

December 30 2019 4:02 PM

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

The Honorable Judge Shelly K. Speir  
Hearing Date: January 10, 2020  
Oral Argument Requested

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

**IN AND FOR THE COUNTY OF PIERCE**

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

**DECLARATION OF MITCHELL  
SHOOK IN SUPPORT OF RESPONSE  
TO DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

BOWMAN

Plaintiff,

V

City of Tacoma,

Defendant.

MITCHELL SHOOK,

Plaintiff, Pro Se

v.

CITY OF TACOMA,

Defendant.

1 I, Mitchell Shook, declare as follows: I am a resident of Tacoma, ratepayer of Tacoma Public  
2 Utilities, taxpayer to City of Tacoma, and customer of Click!, the municipal broadband  
3 telecommunications system operated by Tacoma Public Utilities. I am an expert in matters related  
4 to Click! Network and the ISP industry, having over 20 years of experience working with Click!,  
5 and with other municipal open access systems, in my role as Founder and CEO of Advanced  
6 Stream, an Internet Service Provider that operates on Click! Network. Over these 20 years I have  
7 obtained a tremendous amount of firsthand knowledge about Click! I am over the age of eighteen,  
8 competent to testify in this matter, and make this declaration on my own personal knowledge.

9 1. I consistently monitor Click!’s financial statements, on a monthly basis, and have done so  
10 since January 2012. From my careful consideration and detailed understanding of Click!’s financial  
11 information, which I have honed over these past 8 years in reviewing this information, it is my  
12 understanding and estimation that Click! is earning about \$4 million per year in profit from its  
13 operations, when viewed as an enterprise, without the burden of unrelated governmental  
14 “assessments.” My definition of “assessments are expenses unrelated to running the Click!  
15 enterprise. These profits from Click! operations offset costs for constructing and maintaining a  
16 network Tacoma Power requires for managing its power grid and substations. By sharing in these  
17 costs, Click! saves the electrical utility money. If called to testify, I can clearly show that Click!  
18 pays more than its fair share of such costs and taxes.

19 2. Click! has always been organized as separate entity, or Department, with its own General  
20 Manager and employee organization structure and Organization Chart. The City Finance  
21 Department prepares, and tracks Click!’s income and expenses separately, producing a monthly and  
22 annual “Operational Summary.” It never breaks out the financial numbers, tracking the performance  
23 of any other Tacoma Power divisions. I believe this is more evidence of the fact Click! provides a  
24 unique utility service and is a separate system. I have witnessed many examples of Click!’s  
25 telecommunications products being recognized, offered and operated as a separate utility within  
26 TPU. Click! has its own customer marketing and billing programs, separate from Tacoma Power  
and Tacoma Water. Click!’s customer service, customer care and payments center is provided

1 separately from the TPU utility services, at a different counter, inside the lobby of TPU. Click! is  
2 even more separate than Tacoma Water and Tacoma Power, who share a common payment counter.

3 In addition to wholesale telecommunication service, TPU also provides wholesale water and  
4 power services. In 2018, TPU's annual report showed wholesale power revenue of \$47 million and  
5 wholesale water revenue of \$3,253,029 in 2018. I have provided pages from the annual reports as  
6 in my Exhibit 75, below.

7 **3.** Through my many public records requests, related to Click!'s financial statements, I  
8 have uncovered documentation that shows, in the most recent biennium, Click! was burdened with  
9 an allocation of \$2.7 million in "assessments," that appear as expenses on Click!'s operation  
10 summaries, but are not directly related to the provision of Click!'s telecommunications services.

11 **4.** In 2015, the cost allocation formulas, that distributes the direct operational, maintenance  
12 and capital costs for the network, between Tacoma Power and Click!, were revised. This resulted in  
13 shifting costs from Tacoma Power onto Click!. Previously there was an approximate 75% to 25%  
14 split of costs, with Click! paying the 75% portions, but that changed in 2015, to a higher 94%  
15 burden on Click!. The current ratio for sharing these costs remains at 94% for Click! and 6% to  
16 Tacoma Power. The 2015 change in allocation formulas resulted in an additional \$5.7 million in  
17 annual expenses being shifted onto Click! beginning in 2015. That \$5.7 million number was  
18 reported in the TPU annual report for 2015.

19 **5.** The need for Broadband is generally increasing, in Tacoma and worldwide. Click! users  
20 are transmitting more data, year over year. Click!'s revenue from broadband services is increasing.  
21 For example, in October 2017, Click! generated \$695,919 in Data Transport and Broadband  
22 revenues, increasing to \$768,573 in 2018. I have provided the Operations Summaries for Oct 17,  
23 and Oct. 18, below as Exhibit 76. Since 2015, Click! has returned to profitability, even with the  
24 unrelated interdepartmental "assessments" under governmental accounting methods, and even with  
25 the onerous 94% allocations from the 2015 allocation formulas adjustments. Additionally, it is my  
26 understanding that these formulas unfairly allocated general government's costs onto Click!, since I-  
NET pays no share of the costs for maintaining TPU's network, while I-NET uses 36 strands of

1 backbone fiber, and Click!, only uses 12 strands. Yet, Click! suffers the burden of a 94% allocation.

2 6. It is also my understanding that these formulas and policies were put in place by  
3 Director Gaines in 2015 and had the result of disparaging Click!'s performance. I was at the  
4 meetings, where these were policies were implemented and also, later, when the financial results  
5 they produced were presented to City policy makers. The Director was later fired, after caught  
6 including unauthorized "inferred debt" expenses that concocted Click!'s "losses." The Director used  
7 these losses to support his plan to negotiate a transfer of Click! to a private company, Wave  
8 Broadband, without City Council's prior approval for such negotiations. Mr. Gaines presented those  
9 ("his") "losses" to the media and to City Council, as if they were in fact real, and used them to  
10 support of his personal efforts to dispose of to Click!. The financial numbers were not accurate or  
11 real numbers. They were not produced by the City Finance Department. I was a firsthand witness to  
12 these presentations and the consequences.

13 7. After Director Gaines was fired, more information about his actions came out. In a 2019  
14 podcast interview, TPU Board Member Bryan Flint, described Director Gaines accounting methods,  
15 and the Director's attempts to disparage Click!, by saying the Director had added in "everything and  
16 the kitchen sink" to make the numbers look bad. As a board member of TPU, I consider Mr. Flint's  
17 statements to be the admission of a party-opponent. I posted a video of Board Member Flint's  
18 comments on YouTube, *available* here: <https://youtu.be/8atnBaxl1Rk> .

19 8. Tacoma City Council Member Ibsen, in a public meeting, compared Director Gaines'  
20 actions to those of a "dishonest cashier" stealing from the register. As he is a City Council Member,  
21 I consider Mr. Ibsen's statements to be the admission of a party-opponent. I made a short video of  
22 that statement and posted it on YouTube, *available* here: [https://youtu.be/Vi7fA\\_dmqcU](https://youtu.be/Vi7fA_dmqcU).

23 9. It is my understanding and firm belief, based on a wide range of firsthand experiences  
24 and evidence I have obtained over many years, evidence much to extensive to list here, that a  
25 conspiracy indeed exists to destroy Click! Network and thereby eliminate municipal competition  
26 from the broadband market in Pierce County. That evidence is beyond the scope of this case, but  
worth noting, since it explains the reason why this case is here in the first place. If called on to

1 explain this, I could easily testify for several days about the nature of the conspiracy, and provide  
2 my extensive firsthand evidence, which is in my possession, related to the scheme and the financial  
3 shenanigans to discredit Click!. This scheme, I should mention, extends to the backroom RFI  
4 process that has led to the privatization plan now before this Court. That process was particularly  
5 tainted by the inclusion of a sham bidder, Yomura Fiber, which my research and evidence reveals  
6 was not a real company with any capability or experience relevant to the RFI process; yet, City staff  
7 falsely represented to policymakers that Yomura as a bonified entity and viable finalist in the  
8 process.

