, 15 Wn.2d at 237 (1942) (emphasis supplied). Click! easily meets the *Bremer* test for a public utility as the public certainly "has an interest" in Click!' Network's operations. In *Bremer*, after the City of Bremerton had constructed a wharf, the City later leased the wharf and the buildings located on it, along with surrounding harbor areas, to the Bremerton Terminal Company, without a vote of the people. *Id.*, at 232. The validity of the lease was challenged based on the arguments that the City was not the owner of the harbor areas and therefore did not have the authority to lease that area, that wharves are public utilities that cannot be leased without a vote of approval, and that the city was without power to make certain agreements. *Id.*, at 235. The trial court held the lease invalid since the City was not the owner of the harbor area occupied by the wharves. *Id.*, at 235-6. The Supreme Court heard the appeal and agreed with the result reached, but concluded that RRS §§ 9512-9514 controlled the outcome. *Id.*, at 237. "We are of the opinion that these sections of

our statutes provide the only procedure by which the city can lawfully sell or lease municipal wharves." *Id.* The Court went on to explain that even though the statute specifically enumerates a long list of utilities – which did not include wharves or docks – the included items are irrelevant, since the statutes clearly included any kind of utility in whose operation the public has an interest. *Id.* Moreover, in contrast to the wharves in *Bremer*, which were not related to any of the specific examples in the illustrative statutory list, Click!'s provision of telecommunications services is directly related to the specifically enumerated examples of telegraph and telephone systems. Thus, the *Bremer* Court's decision requires Click! to be subject to RRS § 9512 and RCW 35.94.010. Therefore, the trial court erred by deciding that this case is not controlled – or even influenced – by RRS § 9512 and *Bremer*.

D. The City's Own Representations and Other Related Statutes Further Confirm Click! is a Public Utility Subject to Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter.

It is undisputed that prior to the City's desire to dispose of Click! without a vote of the people, the City consistently held Click!

out as public utility. In the case of *City of Tacoma v. The Taxpayers and the Ratepayers of the City of Tacoma*, Pierce County Superior Court Cause No. 96-2-09938-0, the City successfully argued that the City lawfully issued bonds under Ordinance No. 25930 to construct Click! – **because it was a public utility!** CP 510-14.

> Ordinance No. 25930 provided in relevant part:
>
> > Establishment of Telecommunication System. The City hereby creates a separate system of the City's Light Division to be known as the telecommunications system ("the Telecommunications System"). **The public interest, welfare, convenience and necessity require the creation of the Telecommunications System.**

CP 472 (emphasis supplied). In that same Ordinance, the City authorized the issuance and sale of the City's Electric System Revenue Bonds to provide part of the funds **"**. . . necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system." CP 465. In *Taxpayers*, the defendants claimed that a vote of the people was required for the City to incur general indebtedness for Click!, but the City rightly argued that under the Charter, "no vote of the people is

required **for utility system** acquisitions unless 'general indebtedness in incurred by the city.'" CP 523 (emphasis supplied). The City highlighted that the bonds would not be obligations of the general fund since they were issued under RCW 39.46.150. *Id.* RCW 39.46.150(3) states in relevant part:

> The governing body may obligate the local government to set aside and pay into a special fund or funds created under subsection (2) of this section a proportion or a fixed amount of the revenues from the following: . . . or (b) the public utility or system, or an addition or extension to the public utility or system, where the improvements, projects, or facilities financed by the revenue bonds are a portion of the public utility or system; . . . .

RCW 39.46.150. The City of Tacoma successfully argued in 1997 that it had the authority to build a Telecommunications System and to issue bonds for its construction without a vote of the people, since the bonds were revenue bonds to be paid by revenues from the **public utility**; but, now (nearly 30 years later) the City self-servingly argues that Click! is not a public utility.

There can be no dispute that the public has an interest in Click!. In the case of *City of Tacoma v. Comcast Cable Communications,*

LLC, et al, Pierce County Superior Court Cause No. 19-2-06715-8, the City even plead that "Click! Network is a division of Tacoma Power, a division of Tacoma Public Utilities, a department of the City of Tacoma, that provides internet service to the public and cable facilities to other divisions of Tacoma Power." In *Comcast Cable Communications, LLC, et al*, the City claimed *inter alia* that Defendants' insertion of their own cable in Click!'s conduit constituted a gift of public funds and the conversion of public property to private use. The City further averred that the "Click Network Conduit at issue now, and for all relevant times herein stated, has always had 'TPU Telecom," permanently marked on it," and expressly admitted that "the Conduit had been installed for a public benefit."

The City's averments in *Comcast Cable Communications, et al, supra*, are supported by the fact that the City has consistently and continuously labelled and treated Click! as a utility system. As mentioned above, the City relied specifically upon its statutory authorization to create separate systems to provide utility services

in the recitals to the very ordinance that created Click!. CP 2320 (reciting that "WHEREAS, the Ordinance provides that the City may create a separate system as part of the Electric System and pledge that that income of such a separate system be paid unto the Revenue Fund; and WHEREAS RCW 35A.11.020 authorizes the City operate and supply **utility and municipal services**") (emphasis supplied); *See also*, CP 310-320; 465 (City repeatedly characterizing Click! as a telecommunications system). The Light Division of TPU issued and sold public bonds to finance the entire construction of Click!. CP 465-492. Moreover, City regulations regarding Click! were contained within Title 12 of the Tacoma Municipal Code, which governs utilities within the City. The City also collected a 7.5% "utility tax" on Click! activities, including broadband revenue. CP 1051-66 (detailing 7.5% utility tax on broadband revenue and City website explaining that "City Utility tax refers to a tax on public service businesses, including businesses that engage in telecommunications, supply of electricity and natural gas, and solid waste collection."). Finally, until the transfer of

operational control to Rainier Connect, the TPU website displayed Click! prominently under its services, directly next to its other utilities power, rail, and water. CP 229-239.

The City's own prior representations, statements, and admissions confirm that Click! Network is a public utility subject to the vote requirements contained in Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, and the trial court erred when it ruled to the contrary.

