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

MITCHELL SHOOK,

Plaintiff Pro Se

v.

CITY OF TACOMA

Defendant

No. 19-2-07135-0

PLAINTIFF'S MOTION FOR PEREMPTORY WRIT OF PROHIBITION
or PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. NATURE OF THIS MOTION 1

III. RELIEF REQUESTED 4

IV. STATEMENT OF FACTS..... 4

V. STATEMENT OF THE ISSUE 10

VI. EVIDENCE RELIED UPON 10

VII. LEGAL AUTHORITY AND ARGUMENT 10

VIII. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Brower v. Charles, 82 Wn. App. 53, 59, 914 P.2d 1202 (1996) 12

Kreidler v. Eikenberry, 111 Wn.2d 828, 838, 766 P.2d 438 (1989)..... 12

Skagit Cty. Public Hosp. Dist. No. 304 v. Skagit Cty. Public Hosp. Dist. No. 1,
177 Wn.2d 718, 730, 305 P.3d 1079 (2013) 12

Kucera v. DOT, 140 Wn.2d 200, 209 (2000) 14

Statutes and Regulations

RCW 7.16.29010

RCW 7.16.30011

1	RCW 7.16.310	12
2	RCW 7.16.190	12
3	RCW 7.16.320	12
4	RCW 35.94.020	14
5		
6		
7	Tacoma City Charter and Municipal Code	
8	City Charter §4.3 Rates	7
9	City Charter §4.6 Disposal of Utility Properties	3, 12, 13, 14
10	TMC Title 12	7
11		
12		
13	Tacoma Ordinances and Resolutions	
14	Amended Resolution U-10828 (2015) (Shook Dec., Ex. 20)	2
15	Utility Board Amended Substitute Res. No U-9258 (1997) (Shook Dec., Ex. 1)	4
16	Ordinance No. 25930 (1996) (Shook Dec., Ex. 2)	4
17	Resolution No. 33668 (1997) (Shook Dec., Ex 1)	4
18		
19	Amended Council Resolution NO.39347 (2015) (Shook Dec., Ex. 11)	9
20	Amended Resolution U-10879 (2016) (Shook Dec., Ex. 7)	7, 9
21		
22	Other	
23		
24	USDA Broadband Opportunity Council's Report Expanding Broadband Deployment -August 20, 2015 (Pritzker and Vilsak)	9
25	IRU is a Lease -Article by Randy Lowe, Davis Wright Tremaine LLP Dec. 17 2013	9
26		
27	Community-Based Broadband Solutions the Executive Office of the President of The United States (2015)	7, 8

1 **I. INTRODUCTION**

2
3 This lawsuit is being brought to prevent the sale, lease and/or disposal of
4 Click! Network, the City of Tacoma’s municipal broadband system (the “System”).
5 Constructed, owned and operated by Tacoma Public Utilities¹ for the “public
6 interest, welfare, convenience and necessity”, the System has been in continuous
7 operation since 1999. It provides benefits for utility customers inside and outside
8 City limits. (Shook Declaration, Ex. 2 p.5).² Ex. 11 p.1.

9
10 There is need for immediate relief because plans are presently being made,
11 and contracts drafted, to lay-off the Tacoma Public Utility employees responsible
12 for operating the System, transfer ownership of customer accounts and dispose of
13 Tacoma Public Utilities’ (and the public’s) interest in the System **-without a vote**
14 **of the people** -in clear violation of the Tacoma City Charter. Ex. 3.

15
16 Indeed, Tacoma Public Utilities’ proprietary interest in the municipal
17 broadband System, **along with all public oversight and control in setting**
18 **rates for the System**, is scheduled to be handed over to a private company, with
19 no regard or allowance for the public’s right to a vote on this important public
20 policy issue.
21
22
23
24

25 _____
26 ¹ Tacoma Public Utilities is a department of the City of Tacoma.

27 ² All exhibits cited in this motion are attached to the Declaration of Mitchell Shook submitted
herewith. Page citations refer to a document’s internal page numbers or, if the document’s pages
are not numbered internally, to the ending digits of the Bates numbers added as part of the
document production process.