9 **10.** I also know that influential, powerful, local political and private interests have  
10 conspired to destroy Click! for the benefit of their friends, who are in private competition with  
11 Click!’s municipal system, or similar systems now formed, and being formed, across our county.  
12 One example is Michael Crowley, a former mayor of Tacoma, who has opposed Click! for many  
13 years. He has told me of his opposition. He is one of the Plaintiffs in the *Coates v City of Tacoma*  
14 case that attempted to shut Click! down. Mr. Crowley is friends with Leo Hindery, a powerful and  
15 influential cable industry pioneer. Mr. Hindery told me, in a personal phone call in 2015, of his  
16 opposition to Click! and public broadband generally. Mr. Hindery is well known to have opposed  
17 Click!, since before its creation. I spoke with Mayor Ebersol about the incident of Mr. Hindery  
18 coming to the Mayor’s office and begging the Mayor to stop the creation of Click! Network. Mayor  
19 Ebersol confirmed the visit to his office, and Mr. Hindery’s intense opposition to Click! at the time  
20 of its creation. Mr. Hindery was the president of TCI at the time, the incumbent cable company in  
21 Tacoma, which later became Comcast in Tacoma. Municipal competition represented a real threat  
22 to their business prospects. Mr. Steve Klein, who was Tacoma Power Superintendent during the  
23 planning, creation and construction of Click!, and is often referred to as the “Father of Click!  
24 Network” has confirmed my views and understanding these events on page 8 in his Sept. 26, 2017  
25 deposition taken by David Jurca in connection with the Coates case. I have provided the pertinent  
26 pages of that deposition below, as **Exhibit 74**. In this deposition, Mr. Klein refers to the fact that he  
is sometimes considered the “Father of Click! Network.”

1       **11.** In 2016, City Policy Makers declared they were unanimously committed to Click! and  
2 decided to go “All In”, with TPU Board Resolution U-10879, passed on Sept 28, 2016.  
3 Subsequently, recognizing that Click! had never been properly audited, as an enterprise, and citing  
4 great uncertainty over the numbers, the City Council voted to conduct and audit, in Resolution  
5 39577; but, that audit was never conducted or completed. At a City Council meeting in March 2019,  
6 Council Member Blocker asked City Attorney Fosbre why the audit had not been done. Mr. Fosbre  
7 responded by explaining that the audit could show losses greater than expected, which would be  
8 harmful to the City’s defense in a lawsuit against the, *Coates v. Tacoma (2017)*, which was brought  
9 by Rate Payers seeking relief under the accountancy act. I consider this an admission of a party  
10 opponent and have posted those comments on YouTube. I also consider this another example of the  
11 fraud and bad faith surrounding City staff’s efforts to disposing of the system. Determining the  
12 proper value of the system, is an obvious step in disposing of any municipal asset. The exchange  
13 between Council Member Blocker and the City Attorney occurs at 47 seconds into this video:  
14 <https://youtu.be/s2zOqqLCT4M>

15       **12.** It is my understanding that the *Coates v. Tacoma*, lawsuit, was a primary reason for  
16 policymakers to initiate the RFI process, and seek information on alternative paths forward for  
17 Click!. City Council’s concerns over potential harm, represented by this lawsuit, was cited in the  
18 TPU Resolution U-10988 and Council Resolution No. 39930, which canceled the All In Plan. It is  
19 my understanding that the decision to pursue privatization of Click! Network was not based on any  
20 financial information, since no audit has ever been done to resolve the great concerns that were cited  
21 in the Audit Resolution 39577. No appraisal of the business has ever been completed, nor any  
22 evaluation of the market value of the Click! brand. The Click! brand was heavily promoted in the  
23 community for the past 20 years. In my estimations, the sponsorships, events and marketing budgets  
24 for these promotional efforts amounted to millions of dollars.

25       **13.** In the *Coates v Tacoma* Case, Pierce County Superior Court 17-2-08907-4, the City’s  
26 Attorney, Kari L. Vander Stoep, sought a Stay to prevent immediate enforcement of a partial  
summary judgment against the city in Superior Court. That Motion For Entry Of Cr 54(8) Findings

1 And Final Judgment(S) And A Stay Of Litigation Or New Trial Date was filed on March 2, 2018. It  
2 asked the Court to stay enforcement of the court's Order until the City's appeal has run its course. In  
3 the Proposed Findings attached to that motion, at Finding #8, there was this statement: "8). Given  
4 the magnitude of the issues in dispute and the ultimate outcome's effect on the City, Tacoma Power,  
5 and Click customers, the Court should also stay enforcement of the judgment on its Order until the  
6 City's appeal has run its course. If City were forced to promptly shut down Click, there would be an  
7 immediate negative impact on Click's customer base, which includes elderly, low-income,  
8 governmental, and student users who would suddenly be without service. In addition, Click would  
9 lose all of its customers, employees, and goodwill." It is my understanding that the potential  
10 shutting down of Click!, described in this motion, compelled Council to pursue the privatization of  
11 Click! Network. My understanding is that privatization represented a sort of "lifeline" for Click! and  
12 the customers, to avoid the dire outcome described in the City's March 2, 2018 Motion.

13 **14.** It is my understanding that the City has never done a product line profitability analysis  
14 of Click! and has no idea if Click! is profitable or not. At the September 9<sup>th</sup>, 2019 oral argument in  
15 the Coates v. Tacoma case, Ken Masters, the attorney representing the City was asked by the Court  
16 if there were any disputed issues. Mr. Masters stated that losses were a disputed issue. The City won  
17 the appeal in the Coates case, so the issue of Click! profitability was never resolved by the case.

18 **15.** I participated in the RFI process and submitted the requested "information," essential  
19 advising the City to "Stay the Course," do an audit and collaborate with Pierce County to expand  
20 the network. There was no indication the City was looking for someone to completely take over the  
21 operation of Click! under a total privatization scheme. City officials, and their consultant, JoAnne  
22 Hovis, sought my advice on the best direction forward for Click!, and I provided my input into that  
23 process. The process was identified as an RFI/Q, there was no mention of a "P" or an "RFP." The  
24 RFI/Q indicated that an RFP might be issued in the future. It was not apparent to me that City staff  
25 was seeking a proposal to take over the enterprise. I was not aware the City was selling Click!.  
26 Michaelae Lafreniere, who attended the meeting with me, where I presented my RFI response has  
signed a declaration saying that he also was unaware the City was attempting to sell Click! or

1 soliciting offers for its acquisition. In my opinion there has was no bidding for Click! and the  
2 present privatization agreement cannot possibly represent fair value with a bidding process. There  
3 has certainly been no sealed bids or RFP since the surplus resolutions were passed declaring Click!  
4 as surplus. The process was particularly tainted by a fraudulent misrepresentations. Once example is  
5 Click!'s annual revenues in the RFI. The RFI indicated that Click! only had \$2.2 Million a year in  
6 annual revenue, when the actual amount is ten times that amount. This is more one example of City  
7 bad faith in pursuing a legitimate offer or valuation of the System. Another example is that the RFI  
8 indicated, on page 5, under the Network Overview section, that Click! has been allocated 12 fiber  
9 strands in TPU's 180-count network backbone, using eight strands for the HFC network and four  
10 strands for commercial broadband services, yet the final IRU is set to convey 108 strands. Another  
11 example of the fraudulent process is the fact that the IRU waves all pole attachment charges, as I  
12 cited for the Court in my Shook Decl. 11/1/19, Ex. 29 Pg. 115/2156. This fact, that there were no  
13 pole attachment charges, was not disclosed to me. As a participant in this RFI process the fact all the  
14 strands of fiber were being considered for conveyance, and no pole attachment charges were  
15 expected, would have been important to know. This important information was not disclosed.