Even if the City's own prior representations, admissions, and arguments aren't enough, Courts may also interpret terms in a statute by looking to "other statutes dealing with the same subject matter." *Harmon v. Dept. of Social and Health Services*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998); *see also Morpho Detection, Inc. v. State Dept. of Revenue*, 194 Wn. App. 17, 27, 371 P.3d 101 (2016) (interrelated statutes that relate to the same subject matter must be "read together and harmonized, if possible"). Here, an examination of Washington laws governing public utility districts ("PUD") as well as the treatment of telecommunications businesses like Click! under

other provisions of state law further reinforce the conclusion that Click! is a utility system.

Click! is a "telecommunications company" providing "telecommunications" services under Title 80 RCW, Public Utilities. *See* RCW 54.16.005 (stating that "Telecommunications" has the same meaning as contained in RCW 80.04.010). Under RCW 80.04.010, telecommunications companies are defined as "every…city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public." RCW 80.04.010(28). Telecommunications, in turn, are defined as the "transmission of information by wire…optical cable, electromagnetic, or other similar means." RCW 80.04.010(27). Thus, any city or town that operates or manages any facilities used for transmission of information by wire, optical cable, or other similar means is a telecommunications company. RCW 80.04.010(27), (28). This is exactly what Click! is: a facility for transmission of information by optical cable or similar means that is sold to TPU ratepayers. *See* CP 310-380; 650-55 (identifying the

Click! system as a hybrid fiber coaxial network providing high-speed internet services to the public).

Click!'s status as a telecommunications company providing telecommunications services is significant for two reasons: First, "**[t]elecommunications businesses are public utilities** and are regulated by the state to varying degrees." Wash. AGO 2003 NO. 11 (Wash. A.G.) (emphasis added); *See also*, *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (attorney general opinions "entitled to great weight"); Chapter 80.36 RCW (chapter regulating telecommunications laws, which is contained within Title 80 RCW, Public Utilities); RCW 80.01.110 (*utilities and transportation commission* hears petitions to review rates, terms, and conditions of telecommunications services). Second, PUDs are specifically authorized to "establish a separate utility system…[to] provid[e] wholesale or retail telecommunications services." RCW 54.16.330(3). The City even relied upon this authorization when it first created Click! *See* CP 468. Thus, related statutes: (1) provide authority for PUDs to create separate utility systems, like Click!,

that provide wholesale or retail telecommunications services; and, (2) define telecommunications businesses providing telecommunications services, like Click!, as utilities. Accordingly, the trial court erred by failing to conclude that Click! is a public utility subject to the vote requirements of Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter.

E. To Determine Whether Click! Network is a Public Utility Subject to Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, the Trial Court Should Have Considered Both the Physical Infrastructure and the Services Provided.

Click! is a hybrid fiber coaxial telecommunications system comprised of physical components, which as of 2014 included 1,426 miles of coaxial lines and 369 miles of fiber. CP 1065; 277. This physical infrastructure has allowed the City to make essential telecommunications services available directly to the public[7] to provide the people of Tacoma with essential public services. The Covid-19 pandemic highlighted the essential need for broadband telecommunication services, and even resulted in the creation of

[7] Consistent with 47 USC § 153(53) (defining telecommunications services).

the Governor of Washington's Statewide Broadband Office. RCW 43.330.532. This office was created to "encourage, foster, develop, and improve affordable, quality broadband within the state in order to: (a) drive job creation, promote innovation, improve economic vitality, and expand markets for Washington business; (b) serve the ongoing and growing needs of Washington's education systems, health care systems, public safety systems, transportation systems, industries and businesses, governmental operations, and citizens; and (c) improve broadband accessibility for unserved communities and populations." RCW 43.330.532. The Washington State legislature specifically found:

> **Findings—2019 c 365:** "The legislature finds that:
> (1) Access to broadband is critical to full participation in society and the modern economy;
> (2) Increasing broadband access to unserved areas of the state serves a fundamental governmental purpose and function and provides a public benefit to the citizens of Washington by enabling access to health care, education, and essential services, providing economic opportunities, and enhancing public health and safety;
> (3) Achieving affordable and quality broadband access for all Washingtonians will require additional and sustained investment, research,

local and community participation, and partnerships between private, public, and nonprofit entities;

(4) The federal communications commission has adopted a national broadband plan that includes recommendations directed to federal, state, and local governments, including recommendations to:

(a) Design policies to ensure robust competition and maximize consumer welfare, innovation, and investment;

(b) Ensure efficient allocation and management of assets that the government controls or influences to encourage network upgrades and competitive entry;

(c) Reform current universal service mechanisms to support deployment in high-cost areas, ensuring that low-income Americans can afford broadband, and supporting efforts to boost adoption and utilization; and

(d) Reform laws, policies, standards, and incentives to maximize the benefits of broadband in sectors that government influences significantly, such as public education, health care, and government operations;

(5) Extensive investments have been made by the telecommunications industry and the public sector, as well as policies and programs adopted to provide affordable broadband services throughout the state, that will provide a foundation to build a comprehensive statewide framework for additional actions needed to advance the state's broadband goals; and

(6) Providing additional funding mechanisms to increase broadband access in unserved areas is in the best interest of the state. To that end, this act

> establishes a grant and loan program that will support the extension of broadband infrastructure to unserved areas. To ensure this program primarily serves the public interest, the legislature intends that any grant or loan provided to a private entity under this program must be conditioned on a guarantee that the asset or infrastructure to be developed will be maintained for public use for a period of at least fifteen years.

2019 Ch. 365 § 1. Furthermore, the goals of the Broadband Office confirm that high-speed broadband internet is an important public utility. *See* RCW 43.330.536.

Yet, despite all of this, the trial court simply concluded that Click! is not a public utility subject to the vote requirements of Chapter 35.94 RCW or Section 4.6 of the Tacoma City Charter. VRP 54 ("I'm going to find that – now that the meter issue's been resolved that the Click! system is not a public utility within the definition of 35.94.020 or within section 4.6 of the City Charter, ..."). The City invested tremendous resources to create a state-of-the-art municipal telecommunications system, which system is still providing the exact same services today that it was when it was under the operation and control of the City. Not only is the

physical plant of Click! a public utility for the purposes of Chapter 35.94 RCW and Section 4.6 of the Charter, but so are the services that were (and still are) provided on the actual physical infrastructure. *See* RCW 43.330.532.