II. NATURE OF THIS MOTION

1
2 On April 2, 2019, the Director of Tacoma Public Utilities (“TPU”) signed a
3 “term sheet” with a private company setting forth terms for handing over the
4 System³ to the private company (“privatization plan”). Ex. 5.

5 This term sheet outlines an “**asset purchase agreement**”, or “**APA**”; and, a
6 **40-year indefeasible right of use (“IRU”) for the System.**⁴ It details the
7 proposed disposal and transfer of Tacoma Public Utilities’ operational control and
8 ownership interest in the System **-including “Related Assets”**, such as
9 **customer accounts**, set top boxes, servers, routers, switches, supplier accounts,
10 etc. that together comprise control and effective ownership of the System. Ex. 21.
11 The Term Sheet even allows for **use of the valuable Click! brand name**⁵.

12
13 A “Severance Agreement” has been reached with Click! union employees
14 represented by the IBEW Local 483 regarding the privatization plan. The
15 agreement provides for the System to “**cease operations as a City-owned**
16 **entity**”.⁶ Ex. 18. & Ex. 19.

17 However, this privatization⁷ of the Public Utilities’ municipal broadband
18 System is prohibited by Tacoma City Charter § 4.6 -which **requires that voters**
19 **first approve of any sale, lease or disposal of their public utility System** by
20

21
22 ³ Merriam-Webster definition of System: "a regularly interacting or interdependent group of items forming a unified whole"

23
24 ⁴ An IRU is a Lease. See Ex.15 -Definition of an IRU -An Excerpt of Testimony Concerning
25 Telecommunications Accounting Issues by John M. Morrissey Deputy Chief Accountant, U.S. Securities
26 and Exchange Commission Before the Subcommittee on Oversight and Investigations Committee on
27 Financial Services March 21, 2015

⁵ The Click! brand is valuable, with proud, passionate, customers and a 50% name recognition. (Shook Declaration)

⁶ Shook Dec. & EX 19 City Council Resolution 40294 -IBEW Severance Agreement Disclosing System “Ceases Operation as City Owned Entity”

⁷ Merriam Webster **definition of "privatize": To change from public to private control or ownership**

1 a majority vote of the electorate in a municipal election⁸. Ex. 3 There is imminent
2 risk of the City Charter being violated. No vote of the people is planned or provided
3 for in the privatization “Term Sheet”. Ex 17.

4 Importantly, the **TPU Board essentially agrees with the plaintiff**. In
5 Amended Resolution U-10828 the Board specifically acknowledged and cited City
6 Charter 4.6’s requirement for a **“vote of the people”** -clearly the TPU Board also
7 recognizes the significance and importance of the City Charter language in
8 protecting they utility System assets that belong to the public. Ex. 20.

9 Plaintiff fears losing the benefits the System has brought to ratepayers and
10 the community by delivering affordable municipal broadband Internet access
11 services in an equitable fashion -where public service, not profits, are the primary
12 motive in the operation of the municipal broadband System. Ex. 24 P.330.

13
14 *“The benefits of affordable access are so important to a community*
15 *that making a profit should not be the overarching goal. The main **purpose***
16 ***of municipal broadband** should be to provide an increasingly **necessary***
17 ***public service, not turn a profit**.” Ex. 24 p.598.*

18 The purpose of this action is to make sure the clear language in the City
19 Charter is followed -that the public be allowed their right to vote on the important
20 decision over the fate of their municipal broadband System. Access to broadband
21 will play an ever-increasing role in energy consumption and conservation in the
22 future. Citizens, as “owners”, must be allowed to vote on any lease, sale or disposal
23 of their publicly owned and operated broadband System; for, if the City Charter is
24 ignored, the City would be exceeding its authority and acting ultra vires.¹⁰

25
26 ⁸ Answer ¶3.1

27 ⁹ Currently, 19 states have barriers in place limiting community broadband and protecting
incumbent providers from competition. Ex 22, p. 4

¹⁰ There can be no doubt of City Council’s intention to privatize the System. Ex. 16 shows clear
comments and intent to “Lease” the System, as recorded live at a City Council Meeting on
March 26, 2019.