16 Further evidence of the conspiracy is the fact that I was never informed City would  
17 violate its own Resolution, which I included in my Declaration, Shook Decl. 12/12/19, Ex. 32. Pg.  
18 1, Ln. 20, confirming the City understood and resolved that a public vote over disposal of municipal  
19 utility assets was required under the City Charter. In responding to the RFI, I detrimentally relied on  
20 the City's assurance of a public vote. Knowing the popularity of the System, there is no chance such  
21 a vote would ever pass at the ballot. Click! is loved by the community, as shown by the City's own  
22 many surveys.

23 **16.** Attached hereto as **Exhibit 68** and incorporated herein by this reference is a true and  
24 correct copy of the American Public Power Association article, Multiservice utilities: A one-stop  
shop for communities.

25 **17.** Attached hereto as **Exhibit 69** and incorporated herein by this reference is a true and  
26 correct copy of 1.) an Article from the Institute for Local Self Reliance: Comcast Spends Big on

1 Local Elections: Would Lose Millions in Revenue from Real Broadband Competition, also 2.)  
2 Broad-Banned: The FCC's Preemption Of State Limits On Municipal Broadband Emory Law  
3 Journal, Vol. 68:407; also, 3.) a Law Review article, Measuring Monopsony: Using The Antitrust  
4 Toolbox William & Mary Law Review Vol. 57:299, also copies of Comcast Time Warner Merger  
5 press releases, also a U.S. Dept. of Justice Press Release on Comcast -Time Warner Merger.

6 **18.** Attached hereto as **Exhibit 70** and incorporated herein by this reference is a true and  
7 correct copy of a paper: Creating Capacity And Competition In Broadband Telecommunications:  
8 The City Of Tacoma's Initiative, by Dr. William H. Baarsma, University of Puget Sound, School of  
9 Business & Public Administration & Dr. Ross Singleton Department of Economics University of  
10 Puget Sound, April 2000. <https://perma.cc/RW4U-CFTX>, also a Seattle Times Article from March  
11 17<sup>th</sup>, 1997, by staff reporter Robert Nelson.

12 **19.** Attached hereto as **Exhibit 71** and incorporated herein by this reference is a true and  
13 correct copy of a Click! Network Financial Performance Review by Price Waterhouse Cooper, from  
14 April 2000. As provided to me by Defendant in a public records request.

15 **20.** Attached hereto as **Exhibit 72** and incorporated herein by this reference is a true and  
16 correct copy of U-10988 related to the RFI for Click! Network, also a copy of Advanced Stream's  
17 RFI response, "Stay The Course."

18 **21.** I have personally witnessed the Tacoma Public Utilities Board pass a resolution  
19 purchasing a router that cost approximately \$1 million dollars for Click! Network. Attached hereto  
20 as **Exhibit 73** and incorporated herein by this reference is a true and correct copy of the minutes  
21 from TPU Board meeting of Oct. 26, 2016 where such a router was purchased.

22 **22.** Attached hereto as **Exhibit 74** and incorporated herein by this reference is a true and  
23 correct copies of pages from TPU Power Superintendent's Steve Klein's September 26, 2017  
24 Deposition, also, Mr. Klein's Declaration from May 5, 1997, in support of City's Reply Brief in  
25 Case 96-2-09938-0, that approved the funding of Click!.

26 **23.** Attached hereto as **Exhibit 75** and incorporated herein by this reference are true and  
correct copies of: ( 1.) a page from Click! Network Asset Study from 2013, that I obtained from

1 TPU thru my public disclosure request. This page came from the Click! Asset and Expense  
2 Allocations, 3/18/13 and was produced by Rates, Planning & Analysis (RPA) along with staff  
3 members of Click! and Utility Technology Services (UTS) who performed a study of the assets and  
4 expense allocations shared between Tacoma Power and Click! and a true and correct copy of the  
5 System's Capital Budget for the 2017-2018 biennium;.; *also*, ( 2.) a Click! Network Operations  
6 Update from February 2019, stating "FTTH trim out work installing 135 smart panel covers at the  
7 "Napoleon" were completed and building 5 at "Orchard Street Apartments" had micro ducts  
8 installed"; *and also*, ( 3.) Click! Network Operations Update from October 25, 2017, with a  
9 statement related to "The Grand" Apartment building on page 1, disclosing "We used 41,000 feet of  
10 coax and 41,000 feet of CAT5-E to run 296 strikes into each unit along with running 1,064 outlets  
11 specific to the interior of the units;" *also*, ( 4.) and finally, is a true and correct copy, of a Click!  
12 Network Operations Update for March 27, 2018. Referring to "creating records for HFC  
13 Distribution optical equipment assets in SAP. An individual record will be created for each of the  
14 814 optical devices from each of the four HFC hubs and the Headend." These documents were  
15 provided to me by the defendant thru my public record request. It is my understanding that a System  
16 of this size, if built today, would costs approximately \$900 million; *also*, over \$200 MM was spent  
17 to construct the System; *and*, there remained \$8,068,961 in "book value" of existing capital assets  
18 remaining to be depreciated as of 12/31/2018. That amount was provided to me by TPU in response  
19 to my public records request # T003054-080119; *also*, I have included the wholesale water and  
20 power figures as pages 19 and 20.

21 **24.** Attached hereto as **Exhibit 76** and incorporated herein by this reference are true and  
22 correct copies of the Click! monthly Operational Summary for August, Sept. and Oct. 2019. Also,  
23 Oct. 2018, for comparison. On the August summary, I have included the purple arrows and  
24 comments for emphasis and explanation to represent my understanding of these statements. I have  
25 carefully reviewed these monthly statements for many years and conducted hundreds of public  
26 record requests to obtain the underlying material that comprises these Operational Summaries; *also*,  
a screen shot of the Purple Perks Program for Click! Customers.

1       **25.**       Attached hereto as **Exhibit 77** and incorporated herein by this reference are true and  
2 correct copies of pages FCC’s Connecting America: The National Broadband Plan adopted Mar. 15,  
3 2010.

4       **26.**       Attached hereto as **Exhibit 78** and incorporated herein by this reference are true and  
5 correct copies of documents explaining the Herfindahl-Hirschman Index (“HHI”).

6       **27.**       Attached hereto as **Exhibit 79** and incorporated herein by this reference are true and  
7 correct copy of a Letter Agreement for the Salishan Demand Response Water Heater Project. The  
8 project operated over Click! Network’s DOCSIS telecommunication plant.

9       **28.**       Attached hereto as **Exhibit 80** and incorporated herein by this reference are true and  
10 correct copy of Homer T. Bone Letter on Power Struggles -as published in Congressional Record.