F. The Trial Court Erred by Relying on *Issaquah v. Teleprompter Corp.* instead of *Bremerton Municipal League v. Bremer*.

As explained above, the plain language of the statute, the history of RCW 35.94.010, the text of RRS § 9512, the City's own representations, and the *Bremer* decision collectively establish that Click! is a public utility for the purposes of RCW 35.94.010 and Section 4.6 of the City Charter, and the trial court erred by instead relying on the inapposite case of *Issaquah v. Teleprompter Corp.* VRP 48-50 ("And that is I kept going back to this – Issaquah case, you know, City of Issaquah vs. Teleprompter Corp. . . . And my concern was what's the difference there between that and this.").

The Washington Supreme Court's decision in *Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980), briefly addressed whether cable television was a public utility under

different statutes—RCW 35A.80 and RCW 35.92—and concluded that it was not. *See id.* But, the *Issaquah* decision does not control or inform whether Click! is a utility system under the statutory provision at issue in this case (RCW 35.94) or the City Charter.

In *Issaquah*, the Washington Supreme Court analyzed whether a city is authorized to acquire, own, and operate a cable television system within its municipal borders. *Id.*, at 569. The Supreme Court determined that a city was so authorized. *Id.* As part of the Supreme Court's analysis, the Supreme Court analyzed whether cable television was a public utility under RCW 35A.80 and 35.92. *Id.*, at 573–75. Neither party to the case "provided [the Court] with a definition of utility, nor d[id] the parties advance any helpful discussion on the distinguishing characteristics of utilities." *Id.*, at 573–74. Instead, the Supreme Court relied on the fact that counsel for Teleprompter Corp., the party arguing to the Supreme Court that cable television was a utility, had "frequent[ly] assert[ed] at trial that cable television is not a utility." *Id.*, at 574. **Based on**

the assertion of counsel, the Supreme Court determined that cable television was not a utility for the purposes of RCW 35.80 and 35.92. *Id.*, at 574–75; Wash. AGO 2003 NO. 11 (Wash. A.G.), at n. 6 (recognizing that the "*Issaquah* court found that the cable television system was not a utility (based on the representations of the parties before the court)"). Thus, the Supreme Court's holding in *Issaquah* that cable television was not a utility was based virtually exclusively on the assertion of counsel, and therefore lacks any precedential value outside the specific context of that case.

Additionally, the *Issaquah* decision specifically held that "cable television is not a public utility **as contemplated by RCW 35A.80 and 35.92**." *Issaquah*, 93 Wn.2d at 574 (emphasis added). In so holding, the *Issaquah* court noted that the statutes at issue in the case—Chapters 35A.80 and 35.92 RCW—do not "provide a clear definition" of public utility. *Id.* Thus, the *Issaquah* "public utility" analysis was also predicated upon a lack of a definition or test within the relevant statutory scheme. *See id.* Here, unlike the statutes at issue in *Issaquah*, Chapter 35.94 RCW, as informed by RRS §

9512, does contain an illustrative list and test (as set forth by the Supreme Court in *Bremer*) for determining whether a system qualifies as a public utility. RCW 35.94.010; RRS § 9512. The reasoning contained in *Issaquah* is therefore inapposite because RCW 35.94.010, RRS § 9512, and the *Bremer* Court provide specific guidance as to the appropriate meaning of "public utility" in this case.

Moreover, the *Issaquah* decision does not explicitly hold anything with regard to the meaning of "public utility" for the purposes of Chapter 35.94 RCW. *Issaquah*, 93 Wn.2d at 574 (holding that "cable television is not a public utility *as contemplated by RCW 35A.80 and 35.92*" and never citing Chapter 35.94 RCW nor RRS § 9512) (emphasis added). While the *Issaquah* court did not interpret the meaning of "utility" with respect to Chapter 35.94 RCW or RRS § 9512, the *Bremer* Court certainly did. *See Bremer*, 15 Wn.2d at 237–39 (interpreting meaning of "public utility" under RRS § 9512). Thus *Bremer*, not *Issaquah*, is the controlling Supreme Court precedent on the meaning of "public utility" for the purposes

of Chapter 35.94 RCW, and, as explained above, Click! is a "public utility" under the *Bremer* test.

Even if the *Issaquah* decision applied to the definition of public utility in Chapter 35.94 RCW (which it does not) it would apply only to cable television. Cable television only provides for one-way transmission of information, in contrast to telegraph, telephone, and Broadband Internet, each of which provide for two-way communication. Thus, cable television is not as "similar" to the listed utilities under RRS § 9512 as is Broadband Internet service. As a result, even if *Issaquah* required a determination that cable television was not a public utility under Chapter 35.94 RCW, the *Issaquah* decision does not dictate nor inform whether Broadband Internet and other two-way telecommunications services are "similar or dissimilar" to the public utilities listed in RRS § 9512.

Finally, it goes without saying that *Issaquah* did not interpret the City Charter, and therefore any effect the decision might have on whether Click! is a public utility for purposes of state law would

not impact the question of whether Click! is a public utility under the plain language of the City Charter. For all these reasons, the trial court erred by relying on the *Issaquah* to conclude Click! is not considered to be a public utility under Chapter 35.94 RCW and RRS § 9512, much less under the City Charter.

G. While the Trial Court did not Specifically Rule on the Issue, Click! is Not and Cannot Be "Surplus," Resolution No. 40467 is Void, and the City's Declaration of Click! as "Surplus" was Arbitrary and Capricious.

The trial court erred below when it failed to conclude that Click! is not and cannot be "surplus," that the resolution declaring Click! to be "surplus" – Resolution No. 40467 – is void, and that the City's surplus declaration was arbitrary and capricious. To circumvent the public vote requirement contained in RCW 35.94.020, on November 5, 2019, the City passed Resolution No. 40467 ("Surplus Resolution") and formally declared the entirety of Click! and its related assets surplus pursuant to RCW 35.94.040. CP 846-865 (declaring the heart of Click! Network, including the fiber supporting the broadband internet service, its core routers, servers, and other essential equipment to be surplus). The statutory surplus

provision relied on by the City provides, in relevant part:

> (1) Whenever a city shall determine, by resolution of its legislative authority, that any lands, property, or equipment originally acquired for public utility purposes is **surplus to the city's needs *and* is not required for providing continued public utility service,** then such legislative authority by resolution and after a public hearing may cause such lands, property, or equipment to be leased, sold, or conveyed.
> (2) The provisions of RCW 35.94.020…shall not apply to dispositions authorized by this section.