1 There will always be private companies seeking to eliminate competition by
2 stopping¹¹, or acquiring, public utilities for their own profit motives¹². The citizens
3 who drafted the City Charter in 1952 were keenly aware of such threats -with the
4 specter of similar privatization efforts, during the electrification of America, being
5 recent memory. Those framers of the Charter had witnessed “**decades of**
6 **economic and political rivalry between supporters of municipal**
7 **ownership and private power interests.**”¹³

8 The framers, never knowing the phrase “Indefeasible Right of Use”¹⁴,
9 understood what privatization was. They knew what “*Lease*” and “*to dispose of*”
10 meant. They carefully provided the Charter 4.6 language -which now protects the
11 public’s important community System.

12 When private companies cannot, or will not, deliver the essential infrastructure
13 required for participating in modern society, municipalities must have the right to
14 take such important matters into their own hands -as the citizens of Tacoma did,
15 over 20 years ago, in this case.

16 **III. RELIEF REQUESTED**

17 Plaintiff MITCHELL SHOOK (“Mr. Shook”), pro se, moves the court for the
18 issuance of a peremptory writ of prohibition pursuant to Chapter 7.16 RCW, or in
19 the alternative a preliminary injunction, restraining and prohibiting the Defendant
20 CITY OF TACOMA (“City”) from, in any way, entering into the proposed Asset
21 Purchase Agreement (APA) or Indefeasible Right of Use agreement (“IRU”) with
22

23
24 ¹¹ Laws in 19 states —some specifically written by special interests trying to stifle new competitors —
25 have held back broadband access and, with it, economic opportunity. (Ex. 22, p. 4)

26 ¹² Ex. 8 shows the benefits the System provides in offsetting sunk capital costs, paying off depreciation
27 and amortization, as well as offsetting unrelated overhead for TPU and City government. After all that,
the System is still profitable.

¹³ See Ex. 32, p 4. -also <https://historylink.org/File/5025>

¹⁴ “An IRU is a lease” -Randy Lowe, Davis Wright Tremaine LLP December 17, 2013 (Ex. 31)

1 Mashell Telecom, Inc., doing business as Rainier Connect (“Rainier Connect”), for
2 Click! Network (the “System”), and further from selling, leasing, or disposing of the
3 community’s municipal broadband System to any other party without first
4 obtaining approval in a municipal election for any such sale, lease, or disposition.

5
6 **IV. STATEMENT OF FACTS**

7
8 In 1996 Tacoma City Council established the System, as part of Tacoma Public
9 Utilities, with Ordinance No. 25930¹⁵ that determined it was “*prudent and*
10 *economical*” to provide broadband Internet access, Ethernet transport services and
11 cable television services to residential and business customers. That ordinance
12 anticipated other benefits might include “*automated meter reading and billing,*
13 *appliance control and load shaping*”. Ex. 1. Ex. 2. The System, as one of 6 operating
14 sections of Tacoma Power, continues to provide those functions today. Ex. 13.

15 The System was created at the request of the Department of Public Utilities,
16 who sought in Res U-9258 to provide “*data transport, high speed Internet access, full*
17 *cable television service, and other uses*” over a “*state-of-the art fiber optic system*” to
18 support enhanced electric system control, reliability and efficiency, (2) meet
19 expanding telecommunications requirements in an evolving competitive electric
20 market, the most critical of which is real time, two-way interactive communications
21 with individual energy consumers, (3) create greater revenue diversification through
22 new business lines (i.e. Internet Access, Cable TV, etc.), (4) enhance traditional
23 products and services, and (5) maximize return on Light Division assets”. Ex. 1 p.1