11       **29.**       . On July 5th, 2019 I visited the Washington State Law Library at the Temple of Justice  
12 Building in Olympia, Washington looking for information related to the history of Chapter 35.94  
13 RCW. On that day, with the expert assistance of Laura Edmonston, Deputy Law Librarian in the  
14 Reference Section, I found the origins of RCW 35.94 in the Session Laws of 1917, specifically, in  
15 House bill No. 337, entitled “Sale or Lease of Public Utilities Owned by Cities or Towns.”

16       The Bill was printed in Laws of Washington 1917, as Chapter 137, and became codified as  
17 Remington’s Revised Statutes (“RRS”) 1917 c 137 §§ 9512–14. Attached hereto and incorporated  
18 herein by this reference as **Exhibit 81**, are true and correct copy of photos I took that day of House  
19 bill No. 337, along with published version of RRS 1917 c 137 §§ 9512–14, and a photo of me at the  
20 table in the library with some of the many books associated with my research that day, also a copy  
21 (photo) of a letter dated December 1, 1946, from the Code Revision and Recompilation Committee,  
22 with the addition of a purple arrow and yellow highlight, which I have added to point out the  
23 relevant language. The letter cites authority granted to the Code Committee, under Chapter 252,  
24 Laws of 1943 and Chapter 233, Laws of 1945, specifically to: “propose and submit to the legislature  
25 changes and revisions of the general and permanent laws of the state.” Also, the Letter explains  
26 that the “revisors notes” associated with this effort would have “*three columns*”, with the first  
column being “the section number of the proposed code”, the second column being the “section or

1 sections of Remington’s Revised Statutes from which each new code section is derived.

2 The third column contains the catch-line of each section as set forth in the revision itself, together  
3 with the revisor’s explanation in parenthesis of the “*major changes made in the course of*  
4 *revision.*” (emphasis added).

5 This December 1st letter, cites an “inability to get paper” and indicates the “revision work”  
6 would be published in two volumes, so part of it could be sent out and “give “maximum time,  
7 preceding the next legislative session, for examination of the work done”.

8 Also attached are correct copies (photos) of the Binder of “Volume 2” displaying the words:  
9 “Revised Code of Washington Titles 46-End; and, the cover of the Revisors Notes for Volume 2;  
10 and, page 80-1 from the Revisors Notes for Volume 2 showing the “three columns” as described in  
11 the above mentioned December 1, 1946 letter; and; page 80-7 from the Revisors Notes for Volume  
12 2 with the columns related to Remington Revised Statutes (“RRS”) §§ 9512–14 “Sale Or Lease Of  
13 Municipal Utilities,” including “column three” adjacent to RRS §9512 with the “*revisor’s*  
14 *explanation in parenthesis*” containing the statement “Rewritten for brevity.”

15 Also attached are copies (photos) of the binder of the 1951 edition of the Revised Code of  
16 Washington Volume 6 Title 79-91, and, a page from that publication showing the final results of the  
17 recodification of Rem. Rev. Stat. 1917 c 137 § 1; §9512 into RCW 80.48.010.

18 Also, I have included, for the Court’s convenience, Chapters 149 Laws of 1941, Chapter 252  
19 Laws of 1943, Chapter 233 Laws of 1945, related to the establishment of the Code Committee.

20 **30.** Attached hereto as **Exhibit 82** and incorporated herein by this reference is a true and  
21 correct copy of my Email to Council, informing them of failure to follow surplus process, along  
22 with the surplus information from Duvall’s surplus of property under RCW 35.94.040.

23 **31.** Attached hereto as **Exhibit 83** and incorporated herein by this reference is a true and  
24 correct copy of Click! Network’s website as taken from the Wayback project. I personally saw these  
25 pages at the time they were live, and they are correct representations of Click!’s site at that time.

26 **32.** Attached hereto as **Exhibit 84** and incorporated herein by this reference is a true and  
correct copy of City of Tacoma’s MOTION to STAY in *Coates* Mar. 2 18 Order -Shut It Down.

1       **33.** Attached hereto as **Exhibit 85** and incorporated herein by this reference is a true and  
2 correct copy of Tacoma City Council Ordinance 26141.

3       **34.** The 12/12/19 Declaration of Tenzin Gyaltzen, Mr. Gyaltzen erroneously indicates, in ¶¶  
4 12 and 13, that there are three ISPs operating over Click! Network, when in fact there are currently  
5 only two independent ISPs, Advanced Stream and Rainier Connect, operating over Click! Network.  
6 Net Venture was an ISP, but their website was taken down when Rainier Connect acquired  
7 operational control of Net Venture in 2015. Click! is aware of this combination. Attached hereto as  
8 **Exhibit 86** and incorporated herein by this reference is a true and correct copies of screenshots from  
9 Rainier Connects website announcing the consolidation and a letter sent by Tenzin Gyaltzen to Net  
10 Venture in October 2015, regarding this issue.

11       **35.** Attached hereto as **Exhibit 87** and incorporated herein by this reference is a true and  
12 correct copies of page from King County’s Utility Franchise Application page.

13       **36.** Attached hereto as **Exhibit 88** and incorporated herein by this reference are true and  
14 correct copies of the Complaint and other briefs and declarations in the 1996 and 1997 Superior  
15 Court case that established Click! is a utility system. This is provided to support the estoppel claim  
16 and further support the fact that Click! is a communications utility and municipal utility property,  
17 not a service or asset of Tacoma’s general government.

18       **37.** Attached hereto as **Exhibit 89** and incorporated herein by this reference is a true and  
19 correct copies of Tacoma City Charter Article 4 -UTILITIES.

20       **38.** Attached hereto as **Exhibit 90** and incorporated herein by this reference is a true and  
21 correct copy of *Coates v Tacoma MPSJ ON Motion on Remedy*.

22       **39.** If the proposed privatization of Click! Network is allowed to proceed; it is my  
23 understanding that my company, Advanced Stream will be forced out of business and my customers  
24 will be taken away by a direct competitor; also, that Advanced Stream’s proprietary customer list  
25 would fall into the hands of Rainier Connect, the only other direct competitor on Click! Network;  
26 also, Rainier Connect would be operating the System and setting Advanced Stream’s rates; also,  
that this scenario allows Rainier Connect, a direct competitor, to run Advanced Stream out of

1 business and take Advanced Stream's customers, monopolizing the public's broadband system for  
2 up to 40 years; also, that my customers could lose their Email addresses and personal webspace,  
3 which we provide for them; and, their phone and other essential services could be disrupted. Some  
4 of our customers are on medical equipment, like heart monitoring devices. An interrupting in  
5 services could be life threatening.

6 I declare under the penalty of perjury under the laws of the State of Washington that the  
7 foregoing is true and correct.

8 DATED this 30<sup>st</sup> day of December 2019, at Tacoma, Washington.

9  
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11 \_\_\_\_\_  
12 Mitchell Shook

13 AFFIDAVIT OF SERVICE

14 I declare under penalty of perjury of the laws of the State of Washington that on Dec. 30,  
15 2019, I served true and correct copies of:

- 16 1). Plaintiffs Response To Defendant's Motion For Summary Judgement.  
17 2). Mitchell Shook's 12/30/19 Declaration In Support Of Motion For Partial Summary  
18 Judgement.