RCW 35.94.040 (emphasis supplied). Thus, the municipal vote provision of RCW 35.94.020 applies **unless** the City properly and legally determines by resolution that Click! is surplus under RCW 35.94.040.[8] *Id.*

A municipality does not have limitless discretion to declare a utility surplus. *See, Marino Property Co. v. Port Com'rs of Port of Seattle*, 97 Wn.2d 307, 317, 644 P.2d 1181 (1982) (court's properly review surplus declarations to determine whether they are "arbitrary or capricious or contrary to law"); *See also, South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts

[8] Significantly, as discussed further below, the municipal vote provision contained in the City Charter § 4.6 is not affected by a surplus declaration under RCW 35.94.040, regardless of the legality of such declaration.

without authority are *ultra vires*). Rather, a municipality's surplus declaration is void if it is (1) ultra vires; (2) contrary to law; or (3) arbitrary and capricious. *Marino*, 97 Wn.2d at 317; *South Tacoma Way*, 169 Wn.2d at 123.

As explained below, the City's surplus of Click! is ultra vires and contrary to law because RCW 35.94.040 does not provide cities authority to surplus entire operating utility systems like Click!. In addition, the City's determination that Click! is no longer needed for public utility service is arbitrary and capricious as Click! continues to provide the exact same public utility service despite having now been transferred to Rainier Connect (a private company). Thus, the City did not have authority to declare Click! surplus in Resolution No. 40467, and the trial court erred by failing to find the Surplus Resolution void.

1. The City Cannot Avoid the Public Vote Requirement in the City Charter Using the Surplus Provision of RCW 35.94.040.

As a preliminary matter, the surplus provision of RCW 35.94.040, even if legally exercised, only prevents the need for a

municipal election as otherwise required under RCW 35.94.020. *See* RCW 35.94.040(2) ("The provisions of RCW 35.94.020…shall not apply to dispositions authorized by this section"). A declaration of surplus under RCW 35.94.040, however, does not obviate the public vote requirement in the City Charter. Thus, because Click! is a "utility system" or "essential part thereof" for purposes of the City Charter, the City must hold a municipal election prior to sale, lease, or disposal of Click! — regardless of whether the City properly declares Click! surplus pursuant to RCW 35.94.040. In other words, even if the Surplus Resolution were lawful and proper, which it was not, City Charter § 4.6 and its requirement for a vote of the people still applied.

2. The Surplus Resolution was Void Because the Surplus Provisions of RCW 35.94.040 Do Not Provide a City With Power to Declare an Entire Utility System Surplus.

When the Washington State Legislature adopted the surplus provision, the Legislature granted cities the power to dispose of property that had become inadequate, obsolete, and was no longer needed for provision of the utility service in the future without the necessity of a municipal election—consistent with the analogous

surplus power already enjoyed by PUDs under Chapter 54.16 RCW. The Legislature did not intend to grant municipalities the power to surplus and divest themselves of entire utility systems without a municipal election, and thereby render the municipal vote requirement in RCW 35.94.020 meaningless. Therefore, the City's decision to declare Click! surplus is both ultra vires and contrary to law, and the Surplus Resolution should be declared void. *South Tacoma Way*, 169 Wn.2d at 123; *Marino*, 97 Wn.2d at 317.

In order to properly interpret the surplus provision contained in RCW 35.94.040, it must be viewed in light of the statutory scheme of which it is a part. *See Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–11, 43 P.3d 4 (2002). Prior to enaction of RCW 35.94.040 in 1973, cities could not, under any circumstances, lease or sell *any part* of a utility system without a municipal election under RCW 35.94.020—language which required a municipal election to approve sale of even broken down and useless utility service trucks, outdated and no longer operational transformers, or parcels of land originally acquired for a utility that had never, and would never, be

utilized for utility purposes. *See* RCW 35.94.020. Thus, RCW 35.94.040 was enacted to allow cities to more easily dispose of property that was unserviceable, obsolete, and not required for the continued provision of utility service—*i.e.* surplus. Indeed, the City of Tacoma even admitted this fact during the consideration of the House and Senate bills that led to the adoption of RCW 35.94.040. CP 741-804 (containing a 1973 letter from the City of Tacoma Director of Public Utilities to the Legislature stating the same).

But the surplus provision of RCW 35.94.040 was clearly not intended to empower cities to dispose of entire utility systems such as Click! without a municipal election—it was merely to allow disposition of property held by existing utilities that would no longer be necessary for the continued provision of a utility service. To hold otherwise would frustrate the entire purpose of the statutory scheme and render meaningless the public vote requirement in RCW 35.94.020, because a city could simply surplus any and all of its utility systems under RCW 35.94.040 by simply calling it "surplus," and then never have to hold a municipal election under RCW 35.94.020

prior to leasing, selling, or disposing of the utility systems. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous). Put another way, if cities had the power to surplus an entire utility system under RCW 35.94.040, then there is no set of circumstances where a city would ever have to hold a public vote prior to lease, sale, or disposal of a utility system or part thereof. Such an expansive reading of the surplus provision would swallow entirely the municipal vote requirement based upon the whims of those in power, and such an interpretation is wholly inconsistent with the foundational principles of statutory construction. *See id.*

Significantly, the legislative history surrounding the promulgation of RCW 35.94.040 strongly reinforces the interpretation that the surplus provision cannot be used to surplus an entire utility system. *See State v. Evans*, 177 Wn.2d 186, 199, 298 P.3d 724 (2013) (any ambiguity in meaning of statute may be resolved by resort to legislative history in order to determine legislative intent).