24 Policy makers saw the system would “serve a public purpose”, stating:

25 “Council hereby finds and determines that the City Light Division's
26 broadband telecommunications proposal is in the best interests of the City,
27 **will serve a public purpose** and that the said Business Plan is sufficient
and adequate, therefore, the Council hereby approves the Light Division's
proposal including the Business Plan and the Department of Public

¹⁵ By request of TPU with Resolution No. 33668 (1997) (Shook Dec., Ex 1)

1 Utilities, Light Division is hereby authorized to proceed to implement said
2 proposal for a broadband telecommunications system, and that the
3 proposed broadband telecommunications **system shall be owned,
4 operated and controlled by the City of Tacoma Department of
5 Public Utilities Light Division.**” Ex. 1 p.2

6 The System is a state-of-the-art, carrier-grade, hybrid fiber coaxial
7 telecommunications network offering Gigabit speed Internet access, Fiber To The
8 Home (“FTTH”) and cable modem services with approximately 1,500 miles of fiber
9 and cable plant constructed by TPU in the cities of Tacoma, University Place,
10 Fircrest, Lakewood and Fife, and part of Pierce County. The network covers
11 approximately 66% of the homes in Tacoma Power’s territory. Ex. 10

12 The System has more than 12,500 cable TV customers, 20,000 wholesale high-
13 speed Internet service of customers and 100 wholesale broadband transport circuits¹⁶.
14 It had revenue of \$26,519,861 in 2017¹⁷ and considerable goodwill¹⁸. The System
15 showed an operating profit after depreciation and amortization expenses in
16 Jan.2019¹⁹. Ex. 8. Terms for transferring the System to a private party are actively
17 being negotiated. Answer ¶ 42.

18 Demand response (DR) technology holds potential for load reduction and
19 energy conservation²⁰. The System recently supported a water heater “demand
20 response” project conducted by Tacoma Power and the Bonneville Power
21 Administration in the Salishan housing development neighborhood under an
22 agreement with the Tacoma Housing Authority²¹. Data transport for this water
23 heater project utilized the System’s cable modem platform. Ex. 12, Answer. ¶36

24 TPU is governed by a five-member Public Utility Board, appointed by the

25
26 ¹⁶Answer. ¶21: Admitting plaintiff’s complaint ¶3.8.1¶

¹⁷ Answer ¶ 20.

27 ¹⁸ Answer. ¶22: Admitting plaintiff’s complaint ¶3.8.1¶

¹⁹ The most recent monthly figures available at this time.

²⁰ Answer ¶38.

²¹ Answer ¶36.

1 mayor and confirmed by City Council²². Utility budgets and rates are approved by
2 City Council. Ex. 4.

3 Click! TV and wholesale Internet²³ rates are approved by the Public Utility
4 Board (Board) and City Council, the same as Power and Water rates. Section 4.3 of
5 the City Charter provides City Council with oversight on rates and the authority:
6 ***“to fix and from time to time, revise such rates and charges as it may deem***
7 ***advisable for supplying such utility services the City may provide”***.

8 Title 12 “Utilities” of the Tacoma Municipal Code regulates utilities and rates.
9 Click! CATV and wholesale Internet rates are regulated under Title 12 of the
10 Tacoma Municipal Code, in section 12.13 -just like water and power. Ex. 4.

11 The System supports communications between TPU and over 10,000 electric
12 customers -who have Tacoma Power “gateway meters” now installed on their
13 homes²⁴. These “smart meters” operate over the System and feature remote connect
14 and disconnect functionality allowing electric services to be turned on or off for
15 electric customers. The gateway meters allow automated electric meter reading
16 and provide information to customers relevant to their energy purchasing
17 decisions²⁵. In connection with these Gateway Meters, some TPU customers
18 participate in the “Pay-Go” prepayment system.

19 Municipal networks drive economic development, create competition, increase
20 Internet access availability and lower rates, for both Internet access and cable
21 television services. Ex 23 and Ex. 22

22
23 The TPU Board found²⁶ the System’s Internet-related uses:

24 “provide Tacoma Power customers benefits by giving them access to
25 advanced customer services options such as: power use monitoring, outage

26 ²² Answer ¶125.