19 These documents was delivered via the Court's e-serve system to all Council appearing in this  
20 case, and additionally thru Email to the Attorneys for the Defendant: Zachary B Parker, Robert  
21 L. Christie, Joseph Sloan, at joseph.sloan@cityoftacoma.org and Tom Morrill, at  
22 TMorrill@ci.tacoma.wa.us and Chris Bacha at CBacha@ci.tacoma.wa.us., and plaintiff  
23 Bowman's attorney, Kent Roland Van Alstyne

24 Dated December 30, 2019

25 

26 Mitchell Shook, Plaintiff

# EXHIBIT 68



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*Powering Strong  
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TOPICS

MEMBERS

## COMMUNITY

# Multiservice utilities: A one-stop shop for communities

May 9, 2018

[Betsy Loeff \(/people/betsy-loeff\)](/people/betsy-loeff)

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Many public power utilities provide more than electric service for their communities; they might also manage the area's water, wastewater, cable, internet, waste, gas, and telecommunications services. For these utilities, being a multiservice provider brings opportunities in streamlining how work gets done, organizing the workforce, and giving back to the communities they serve.

## Finding efficiencies in the field

"Operationally, one advantage we see in being a multiservice utility is having the ability to coordinate our various activities," said Ken Weber, chief executive officer of Harlan Municipal Utilities (HMU), which supplies electric, gas, water, and telecommunications services to some 5,100 people in Harlan, Iowa. Weber points to the convenience for customers that his utility can provide as a single point of contact for contractors and movers.

Coordination impacts field operations, too, said Gabriel Khalife, borough manager for Kutztown, Pennsylvania, a municipality about the same size as Harlan that also offers a gamut of services: water, wastewater, gas, electric, telecommunications, and waste management.

"If we're opening up a street, all the services get a chance to look at what's underneath and see if there is an opportunity to improve service," noted Khalife. "We get a firsthand look at what we can do all at once."

## **A well-connected workforce**

Efficiencies accrue in utility offices just as readily as they appear in the field.

"We definitely benefit from economies of scale for increased efficiency and productivity," said Kelly Simonsen, marketing and communications manager for Easton Utilities. The town of Easton is Maryland's first municipality to own all of its utility services. Easton Utilities provides electric, water, wastewater, natural gas, cable television, and internet utility services for nearly 17,000 people in the Town of Easton and its surrounding area.

In Easton, shared services covering functions including accounting, information technology, human resources, and marketing support all seven business units. "We regularly call on each business to support another, and that brings talent that we would not be able to have on staff full-time if we were just one business," she said.

Simonsen added that internal training, leadership development and corporate communications also benefit from the economies of scale inherent in offering multiple services to the community. For instance, in a recently implemented leadership program, the utility was able to bring in high-caliber training resources.

"Participants also grow from each other's experiences," she said. In fact, the utility is committed to cross training. "For example, our customer service team members will spend time in the field viewing what a lineworker does. They can better communicate with the customer when they understand a bit more what linework entails."

In Kutztown, Khalife said safety education crosses department lines. "We have a very active workforce that goes through monthly training meetings," he explained. With ongoing investments in safety equipment and instruction, the utility has recently experienced two accident-free years.

In addition to providing opportunities for savings, delivering several services also boosts employee retention. "It serves as a natural arena for career mobility," said Khalife.

For instance, a couple of years ago when two jobs opened on the electric side of the utility, two public works employees jumped at the opportunity to change fields. The borough, Khalife said, supported their training, certifications, and transition. In return, the city "retained their skills and knowledge of the borough," he said. "If another department needed help with heavy equipment or snow plowing, those skills are still with us."

Harlan's Weber sees similar value in the career mobility his utility can offer. "We had one of our cable television gentlemen go from the telecom department to the gas department," he said. "If there's anybody who knows where everybody lives in town, it's going to either be a cable guy or a gas meter guy. This employee's familiarity with the town, with the customers, and with the general operation of HMU made for a shorter training period."

### **More ways to promote good citizenship**

Employees of multiservice utilities aren't just acquainted with a town, they're part of it, so reinforcing community ties is a high priority. The many services these organizations offer provide plenty of opportunities for positive impact.

Kutztown's utility has what Khalife called a "passion for natural resources" that shows up in "tremendous volunteerism." For example, the town's environmental advisory commission teamed up with volunteers through Berks Nature, a local nonprofit agency focused on conservation, and the U.S. Department of Agriculture's Natural Resources Conservation Service to address high levels of nitrates in Sacony Creek, a vital watershed for the community.

The combined effort helped local farmers install fencing and animal crossings over the streambed to prevent contamination and adopt nutrient management practices that facilitated controlled and timely application of fertilizers. Both efforts limited pathogens from entering the water. Before this initiative, the city's water treatment plant had been updated with nitrate-removal equipment, but two years after this undertaking, that equipment runs at minimum capacity because nitrate levels have dropped by half.

Along with supporting the nearby ecology, multiservice utilities support the economy. In Harlan, utility managers chose to invest in a new building associated with the local community college.

"They were building a kind of technology incubator," Weber explained. "Not only did we see the big picture for improving the community college for education, we saw the big picture for the technology center."

He adds that the utility was the leading provider in the area capable of supplying the kind of high-speed internet such a center would require. HMU made a donation to help college officials get that center built, and now HMU is the provider of choice for the facility.

Easton's Simonsen said the utility's many services help the organization "be a more significant partner in the community by supporting organizations or events as a sponsor." As an example, as a cable provider, the utility is able to give non-profit organizations opportunities to share their messages on local TV broadcasts free of charge.

## **Challenges to consolidation**

While there are many advantages to being a multiservice utility, there can be some challenges, too.

One is the complexity of training for customer service representatives. "It is a little bit more of a learning curve for a CSR," said Weber. "They have to go across four different main services, and then the telecom CSR drills down into internet, cable TV, and telephone. But that's just standard operating procedure for us."

Another issue: the bigger bills when customers get invoiced for combined services. Weber compares his utility's bills to those in other markets, where a customer might get one bill for electric, and another for gas, water, wastewater and telecommunications, all from different organizations.

"In Harlan, a customer gets electric, gas, [and] water and we also collect for the city on the garbage and sewer side. That's one big bill," he said.

Meanwhile, Harlan sometimes finds itself with an interesting problem: popularity. "We often have requests to expand our service territory, especially with respect to internet service," said Simonsen. "With a mindset to always serve the customer, it is challenging for us to not accommodate these requests. Still, there are times when the cost of supplying such service is financially unattractive."

## **Building trust, earning loyalty**

Despite minor hiccups, multiservice utilities report that having more contact with the community also strengthens local support for the utility.

Kutztown's Khalife noted that the same convenience customers find in acquiring all their utility services from one provider extends to the grievance process. "In a one-stop shop, there's one place to thank and the same place to complain against," he said.

Khalife said his utility maintains "door-to-door response." That is, the utility helps customers onsite with energy assessments, cable TV troubleshooting, and more. "It's a response that customers might not get from a different utility venue."

Simonsen said such commitment encourages customer loyalty for Easton: "People who currently have some of our services are inclined to add other offerings we provide."

In Harlan, commitment to the community has similarly translated into opportunity and fierce loyalty. "The electric and water divisions of our utility were established in 1891. In the 1950s, there was a push to add natural gas, and an investor-owned utility tried to come into town," recounted Weber. "The community overwhelmingly approved a municipal gas utility over the competition."

The same thing happened in the 1980s, when a co-op tried to wrestle away electric service, and again in the 1990s, when the town voted to let HMU add telecommunications to its offerings. Today, competitive providers struggle to gain a foothold against the municipal provider that people trust for just about every utility need.

"We've been invested and involved in our town for 125 years, and now it's a back-and-forth arrangement," Weber said. "Our customers trust us, support us, and rebuke outside interference."