The legislative history of the surplus provision almost exclusively consists of letters and statements offered by the bill's principal proponent, the City of Tacoma (largely by Al Brenninger, of the City of Tacoma Public Utilities). *See* CP 759-770; *See also Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 104–05, 829 P.2d 746 (1992) (court will consider all materials that are sufficiently probative of legislative intent in determining the same). The City of Tacoma wrote the original letters in support of the bill to both the House of Representatives and the Senate, in March of 1973. CP 748-751; 769-770; 794-795. Mr. Brenninger of TPU also presented and explained the bill on the Senate floor, while Paul J. Nolan, Deputy City Attorney for Tacoma Public Utilities, presented and explained the bill on the floor of the House. CP 758-760, 797-799. The bill was passed largely without amendment by the legislature that same session. CP 804. TPU's letter in support of the bill stated, in relevant part:

> Sections 35.94.020 and .030 require a formalized procedure [for disposal of public utility property] with a confirming approval of the voters on a ballot proposition. **Such procedure is, of course, desirable where in fact all or an integral part of an operating utility is to be so disposed of.** However, the

> procedure is completely impractical for example in the disposition of property and equipment, land, substations, and other parts and segments of facilities no longer required for utility service…Chapter 35.94 RCW as now enacted unfortunately prevents this.
>
> The proposed amendment would accomplish greater procedural flexibility in such transactions **without repealing the formalized procedures in the proper situations…[t]he flexibility is reasonably consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180**, and investor-owned utilities.

CP 748-751 (emphasis supplied). Thus, it is evident that the bill was not intended to allow the surplus provision to "repeal[] the formalized [public vote] procedures in the proper situations…where in fact all or an integral part of an operating utility" is to be disposed of, but instead to provide flexibility to cities in surplussing property "consistent with that long enjoyed by Public Utility Districts under RCW 54.16.180." *Id.*; *See also,* CP 797-799 (Tacoma City Attorney stating to the House that bill would "allow municipal utility districts the same privileges…as other public and private utility districts."). In 1973, RCW 54.16.180 provided that a PUD:

> May sell and convey, lease, or otherwise dispose of all or any part of its works, plants, systems, utilities and

> properties, after proceedings and approval by the voters of the district, as provided for the lease or disposition of like properties and facilities owned by cities and towns. *Provided*…That a district may sell, convey, lease or otherwise dispose of to any person or 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 operation of the system and which is no longer necessary, material to, and useful in such operations, without the approval of the voters.**

1963 Wash. Sess. Laws, Ch. 196 (emphasis supplied); *See also* RCW 54.16.180(1), (2)(a) (containing modern day language almost identical to provision existing in 1973). In other words, when the Legislature enacted the surplus provision, it granted cities the power to surplus portions and property of the utility that were unserviceable, obsolete, and no longer necessary and useful in the operation of the utility, consistent with the existing power of PUDs to do the same. *See* 1963 Wash. Sess. Laws, Ch. 196. The Legislature did not, however, grant cities the power to surplus all or an integral part of an operating utility like Click!. As a result, the Surplus Resolution is ultra vires and contrary to law, because it attempts to exercise a surplus power that the Legislature never granted the City.

The statutory scheme of Chapter 35.94 RCW—properly construed and supported by the legislative history of the surplus provision—demonstrates that municipalities cannot legally surplus entire utility systems. Therefore, the Surplus Resolution declaring the entirety of Click! surplus is *ultra vires* and contrary to law, and void as a matter of law. *South Tacoma Way*, 169 Wn.2d at 123; *Marino*, 97 Wn.2d at 317.

3. Click! is Required for Continued Public Utility Service, Thus the Surplus Resolution Declaring Click! to be Surplus is Arbitrary and Capricious.

Under RCW 35.94.040, a city must determine in its declaration of surplus both that the property to be surplussed is (1) "surplus to the city's needs," **and** (2) "**not required for providing continued public utility service**." RCW 35.94.040 (emphasis supplied). The City's determination in the Surplus Resolution that Click! is not required for providing continued public utility service is clearly arbitrary and capricious, because Click! is itself a utility system, and Click! and all the equipment associated with Click! continues to be a utility system, provides the exact same utility services to the public as

it always has, and performs the same functions notwithstanding the transfer of operational control to Rainier Connect. As a result, the City's determination to surplus Click! was arbitrary and capricious, and solely designed to avoid submitting to the voters the question of whether Click! should be handed over to a private entity. *Marino*, 97 Wn.2d at 317.

An examination of typical surplus declarations in the public utility context is helpful for framing the purpose of RCW 35.94.040, and analyzing whether utility property is required for providing continued public utility service. Typically, municipalities surplus a used truck previously used in conjunction with the utility, or a weedwhacker previously used to maintain utility facilities, or an old transformer no longer to be used in conjunction with the utility. *See, e.g.,* CP 1636-1643 (City of Duvall surplus declaration). Used trucks, weedwhackers, and an old transformer have two important characteristics in common: they are equipment and/or pieces of a utility system, and after surplus they will no longer be used in support of continued provision of a utility service.

In contrast, Click! is a utility system that provides the utility service of broadband internet access to the public, cost over $200 million in ratepayer resources to construct, and provides services to over 35,000 unique customer accounts. Click! still provided the same services to the public, the City, and TPU that it did when it was first created at the time it was declared to be "surplus." CP 288-290 (ordinance creating Click! noting that in addition to cable television and broadband internet services, the System was created for "revenue diversification" for Tacoma Power and to promote "economic development" and provide data transport). Unlike a truck that used to service electrical utility customers but now after surplus will be used for completely different purposes, all the property, equipment, and appurtenances of Click! continues to be used in support of Click!. A Click! utility truck, after surplus and sale to Rainier Connect, continues to be a Click! utility truck.

Indeed, Click! as a whole continues to be a utility system despite its lease to Rainier Connect, because Rainier Connect continues to use Click! assets to provide broadband internet and

telecommunications services as a public utility. *See Inland Empire Rural Electrification, Inc. v. Dept. of Public Service of Washington*, 199 Wn. 527, 537–38, 92 P.2d 258 (1939) (determination of whether a service is a public utility does not hinge on whether provider of that service is public or private, but rather on whether the service is designed for public use by the public as a class). Thus, not only is Click! "required for providing continued public utility service," it actually continues to provide the exact same public utility service today.