27 ²³ “Wholesale internet” service refers to Click’s making its HFC network infrastructure available to other telecommunications companies who provide “retail internet” service to homes and businesses.

²⁴ Answer ¶128.

²⁵ Answer ¶ 29.

²⁶ Excerpts from Resolution U-10879. Ex. 7

1 reporting, scheduling of services, bill paying, and electrical appliance
2 control”; and, **“in planning for an uncertain and unknown future,**
3 **there may be other potential functions related to the supplying of**
4 **electricity** to customers not considered in the existing business plan that
5 might also make use of the telecommunications system infrastructure
6 including: cyber security, electric car charger locations and metering, and
7 enhanced customer information products (power usage by time of day,
8 behavior-based saving programs, outage communications, energy audits,
9 and participation in Evergreen Options.” Ex. 7 p. 4

10 The System provides economic growth benefits for Tacoma Power.
11 As TPU Board Resolution U-10879 explained:

12 “Over recent years wholesale power prices and sales have dropped
13 substantially. Tacoma Power **wants to make up this lost revenue** by
14 looking at ways to increase its retail power sales through economic growth
15 in the community. Communities across the nation **have benefited**
16 **economically** from competitive access to Internet services in their
17 communities. Tacoma Power's continued operation and maintenance of the
18 System **for Internet access purposes assists in making the Internet**
19 **services competitive in Tacoma Power's service area, which**
20 **increases economic growth that leads to greater retail power sales**
21 in Tacoma Power's service area”. Ex. 7, p. 4. Dec

22 City Council Members and TPU Board Members commonly referred to the IRU
23 as a “Lease” agreement -when discussing the proposed privatization²⁷ and disposal
24 of the System. City Council Members Hunter, Ibsen, and Mayor Woodards, called
25 the IRU a “**Lease**” at the Council meeting on March 26th, 2019. Ex. 16. An IRU is a
26 “Lease”. Ex. 31²⁸. Decl. Shook ¶32.

27 The important public policy benefits of municipal broadband are widely known
28 and broadly promoted. Ex. 22 p.2 Economic studies confirm broadband Internet

²⁷ Privatization is the process of transferring ownership of a business, enterprise, charity or public service from the public sector (the state or government) to the private sector.

²⁸ “An IRU is a lease” -Randy Lowe, Davis Wright Tremaine LLP December 17 2013

1 creates significant value for communities and consumers. Ex. 22 p.6. Many of the
2 benefits are widely recognized and common knowledge.

3 “Like roads, ***broadband is essential infrastructure*** for a modern
4 economy. *Broadband is a core utility* for households, businesses and
5 community institutions”. Ex. 23 p.320.

6 “Today, broadband is ***taking its place alongside water, sewer and***
7 ***electricity as essential infrastructure for communities***”.²⁹ Ex. 26 p12.

8 The Internet is now at the heart of energy conservation efforts, with recent
9 developments in the “Internet of things”, “smart homes”, “smart grid” applications,
10 home generation systems -such as a small wind turbine or solar power systems-
11 electric vehicle charging, energy storage, demand-response (DR) technologies and
12 remote appliance control. The System’s capability for broadband Internet access
13 supports these technologies³⁰ -as anticipated and intended by its creation. Ex. 12.

14
15 The Department of Energy's Office of Electricity Delivery and Energy
16 Reliability maintains an extensive website, at www.smartgrid.gov, which
17 documents the amazing potential the Internet, smart home and smart grid
18 technology holds for conserving energy in our future. That website says:

19 “Home energy management systems will help you to make the most of
20 time-of-use pricing. Accessed with a home computer or hand-held mobile
21 device, you will be able to see when prices are highest, which appliances use
22 the most electricity, and even—at some point down the line—be alerted
23 when prices go up, so you can remotely turn off unnecessary appliances until
24 demand lowers and prices go back down.”³¹

25
26 ²⁹ USDA Broadband Opportunity Council Report, Pritzker and Vilsak 2015. Ex. 26. Permalink:
<https://perma.cc/UT6S-HZP3>

27 ³⁰ Decl. Shook ¶14.