**Topics** [Community \(/Topic/Community\)](#) | [Workforce \(/Topic/Workforce\)](#)

# EXHIBIT 69

# Comcast Spends Big on Local Elections: Would Lose Millions in Revenue from Real Broadband Competition

By H. Trostle & Christopher Mitchell

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## Summary

Comcast has a lot to lose from a competitive market in broadband Internet access. The cable firm is often the only option for broadband Internet access as defined by the Federal Communications Commission today.<sup>1</sup> Comcast faces no competition in four out of ten census blocks where it offers broadband service and in 73 percent of the blocks that have competition, there is only one other option.<sup>2</sup> The cable giant joined incumbent telephone company CenturyLink in Seattle with a [\\$50,000 donation](#) to their preferred candidate, who just happens to oppose a municipal fiber network.

In Fort Collins, the state cable association and Chamber of Commerce have spent more than \$200,000 opposing an effort to amend the city's charter to add authority for a telecommunications utility (although the city has not yet decided how it would use such authority). Comcast is almost certainly the one writing big checks to those organizations.

And yet, Comcast is probably under-spending relative to the threat it faces from encouraged

local Internet choice. Evidence from other cities suggests that a real choice in broadband services could reduce Comcast's revenues by millions of dollars per month. Competition in Fort Collins would cost Comcast between \$5.4 million and \$22.8 million per year. In Seattle, robust competition would cost between \$20 million and \$84 million per year.

A few tens of thousands of dollars is a small price to pay to secure tens of millions in monopoly profits per year. Massive firms monopolizing single industries threatens our political system because of the large incentive they have to protect their turf. They can justify spending more single-handedly to influence elected officials than all sides typically spend in a campaign. And campaign expenditures are only one of many tools firms like Comcast use to protect their business from competition. Comcast also has regular access to decision-makers via direct meetings, trade associations, and via their ["philanthropic" pursuits](#).

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<sup>1</sup> The Federal Communications Commission (FCC) defines broadband as at least 25 Megabits per second (Mbps) download and 3 Mbps upload.

<https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2016-broadband-progress-report>

<sup>2</sup> According to the FCC's Form 477 June 2016 version 2 dataset, Comcast provides service in over 1.6 million census blocks and faces at least one competitive broadband ISP in only about 930,000 of them. These numbers are more than a year out-of-date, and we await the FCC publishing the next Form 477 dataset. <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477> This is the best available data set but it does not guarantee competition in blocks with more than one provider as they may have split the census block to avoid competing.

## Seattle

In Seattle, Comcast and CenturyLink have thrown their weight behind a mayoral candidate with a donation of \$50,000. This is pocket change compared to what they stand to lose. According to our estimates, Comcast could stand to lose an estimated \$1.68 million - \$7 million in revenue each month if faced with competition.

At the end of 2016, Comcast reported approximately 138,000 video subscribers. Comcast has roughly the same number of broadband subscribers as video. Comcast gets an [Average Revenue Per User \(ARPU\) per month of about \\$50](#) for Internet service customers. In our experience with municipal networks, we would expect Comcast to lose between 20 and 30 percent market share as well as a decreased ARPU from remaining subscribers due to more intense price competition.

We conservatively estimate Comcast losing 20 percent of its 138,000 subscribers and a

decrease in ARPU of 5 percent for the remaining subscribers. A high bound is Comcast losing 30 percent of its subscribers that are largely video customers, for which Comcast's [ARPU is \\$150 per month](#). Additionally, for this estimate, Comcast's ARPU would decline 5 percent due to price competition.

As a result of serious competition in Seattle, Comcast would lose between \$1.66 million and \$7 million per month. That works out to between \$20 million and \$84 million per year. Spending tens of thousands of dollars in Seattle is a no-brainer. **Spending more to protect its market share would be a sound investment but could backfire by drawing too much attention.** Comcast faced criticism previously for its [donations](#) to the previous Mayor Murray, who claimed he was not influenced by Comcast's support. Before resigning in disgrace, Mayor Murray did little to create Internet choice following a curiously framed municipal fiber study that deliberately

Table 1: Comcast's Potential Losses in Seattle

Low Estimate to Comcast Internet Service		Each Month
20% of Comcast subscribers at \$50 ARPU		\$1.38 million
80% of Comcast subscribers minus \$2.5 ARPU		\$276,000
<b>Total Comcast Lost Revenue</b>		<b>\$1.66 million</b>
High Estimate to Comcast Video Service		
30% of Comcast subscribers at \$150 ARPU		\$6.21 million
70% of Comcast subscribers minus \$7.5 ARPU		\$830,000
<b>Total Comcast Lost Revenue</b>		<b>\$7 million</b>

inflated costs to make any city effort appear too risky.

It isn't just campaign contributions that wear down local leaders, the constant meetings and pressure from client organizations help. But the scale of potential losses in monopoly profits from competition demonstrate Comcast's strong motivation to protect its turf.

## Fort Collins

Fort Collins, Colorado, is far smaller than Seattle but is getting a lot more attention from the cable giant. The city is home to approximately 164,000 people or about 65,500 households. In November 2015, Fort Collins overwhelmingly voted 83 to 17 percent to opt out of a state law that prevents cities from considering municipal networks, without active opposition from Comcast in that referendum. In November, 2017, Fort Collins voters will decide a referendum on amending the city's charter to add authority for a telecommunications utility -- the next step toward a municipal network.

Comcast is the dominant Internet service provider in the city and is contributing heavily to the opposition to the referendum. At [last count](#), 57 percent of the households in Fort Collins subscribe to Comcast. Opponents of the referendum, which include the Chamber of Commerce and Colorado Cable Telecommunications Association (Comcast being a dominant member of both), have spent [\\$200,000](#) as of two weeks before the vote.

If Fort Collins were to build a competitive municipal network, Comcast could lose between \$523,000 and \$2.13 million per month. That is from \$5.4 million to \$22.8 million per year. This calculation uses 37,335 residential Comcast customers (57 percent of the 65,500 households in town) and the same assumptions as above.

Comcast has a relevant history in Colorado, having previously spent on the order of half a million dollars (via the CCTA) to stop competition in Longmont, just south of Fort Collins. Longmont went on to build a fiber network that has done quite well, offering a \$50/month gigabit connection citywide.

Table 2: Comcast's Potential Losses in Fort Collins

Low Estimate to Comcast Internet Service		Each Month
20% of Comcast subscribers at \$50 ARPU		\$373,500
80% of Comcast subscribers minus \$2.5 ARPU		\$75,000
<b>Total Comcast Lost Revenue</b>		<b>\$450,000</b>
High Estimate to Comcast Video Service		
30% of Comcast subscribers at \$150 ARPU		\$1.68 million
70% of Comcast subscribers minus \$7.5 ARPU		\$224,000
<b>Total Comcast Lost Revenue</b>		<b>\$1.9 million</b>

Comcast's reaction? It has [blatantly lied](#) about the network in communication with Fort Collins City Council.

In a related note, the campaign against the referendum this year also lies, claiming that a yes vote in the referendum will result in borrowing \$150 million. Fort Collins has no plans to borrow \$150 million; the city simply needs to authorize an upper limit for borrowing in the event they decide to move forward with any investment.

### About the Authors

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Learn more at [MuniNetworks.org](#) and [sign up for the newsletter](#).