Rather than surplussing property which will no longer provide utility functions in the future or will no longer provide support for public utility purposes as contemplated by RCW 35.94.040, Click! and its related assets continue to do both. As a result, the City's Surplus Resolution should be declared void, since the City's determination that Click! is not required for continuing public utility service is arbitrary and capricious.

H. While the Trial Court did not Specifically Rule on the Issue, the City Should be Estopped from Now Arguing that Click! is Not a Public Utility.

For all the reasons set forth in Section D, above (highlighting

the many instances and legal proceedings in which the City previously argued that Click! is a public utility system), the trial court erred by not concluding the City should be equitably estopped from arguing Click! is not a public utility.

A party should be held to representations made or positions assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Kramarevcky v. Department of Soc. & Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The elements of equitable estoppel are: (i) an admission, statement, or act inconsistent with a claim afterwards asserted, (ii) action by another in reasonable reliance on that act, statement, or admission, and (iii) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). All of these elements are satisfied in this case.

The City consistently represented to the public and to the courts that Click! was a public utility. CP 229-239; 310-320; 465-492;

510-514; 523; 1051-1066; 2320. Appellants, and the people of the City of Tacoma reasonably relied on these representations and the actions taken by the City, and will suffer the irreparable loss of their right to vote on the disposition of Click! if the City is allowed to now contradict its prior statements and actions with regard to Click!. Thus, the trial court erred when it allowed the City to argue that Click! is not a public utility subject to the vote requirements in Chapter 35.94 RCW and the City Charter.

I. The Trial Court Erred Below by Failing to Consider the Facts and All Reasonable Inferences in a Light Most Favorable to the Nonmoving Parties.

Even though the record below was replete with facts evidencing that Click! is a public utility subject to the vote requirements set forth in Chapter 35.94 RCW and Section 4.6 of the Tacoma City Charter, the trial court still ruled that Click! is not a public utility. VRP 54-55.

In reviewing a summary judgment, the appellate court must review material submitted for and against a motion for summary judgment in a light most favorable to the nonmoving party. *Reese v.*

Sears, Roebuck & Co., 107 Wn.2d 563, 567, 731 P.2d 497 (1987). Thus, this Court is required to review the record before the trial court in a light most favorable to the Appellants. While the question of whether Click! is a public utility subject to the vote requirements in RCW 35.94.020 and Section 4.6 of the City Charter is a legal question reviewed *de novo*, the answer to this question must necessarily be informed by the facts in the record. *See*, *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). The facts in the record clearly support Appellants' contention that Click! is a public utility. *See e.g.,* CP 167-2025; 2210-2394; 2395-2580; 2637-2638. Accordingly, the trial court erred by failing to consider the factual record and all reasonable inferences drawn therefrom in a light most favorable to the Appellants when granting the City's motion for summary judgment. Respectfully, Appellants urge this Court not to make the same mistake.

IV. CONCLUSION

Click! is and always has been a most important public utility. If this Court considers the legislative history of Chapter 35.94 RCW

and the Supreme Court's decision in *Bremer*, then the Court will quickly realize that Click! is categorically a public utility subject to the same. The Appellants simply ask this Court to give them and the voting public an opportunity to participate in the City's decision to hand this important public utility over to a private company, which is their clear legal right under RCW 35.94.020 and Section 4.6 of the Tacoma City Charter.

For all of the foregoing reasons, Appellant Anderson respectfully requests this honorable Court: (i) hold that Click! is a public utility subject to the vote requirements contained in RCW 35.94.020 and Section 4.6 of the Tacoma City Charter; (ii) enter judgment for the Appellants; and (iii) remand this case to the trial court for the limited purpose of overseeing a municipal election on the question of whether the City has the authority to lease Click! to a private company.

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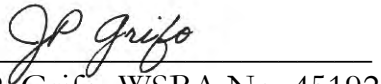
RESPECTFULLY SUBMITTED:

The Law Office of James P. Grifo, LLC



James P. Grifo, WSBA No. 45192
Attorney for Appellant Anderson

CERTIFICATION

The undersigned hereby certifies that the foregoing instrument contains 11,925 words in accordance with RAP 18.17(b).

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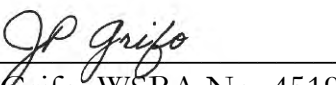

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CERTIFICATE OF SERVICE

I, James P. Grifo, certify under penalty of perjury under the laws of the State of Washington, that on the date and manner indicated below, I caused a true and correct copy of the Opening Brief of Appellant Christopher Anderson to be served on the following individuals:

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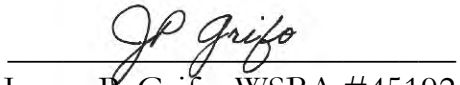

James P. Grifo, WSBA #45192

APPENDIX A

deeds or instruments of conveyance; and any such sale or agreement of sale heretofore made or attempted to be made as aforesaid may be completed by the proper officers of such city or town with the same effect as if all the proceedings heretofore had and taken were had and taken after the passage of this act. [L. '07, p. 167, § 3.]

"Act" in this section refers to §§ 9509—9511.

§ 9512. Sale or Lease of Public Utilities.

It is and shall be lawful for any city or town in this state now or hereafter owning any water works, gasworks, electric light and power plant, steam plant, street railway line, street railway plant, telephone or telegraph plant and lines, or any system embracing all or any one or more of such works or plants or any similar or dissimilar utility or system, to lease for any term of years or to sell and convey the same or any part thereof, with the equipment and appurtenances, in the manner hereinafter prescribed. [L. '17, p. 573, § 1.]

§ 9513. Resolutions Proposing Sale or Lease—Notice—Bids—Referendum.