³¹ Permalink: <https://perma.cc/LVK7-NNDB>; Also:
https://www.smartgrid.gov/the_smart_grid/consumer_engagement.html

1 An Internet connection is essential for a home energy management system to
2 create a “connected home”. Decl. Shook ¶14. The Utility’s broadband System holds
3 great potential for energy conservation. Ex. 7 p 4. The broadband System enables
4 the “Internet of Things”, allowing Zero Net Energy (ZNE) homes, customer-
5 installed control systems, smart thermostats, water heaters, air conditioners,
6 electric vehicle (EV) charging stations, and advanced plug load controllers all
7 assisting in energy conservation³².

8 Open Automated Demand Response (OpenADR) technology now provides a non-
9 proprietary, open standardized DR interface allowing electricity providers to
10 communicate DR signals directly to existing customers using a common language
11 and existing communications such as the Internet. Ex. 25 p. 7

12 Plans are being made to dispose of the System, with a “Severance
13 Agreement” having been reached with Click! union employees represented by the
14 IBEW Local 483 regarding the proposed privatization. The agreement provides for
15 the System to “**cease operations as a City-owned entity**”.³³ Ex. 18 & 19

17 **V. STATEMENT OF THE ISSUE**

18 The following issue is presented for resolution by the court: whether the
19 court should issue a peremptory writ of prohibition as requested herein; or,
20 alternatively grant an injunction.

21 **VI. EVIDENCE RELIED UPON**

22 This motion is based on the pleadings and papers filed under this cause and
23 the declaration of Mr. Shook (with Exhibits) filed herewith.

24 **VII. ARGUMENT and LEGAL AUTHORITY**

25
26
27 ³² Resolution 39347 acknowledges the Systems Smart Cities technology potentials (2015) Ex. 1

³³ Shook Dec. & EX 19 City Council Resolution 40294 -IBEW Severance Agreement Disclosing System “Ceases Operation as City Owned Entity”

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1. Plaintiff Has Standing to Sue for the Requested Relief

Plaintiff, as a resident of the City of Tacoma and customer of the municipal broadband System, with a legal right to vote on any “*sale, lease or disposal*” of the public utility System, has standing and is beneficially interested in eminent **privatization** of the System. Plaintiff also has express statutory standing to sue under RCW 80.04.440 and RCW 7.24.020.

2. The Court May Issue A Peremptory Writ of Prohibition

This Court has the authority under RCW 7.16.290, et seq., to issue a peremptory writ of prohibition restraining the City from proceeding with the proposed IRU and asset sale in a manner that violates the Tacoma City Charter (“Charter”). A writ of prohibition is defined by statute to be, “the counterpart of the writ of mandate.” RCW 7.16.290. A writ of prohibition “arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” Id. The grounds for issuing a writ of prohibition are as follows:

7.16.300. Grounds for Granting Writ—Affidavit It may be issued by any court, except district or municipal courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

RCW 7.16.300 (emphasis added). The court may issue an alternative or peremptory writ of prohibition. RCW 7.16.310. If a peremptory writ of prohibition is issued, it must command the party to whom it is directed to desist or refrain from further proceedings in the action or matter specified:

RCW 7.16.310. Alternative or Peremptory Writs—Form

1 The writ must be either alternative or peremptory. The alternative
2 writ must state generally the allegations against the party to whom it
3 is directed, and command such party to desist or refrain from further
4 proceedings in the action or matter specified therein until the further
5 order of the court from which it is issued, and to show cause before
6 such court, at a specified time and place, why such party should not be
7 absolutely restrained from any further proceedings in such action or
8 matter. **The peremptory writ must be in a similar form**, except
9 that the words requiring the party to show cause why he or she should
10 not be absolutely restrained, etc., must be omitted and a return day
11 inserted.