## Conclusion

The big cable companies like Comcast have a stunning amount at stake in preventing additional choices and competition in the areas they currently monopolize. Our analysis doesn't even consider the additional costs that competition would mean for Comcast (often increased marketing, and earlier technical upgrades).

If Comcast faced more competition, the lost revenues wouldn't just disappear. It would remain in the pockets of subscribers in the form of lower monthly rates and in the salaries of people working for the new competitor. Money that today flows to Comcast executives and shareholders far outside these cities would be more likely to stay in the local and regional economies.

Spending a few hundreds of thousands of dollars once or twice to stop a referendum is a smart investment to stop competition that would cost many millions of dollars in lost revenue year after year. It also puts into perspective the relatively small price North Carolina cable and telephone firms [paid to block all local Internet choice](#) from local governments there.

Given the many reasons that communities have to create local Internet choice, including [better educational opportunities](#), [dramatic community savings](#), [key economic development wins](#), and more, some wonder why communities might decide against local investments. The answer is that the big cable and telephone monopolies are highly motivated to preserve the [broken broadband market](#).

# **BROAD-BANNED: THE FCC'S PREEMPTION OF STATE LIMITS ON MUNICIPAL BROADBAND AND THE CLEAR STATEMENT RULE**

## **ABSTRACT**

*Congress instructed the FCC in the Telecommunications Act of 1996 to take action to ensure that advanced telecommunications capabilities were being timely deployed to all Americans. In 2015, the FCC preempted statutes in North Carolina and Tennessee that limited the powers of municipally owned internet service providers to expand their networks to nearby underserved communities. The FCC had determined, pursuant to Section 706 of the 1996 Act, that these state limits on municipal broadband networks were anticompetitive barriers to infrastructure investment in contravention of the express purpose of the Act. The FCC reasoned that the municipal broadband networks were filling gaps in the broadband market, where private internet service providers were unwilling to invest in infrastructure or providing lousy service due to the lack of competition in the local markets.*

*North Carolina and Tennessee appealed the FCC order, arguing that the FCC did not have the authority to interpose itself between the States and their political subdivisions. Relying on the Supreme Court's earlier decision in *Nixon v. Missouri Municipal League*, which addressed a similar factual issue, the Sixth Circuit agreed with the States that the FCC lacked the authority to interfere with the States' management of their political subdivisions. This Comment argues that the Sixth Circuit should have applied a narrower reading of the clear statement rule, which would strike an appropriate balance between the FCC's unmistakably clear authority to regulate the deployment of broadband technology against the legitimate sovereign interests of the affected states.*

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## INTRODUCTION

Upon the signing of the Telecommunications Act of 1996, President Clinton predicted that the Act would “help connect every classroom in America to the information superhighway by the end of the decade.”<sup>1</sup> Since the enactment of this bill, the Internet—the “information superhighway” to which President Clinton referred—has provided Americans with new opportunities in communication, education, healthcare, and the economy.<sup>2</sup> The benefits of these opportunities are particularly pronounced in rural America, where broadband empowers previously remote communities to become a part of the global community.<sup>3</sup> Access to these opportunities has increasingly become a necessity, especially for students and professionals, as the Internet becomes more central to daily life in America.<sup>4</sup> However, over two decades after the passage of the 1996 Telecommunications Act, approximately 24 million Americans still lack access to fixed broadband services.<sup>5</sup>

Around the country, communities that either lack access to broadband or are dissatisfied with their current service providers have banded together to launch their own municipal broadband services with the support of local governments.<sup>6</sup> Nineteen states, however, have laws in force that restrict communities’ ability to form municipal broadband networks.<sup>7</sup> These restrictions, nominally passed to prevent government boondoggles and ensure fair competition in the

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<sup>1</sup> Statement by President William J. Clinton Upon Signing S. 652, 32 WEEKLY COMP. PRES. DOC. 218 (Feb. 8, 1996).

<sup>2</sup> COUNCIL OF ECONOMIC ADVISERS, THE DIGITAL DIVIDE AND ECONOMIC BENEFITS OF BROADBAND ACCESS 5–6 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160308\\_broadband\\_cea\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160308_broadband_cea_issue_brief.pdf).

<sup>3</sup> Press Release, FCC, FCC Takes Key Step Toward Auction to Expand Rural Broadband Access (Dec. 19, 2017), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db1219/DOC-348332A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1219/DOC-348332A1.pdf); see, e.g., Cecilia Kang, *Broadband Law Could Force Rural Residents off Information Superhighway*, N.Y. TIMES (Aug. 28, 2016), <https://www.nytimes.com/2016/08/29/technology/broadband-law-could-force-rural-residents-off-information-superhighway.html> (describing how access to reliable high-speed Internet allowed Vick Family Farms to adopt new technology, allowing it to increase its international exports).

<sup>4</sup> FCC 2018 Broadband Deployment Report, 33 FCC Rcd. 1660, 1748 (2018) (dissenting statement of Comm’r Rosenworcel) (“No matter who you are or where you live in this country, you need access to modern communications to have a fair shot at 21st century success.”); see also Gaby Galvin, *States Struggle to Bridge Digital Divide*, U.S. NEWS & WORLD REP.: BEST STATES (Mar. 16, 2017, 1:06 PM), <https://www.usnews.com/news/best-states/articles/2017-03-16/internet-access-a-staple-of-american-life-yet-millions-remain-under-connected> (discussing how tasks like applying for jobs or completing homework have “shifted largely online in recent years”).

<sup>5</sup> FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1679; see also *infra* note 25.

<sup>6</sup> LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 3 (2016).

<sup>7</sup> *Community Network Map*, COMMUNITY NETWORKS, <https://muninetworks.org/communitymap> (last visited Oct. 20, 2018).

telecommunications market,<sup>8</sup> have often been the subject of intensive lobbying efforts from private internet service providers (ISPs).<sup>9</sup>

In 2014, two cities with existing municipal broadband networks—Wilson, North Carolina and Chattanooga, Tennessee—petitioned the Federal Communications Commission (FCC) to preempt statutes in their states that limited their ability to expand broadband services to neighboring, underserved communities.<sup>10</sup> The FCC granted the petitions of Wilson and Chattanooga pursuant to its authority under Section 706 of the 1996 Telecommunications Act.<sup>11</sup> North Carolina and Tennessee promptly appealed the preemption, and the cases were consolidated in the Sixth Circuit.<sup>12</sup>

The Sixth Circuit overturned the FCC's preemption order in *Tennessee v. FCC*, reasoning that because this action interposed the federal government between the state and its political subdivisions, the clear statement rule enunciated by the Supreme Court in *Gregory v. Ashcroft* applied.<sup>13</sup> When preemption would “upset the usual constitutional balance of federal and state powers,” courts apply the clear statement rule, which requires that Congress's intent to preempt be “unmistakably clear” in the text of the statute.<sup>14</sup> The Sixth Circuit relied on the Supreme Court's application of the clear statement rule in *Nixon v. Missouri Municipal League*, in which the Court found that a different section of the Telecommunications Act of 1996 did not grant the FCC the authority to preempt a state statute prohibiting public utilities from providing telecommunications services.<sup>15</sup> Because the Sixth Circuit found more than one reasonable interpretation of Section 706, the three-judge panel ruled that congressional intent was not clear, and therefore the FCC lacked the power to

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<sup>8</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4, 8.

<sup>9</sup> See, e.g., Jon Brodtkin, *Comcast Has a Lot to Lose if Municipal Broadband Takes Off*, ARS TECHNICA (Nov. 3, 2017, 11:40 AM), <https://arstechnica.com/tech-policy/2017/11/comcast-has-a-lot-to-lose-if-municipal-broadband-takes-off/>.