The legislative authority of such city or town, if it deems it advisable to lease or sell such works, plant or system or any part of the same, or any similar or dissimilar utility or system, shall adopt a resolution stating whether it desires to lease or sell the same. If it desires to lease, the resolution shall state the general terms and conditions of such lease, but not the rent. If it desires to sell the general terms of sale shall be stated, but not the price. The resolution shall direct the city or town clerk, or other proper official, to publish such resolution not less than once a week for four weeks in the official newspaper of the city or town if there be such an official newspaper, or if there be none then in any newspaper published in such city or town, or if there be none then in any newspaper published in the county in which such city or town is located, together with a notice calling for sealed bids to be filed with such clerk or other proper official not later than a certain time, accompanied by a certified check payable to the order of such city or town, for such amount as the resolution shall require, or a deposit of a like sum in money. Each bid shall state that the bidder agrees that if his bid be accepted and he fails to comply therewith within the time hereinafter specified, such check or deposit shall be forfeited to the city or town. If bids for a lease be called for bidders shall bid the amount to be paid as the rent for each year of the term of the lease. If bids for a sale and conveyance be called for the bids shall state the price offered. The legislative authority of the city or town shall have the right to reject any or all bids and to accept any bid which it deems best. At the first meeting of the legislative authority of the city or town held after the expiration of the time fixed for receiving bids, or at some later meeting if such legislative authority so decides, the bids shall be considered. In order for such legislative authority to declare it advisable to accept any bid it shall be necessary for two-thirds of all the members elected to such legislative authority to vote in favor of a resolution making such declaration. If such resolution be so adopted it shall be necessary, in order that such bid be accepted, to enact an ordinance accepting such bid and directing

APPENDIX B

130 P.2d 367

15 Wn.2d 231

BREMERTON MUNICIPAL LEAGUE
v.
BREMER et al.

No. 28589.

Supreme Court of Washington

October 27, 1942

Department 1.

Taxpayers' suit by Bremerton Municipal League against Sophia Bremer, a widow, and others, to annul a lease. Decree for plaintiff, and defendants appeal.

Affirmed as modified.

Appeal from Superior Court, Kitsap County; Roger J. Meakim, judge. [130 P.2d 368]

Hulbert, Helsell & Bettens and Paul Fetterman, all of Seattle, and Ralph Purves and Marion Garland, both of Bremerton, for appellants.

Bryan & Arthur, of Bremerton, for respondent.

ROBINSON, Chief Justice.

This is a taxpayers' suit to annul a lease of two street ends in the city of Bremerton, with [15 Wn.2d 232] the harbor areas in front of and adjacent thereto, and to restrain all of the parties defendant from carrying out its provisions. The relief prayed for was decreed by the trial court, and the defendants appeal from the decree.

The two streets involved, Front and Second, did not originally extend across the tide lands to the harbor area. The intervening tide lands were acquired by the city about 1913; in the one case, by condemnation (*In re Bremerton,* 73 Wash. 565, 132 P. 240); in the other, by purchase. In 1914, in order to assist the city to establish a municipal wharf, the board of state land commissioners filed a supplemental plat of Bremerton tide lands. On this is shown the outline of what became the municipal wharf of the city of Bremerton at the foot of Front street, lying within a tract of harbor area of 250 feet frontage and extending to the outer harbor line a distance of 335 feet. This area is designated on the plat 'Public Place.' Flanking the Public Place on each side is an area 335 feet in depth, 65 feet in width inshore, and 150 feet wide at the outer harbor line. Each of these areas is designated 'Waterway.'

For many years after the construction of the municipal wharf, the Puget Sound Navigation Company, or its predecessors or affiliates, used this wharf for the transportation, by boats and ferries, of passengers and freight between Seattle and Bremerton, and it was used by smaller transportation companies as a transportation facility in carrying on other commerce by water.

In 1937, Sophia Bremer leased harbor area adjoining the southerly of the waterways, above mentioned, and between it and the United States Navy Yard, and assigned the lease to the Bremerton Terminal Company, a corporation, of which she owns all the shares, except [15 Wn.2d 233] two owned by her children. On this harbor area, the terminal company constructed a modern wharf, dock, and ferry landing. The Puget Sound Navigation Company and its affiliates transferred their operations to this wharf, it is said, in 1937 or 1938. We think, however, it must have been well along in 1938, since the evidence shows that the revenue of the municipal wharf during that year was $14,006.11, and in 1939 amounted to but $3,011.51.

After the navigation company transferred its business to the new Bremer wharf, the main building on the municipal wharf was rented for various purposes. A part of the main floor was rented to a grocery company, a portion of the second floor to a dancing school, another portion as a rifle range, and a portion of the lower floor for lumber storage. However, several small vessels have continuously used the wharf as a

landing place, paying small monthly sums for the privilege. A freight boat regularly paid wharfage to the city, and the city kept a wharfinger in charge. As we have above stated, the revenue of the wharf in 1939 was but $3,011.51. In 1940, it was $5,107.93, and of this amount $1,994 was wharfage.

In the lease involved in this action, executed on February 19, 1941, the city of Bremerton is lessor, the Bremerton Terminal Company, lessee, and Sophia Bremer is designated as 'Third Party.' By the terms of the instrument, the city, pursuant to a resolution and ordinance, undertakes to lease to the terminal company, for an eleven-year period, (1) that portion of Front street above the inner harbor line which is used as an approach to the municipal wharf; (2) that part of the harbor area marked 'Public Place,' occupied by the municipal wharf, the wharf itself, and the buildings thereon; (3) all harbor area included in a lease made [15 Wn.2d 234] by the state to the city in 1932, and numbered 977 in the land commissioner's office, which lease covers a portion of the northerly of the two waterways, hereinBefore mentioned as flanking Public Place; (4) all harbor area included in a lease from the Port of Bremerton to the city of Bremerton, made in 1932, and so ambiguous in its description that the parties to this action are in hopeless conflict as to what area it covers; also similar approaches to the Second street wharf and portions of harbor area in front of it.

The lease provides for a rental of $200 per month during the first five years and that the rental shall be readjusted at the [130 P.2d 369] end of each five year period by mutual agreement, or, failing agreement, by arbitration.

The lease provides that the lessee shall have the right to remodel the wharves and buildings thereon and maintain and operate them as public wharves, subject to regulation by such authorities as are by law authorized to regulate such utilities. It is further provided that, when the wharves, buildings, etc., have been repaired, they shall be kept in good repair and shall revert to the lessor at the expiration of the lease.

The lease also provides: 'First Party hereby agrees that it will not, during the term of this agreement, or upon expiration thereof, make, or cause to be made, any application to the State of Washington or to the Port of Bremerton, for a lease of any premises upon which Second and Third parties, or either of them, now have a lease from the State of Washington.'