12 RCW 7.16.310. A peremptory writ of prohibition may be issued in the first
13 instance (as opposed to issuing an alternative writ of prohibition in the first
14 instance), so long as the Defendant is given at least 10-days' notice of the
15 application, therefore. RCW 7.16.190, 7.16.320.

16 Prohibition is an extraordinary remedy that may only be issued where (1) a
17 state actor is about to act in excess of its jurisdiction and (2) the Plaintiff does not
18 have a plain, speedy and adequate legal remedy. *Brower v. Charles*, 82 Wn. App.
19 53, 59, 914 P.2d 1202 (1996); See also, *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838,
20 766 P.2d 438 (1989).

21 In *Skagit Cty. Public Hosp. Dist. No. 304 v. Skagit Cty. Public Hosp. Dist. No.*
22 1, 177 Wn.2d 718, 730, 305 P.3d 1079 (2013), a trial court issued, and the Supreme
23 Court affirmed the issuance of a writ of prohibition against a public hospital
24 district that was providing health care services outside of its prescribed
25 boundaries. Even though the court believed that other relief may have been
26 available to the Plaintiff, it held that there was no “plain, speedy, and adequate
27 remedy available in the ordinary course of legal procedure.” *Skagit Cy. Public*
Hosp. Dist. No. 304, 177 Wn.2d at 730-31.

1 Here, the City is preparing to enter into an IRU and Asset Purchase
2 Agreement for the System without first obtaining approval in a municipal election,
3 as is required under Section 4.6 of the Charter³⁴. If the IRU and APA are permitted
4 without being approved in a municipal election, Mr. Shook's rights as a resident of
5 the City of Tacoma will be violated. There is no plain, speedy, or adequate remedy
6 for this violation available in the ordinary course of legal procedure. Accordingly,
7 the court has the authority to issue a peremptory writ of prohibition barring the
8 City from entering into an IRU and asset sale for the System until the same has
9 been approved in a municipal election.

10 **3. The Proposed IRU and Asset Sale Violates The City Charter.**

11 The proposed IRU and asset sale would sell, lease and/or dispose of the
12 System without the same first being approved in a municipal election. Such
13 "privatization"³⁵ violates the plain language of Charter § 4.6, which provides:

14 **Disposal of Utility Properties -Section 4.6**

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

21 The City's clearly stated plans to "**Transfer Operational Control**"³⁶ over the
22 municipal broadband System and dispose of the System's assets thru an Asset
23

24 ³⁴ The public policy underlying the Charter provision is well-recognized in Washington law. As
25 the Washington Supreme Court explained a century ago, "The object of municipal ownership
26 [of utilities] is to give the citizen the best possible service at the lowest possible price...
27 [otherwise] there can be no virtue in public ownership." *Uhler v. City of Olympia*, 81 Wash. 1,
14, 151 P. 117 (1915).

³⁵ Privatization is the act of reducing the role of government, or increasing the role of the
private sector, in an activity or in the ownership of assets.

1 Purchase Agreement³⁷, to hand over the customer’s account information, billing
2 records, related customer premise equipment and goodwill, to “**cease operation as**
3 **a City-owned entity**” and forfeit all public authority for setting rates under the
4 municipal code and determining the services to be provided, while skirting or
5 ignoring the unambiguous requirement of the City Charter for a vote by the people
6 over the privatization of their utility System, creates an eminent threat of
7 irreparable harm and a justiciable controversy of significant public importance.

8 **4. Alternatively, the Court Could Grant A Preliminary Injunction.**

9 Alternatively, if this court were to find that other speedy and adequate
10 remedies existed, it should enjoin the City from entering into the planned IRU and
11 **APA, and from all actions associated therewith until such time as the**
12 **claims can be heard on the merits at trial or through a dispositive motion.**
13 “[O]ne who seeks relief by temporary or permanent injunction must show (1) that
14 he has a clear legal or equitable right, (2) that he has a well-grounded fear of
15 immediate invasion of that right, and (3) that the acts complained of are either
16 resulting in or will result in actual and substantial injury to him.” *Kucera v. DOT*,
17 140 Wn.2d 200, 209 (2000). Further, “[s]ince injunctions are addressed to the
18 equitable powers of the court, the listed criteria must be examined in light of equity
19 including balancing of the relative interests of the parties, and, if appropriate, **the**
20 **interests of the public.”** *Id.*