The 'Third Party' (Sophia Bremer) agrees, in paragraphs 11 and 12, that she will, within one year from the date of the lease, improve two large areas of nearby upland, and during the remainder of the lease [15 Wn.2d 235] maintain them as free parking lots; and paragraph 19 reads as follows:

> 'It is further agreed that should the amount of rental payable by Second Party to First Party for the premises leased hereby be at any time increased, that then, and in such event, First Party shall pay to Third Party, as additional consideration for the agreements contained in paragraphs 11 and 12 hereof [re parking lots] on the 1st day of each and every month during said lease, an amount equal to the amount of monthly increase in such rental.'

Respondent contended in the trial court, and contends here, that the lease is invalid on three principal grounds: (1) that the city is not the owner of the harbor area occupied by the two wharves, and that the city, therefore, has no power to lease this area; (2) that the wharves are public utilities which the city cannot lease without complying with the provisions of Chapter 137, Laws of 1917 (Rem.Rev.Stat., §§ 9512-9514), authorizing cities to sell or lease their public utilities, but requiring them to advertise for bids and submit the proposition to lease to the voters of the city for their approval; and (3) that the lease contains agreement which the city had no power to make, namely: (a) that the city would not, during the term of the lease or upon the expiration thereof, make or cause to be made any application for a lease of any premises upon

which the lessee or Sophia Bremer now has a lease from the state; (b) that should the rental be increased at any time during the term of the lease, the city shall pay, as a consideration for the maintenance of the free parking lots, an amount equal to the amount by which the rent was so increased.

The trial court held that the lease was invalid on the ground that the city was not the owner of the harbor area occupied by the wharves, and that the city [15 Wn.2d 236] was without power to lease this area. In an oral opinion, the court stated:

'So then we have a street which, after you pass the outer edge of the tidelands, depends for its quality on what came from the State. The legal title to that land beyond the outer edge of the tidelands has always been in the State, and the only reason we say it is a street end, if that is correct, is because it is virtually a continuation of the upland street, but the title rests somewhere else. * * * Now, there is a difference between the quality of ownership the City has in the outer end of that street and in the inner end.'

In the first paragraph of its decree, the trial court held the ordinance authorizing the lease and the lease itself null and void; in the second paragraph, it enjoined the defendants and all persons in interest from proceeding further under the terms of the lease. The decree continues as follows:

'It is Further Ordered and Adjudged that the area between the government meander line and the outer harbor line and between the prolongations of the side lines of Second Street across the harbor area, and the area between the government meander line and the outer harbor line and between the prolongations of the side lines of Front Street across said harbor area, and including also all Public Place No. 1 in front of said Front Street, be and said areas are hereby declared to be public streets, extended and dedicated to the use of the public as such, and are forever reserved from lease or sale.'

We agree with the result reached. We, however, feel that the adjudication made in the last paragraph of the decree, that is, in the paragraph just quoted, is not necessary to the decision, and that it should be for that reason eliminated. We herein express no opinion as to whether [130 P.2d 370.] the areas involved are public streets or whether they are for the or any reason forever reserved from lease or sale.

[15 Wn.2d 237] We further think it unnecessary to discuss any of the objections made by the respondent to the validity of the lease, other than that rested upon the provisions of Chapter 137, Laws of 1917, p. 573, Rem.Rev.Stat., §§ 9512-9514. We are of the opinion that these sections of our statutes provide the only procedure by which the city can lawfully sell or lease municipal wharves. Section 9512 provides as follows:

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

The appellants point out that the statute specifically names a long list of utilities, but 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.

The appellants urge that the wharves had been abandoned. As to the Second street wharf, this seems to be true. We have said little concerning that property in this opinion because we have assumed that, unless the lease is valid as to the Front street wharf, the whole project must fail. As we read the record, the Front street wharf was not abandoned--or if so, only in anticipation

of making the lease in question, for the ordinance approving the lease was passed on first reading by the city commission on January 18, 1941. As has been already stated, the revenue from the municipal wharf at the foot of Front street for the year 1940 [15 Wn.2d 238] was $5,107.93, an increase of more than $2,000 over the preceding year, and of the $5,107.93, the sum of $1,994 was wharfage fees; and, although a public utility may, in some circumstances, be abandoned, *State ex rel. Howard v. Seattle,* 154 Wash. 475, 282 P. 829; *Woody v. Port of Seattle,* 118 Wash. 163, 203 P. 59, it may well be doubted whether an abandonment would be approved which has the appearance of having been made to circumvent the provisions of sections 9512-9514, inclusive, of the statutes.

The appellants rely strongly--more strongly, we think, than the case warrants--upon *City of Seattle v. Pacific States Lumber Co.,* 166 Wash. 517, 7 P.2d 967. That action was brought to prevent the execution of a contract disposing of timber located on the Cedar river watershed--the contract not having been submitted to the voters of Seattle in accordance with the provisions of §§ 9512-9514, Rem.Rev.Stat. In holding that the vote of the people was not required, this court held that the timber '* * * happened to be standing on lands embraced in the water system and was merely an incident to but not a part of the water system * * *.' 166 Wash. page 529, 7 P.2d page 971.

It reiterated that finding on page 530 of the opinion in 166 Wash., on page 972 of 7 P.2d, in these words: 'In view of our determination that the standing timber was not a part of the municipal water system, but was merely incidental thereto, * * *.'

Clearly, we can arrive at no similar determination in this case. The city is attempting to lease the entire utility, not something merely incidental thereto, and it has even included in the lease a provision tending to disable itself from acquiring other suitable wharf sites, and has further agreed that, if the monthly rental be raised at the end of a five-year period, pursuant to the [15 Wn.2d 239] provisions of Rem.Rev.Stat. § 9070, it will monthly pay an amount equivalent to the increase to the 'Third Party,' Sophia Bremer, the alter ego of the lessee, for the use of her parking lots.

The decree appealed from is modified by striking therefrom the paragraph hereinabove quoted adjudicating the title to the harbor area adjacent to Front and Second streets, and, as so modified, the decree will stand affirmed.

MILLARD, STEINERT, and DRIVER, JJ., concur.

MAIN, J., not participating.

THE LAW OFFICE OF JAMES P. GRIFO, LLC

January 30, 2023 - 11:31 AM

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