22 Here, all three requirements are satisfied. **First**, the Plaintiff, and others
23 similarly situated, have a right to vote on the sale, lease or disposal of the
24 municipal utility System under City Charter 4.6:

25 “The City **shall never sell, lease, or dispose of any utility system,**
26 **..., unless and until such disposal is approved by a majority vote of**

27

³⁶ Ex. 30, p. 3.

³⁷ Ex. 30, attachment A, p. 1

1 **the electors voting thereon at a municipal election** in the manner
provided in this charter and in the laws of this state”;

2 Additionally, under Washington State law RCW 35.94.020, Plaintiff is further
3 assured of his legal right to a vote on the issue. State law requires the City **“if it**
4 **deems it advisable to lease or sell the works, plant, or system, or any part**
5 **thereof, shall adopt a resolution stating whether it desires to lease or sell”**. After
6 adopting the resolution, it must be published in the paper and, then, finally,
7 **“submitted to the voters of the city for their approval or rejection at the**
8 **next general election”**. None of these requirements have been met by the
9 Defendant. Clearly Plaintiff has a legal right to exercise his vote.
10

11 **Second**, Plaintiff has a well-grounded fear of an immediate invasion of that
12 right because the City is in the midst of finalizing the details for the **lease and**
13 **disposal** of the System at this moment. Layoffs are being negotiated and the
14 proposed material terms and transitional framework is set to be presented to the
15 Board and Council on June 18, 2019. Ex. 30. p.4 With every passing day, countless
16 City public resources and expenses—including but not limited to city attorney and
17 legal staff hours, preparation of employee termination agreements, job interviews
18 being forced upon traumatized System employees, with negotiations proceeding
19 over material terms—are all impermissibly being expended prior to the required
20 voter approval.
21

22 **Third**, the continuance of contract negotiations and ultimate execution will
23 result in actual and substantial injury to Plaintiff by depriving him of his city -and
24 state- guaranteed vote on the process, which may lead to increased rates, and
25 inferior broadband services without the current level of public oversight. Finally,
26 the balance of the relative interests weigh in favor of an injunction until a final
27 hearing on the merits because Plaintiff’s -and the public’s - right to a vote, and
equal and fair access to transparently-run, affordable, broadband services are at

1 stake; whereas, a temporary stay on all work related to the Indefeasible Right of
2 Use agreement (“TRU”) and Asset Purchase Agreement (APA) will have negligible
3 impact on city operations.

4 A preliminary injunction is warranted and necessary.

5 City Charter 4.6 is clear: “The City shall **never sell, lease, or dispose** of any
6 utility system³⁸” without a vote of the people that own it. **The broadband**
7 **System**, owned and operated by **Tacoma Public Utility**, is a “utility System”,
8 with rates set by City Council, that benefits the public by providing services
9 customers want, need and rely on -with **rates regulated by City Council**. Ex. 6.
10

11 **Voters can choose to “privatize”, or “lease” or “dispose” of their**
12 **municipal network**, if they so desire. **The Charter gives them that choice**, by
13 clearly spelling out the process for *a vote of the people* to accomplish it. There is
14 **No harm** in granting Plaintiff’s Writ (or Injunction).
15

16 VIII. CONCLUSION

17 For the forgoing reasons the Court should grant plaintiff’s motion for
18 peremptory writ of prohibition, *or* in the alternative for preliminary injunction, to
19 prevent the proposed sale, lease, or disposal of the public utilities’ municipal
20 broadband System, unless and until such plans are approved by a majority vote of
21 the electors at a municipal election.
22

23 Respectfully submitted, this 21st day of May, 2019
24

25 

26 Mitchell Shook
27 Plaintiff