<sup>10</sup> City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2413 (2015) (mem. op. and order).

<sup>11</sup> *Id.* at 2414 (“Section 706(b) requires that the Commission ‘take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market,’ if it finds . . . that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.” (citation omitted)). See generally Matthew Dunne, Note, *Let My People Go (Online)*, 107 COLUM. L. REV. 1126, 1146 (2007) (arguing that Section 706 confers preemption authority on the FCC and obligates it to preempt if it finds that state law hinders broadband deployment).

<sup>12</sup> *Tennessee v. FCC*, 832 F.3d 597, 609 (6th Cir. 2016).

<sup>13</sup> *Id.* at 613.

<sup>14</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

<sup>15</sup> *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140–41 (2004).

preempt these statutes.<sup>16</sup> However, in a partial dissent, Circuit Judge White argued that the clear statement rule does not apply to federal regulation of local governments that does not concern states' core sovereign powers.<sup>17</sup>

What is clear, however, is that Congress did grant the FCC the authority to ensure that broadband technology is deployed efficiently and universally. This Comment proposes that the Sixth Circuit should have adopted Judge White's narrower reading of the clear statement rule to empower the FCC to preempt those state statutes that exclusively effectuate regulatory communications policy.<sup>18</sup> As *Nixon* was factually analogous to *Tennessee v. FCC*, the Sixth Circuit relied on it extensively to reach its decision.<sup>19</sup> However, some of the laws that the FCC preempted that were at issue in *Tennessee* are plainly distinguishable from those statutes that deal solely with core issues of state sovereignty, such as the statute at issue in *Nixon*.<sup>20</sup> By narrowing the application of the clear statement rule in *Tennessee*, the Sixth Circuit would have enabled the FCC to exercise the authority granted to it by Congress to ensure the timely deployment of broadband technology to all Americans.<sup>21</sup>

This Comment proceeds in four Parts. Part I provides an overview of broadband technology and the municipal broadband policy debate. Part II discusses Congress's instruction to the FCC in Section 706 of the 1996 Telecommunication Act and the FCC's 2015 preemption order. Part III analyzes the Sixth Circuit opinion overturning the order, demonstrates that Congress plainly meant to grant the FCC preemption authority in Section 706, and argues that the narrower application of the clear statement rule proposed by Judge White would better reflect congressional intent and alleviate concerns that had been raised in previous clear statement cases. Finally, Part IV addresses the implications of this proposed tailoring of the clear statement rule, including expanded access to broadband technology, the increased authority of the FCC in the broadband space, and concerns for judicial and legislative economy. This narrower reading of the clear statement rule will empower the FCC to better effectuate its congressional mandate by ensuring that state communications policies accord with federal communications policy.

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<sup>16</sup> *Tennessee*, 832 F.3d at 613.

<sup>17</sup> *Id.* at 615 (White, J., concurring in part and dissenting in part).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 610 (majority opinion).

<sup>20</sup> *Mo. Mun. League*, 541 U.S. at 140–41.

<sup>21</sup> 47 U.S.C. § 1302(a) (2012); *see also Tennessee*, 832 F.3d at 614 (White, J., concurring in part and dissenting in part) (finding that the FCC was correct in determining that Section 706 grants preemption authority).

## I. BROADBAND TECHNOLOGY AND THE MUNICIPAL BROADBAND DEBATE

Broadband technology has developed rapidly over the last two decades, providing new opportunities for employment, healthcare, and education.<sup>22</sup> But access to these opportunities has been dictated by users' proximity to high-density population centers.<sup>23</sup> Local, state, and federal government entities have responded to this access gap with various legislative and executive actions. This Part first provides an overview of the current state of broadband access in the United States, followed by an explanation of the advent of municipal broadband networks, and concludes with a description of the restrictive state government responses to municipal networks.

### A. *Broadband Basics*

Broadband, commonly understood to be high-speed Internet, allows users to send and receive data using multiple frequencies, which increases the data transmission speed.<sup>24</sup> Broadband signals can be fixed—delivered using a physical transmission path—or mobile—received using a smartphone or similar device.<sup>25</sup> Rather than defining broadband by its underlying technology, the FCC defines broadband by the speed at which data is transmitted, allowing it to more easily update its standard as technology evolves.<sup>26</sup> In 2015, the FCC increased the benchmark for fixed broadband to 25 megabytes per second (Mbps) downstream (i.e., download speed) and 3 Mbps upstream (i.e., upload speed) citing the demand for streaming video services and simultaneous usage of multiple devices in a single household.<sup>27</sup> In practice, broadband service with these speeds allows users to download a three minute song in under two seconds and a two hour movie in about twenty-six minutes.<sup>28</sup> ISPs have begun to introduce fiber optic-based Internet services, which offer gigabit download speeds (1 Gbps), or about 1000 Mbps.<sup>29</sup> At these speeds, users can download

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<sup>22</sup> LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 1 (2016).

<sup>23</sup> *Id.* at 3.

<sup>24</sup> EXEC. OFFICE OF THE PRESIDENT, COMMUNITY-BASED BROADBAND SOLUTIONS 5 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based\\_broadband\\_report\\_by\\_executive\\_office\\_of\\_the\\_president.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf).

<sup>25</sup> FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 710–12 (2016).

<sup>26</sup> *Id.* at 705.

<sup>27</sup> *Id.* at 706. This marked a significant increase over the previous benchmark of 4 Mbps downstream and 1 Mbps upstream, which had been in place since 2010. *Id.* The FCC maintained this standard in the FCC 2018 Broadband Deployment Report. 33 FCC Rcd. 1660, 1664–65 (2018).

<sup>28</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 24.

<sup>29</sup> Mike Freeman, *Cox, Spectrum Upgrade Networks to Bring Gigabit Internet Speeds to San Diego*, SAN DIEGO UNION-TRIB. (July 11, 2018, 5:40 PM), <http://www.sandiegouniontribune.com/business/technology/sd->

100 songs in three seconds and a high-definition movie in sixty seconds.<sup>30</sup> Beyond its entertainment functions, “Americans increasingly rely on broadband for job opportunities, healthcare, education, public safety, and civic participation.”<sup>31</sup>

Although the broadband market as a whole has rapidly improved the quality and speed of its services, these improvements have not been evenly distributed throughout the United States.<sup>32</sup> The FCC found in its 2018 Broadband Deployment Report that about 8% of Americans lacked access to broadband that meets the FCC’s 2015 benchmarks.<sup>33</sup> However, for Americans living in rural areas,<sup>34</sup> that number increased to about 31%, while the same was true for only 2% of their urban counterparts.<sup>35</sup>

The broadband access gap between rural and urban Americans has been driven by the limited profitability of ISPs due to the mismatch between the high costs of infrastructure investment and small customer bases in rural communities.<sup>36</sup> Simply put, infrastructure costs increase with distance, and profitability increases with more customers.<sup>37</sup> Thus, ISPs are more willing to make the necessary capital investments to deliver high-quality broadband in densely populated urban areas where they can quickly recoup their investment while providing a reasonably priced product.<sup>38</sup> Unfortunately, rural areas are defined by the presence of few people over long distances, making the necessary infrastructure investment prohibitively expensive from ISPs’ perspective.<sup>39</sup>

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fi-cox-gigabit-20180710-story.html; see also *AT&T Fiber*, AT&T, <https://www.att.com/internet/fiber.html> (last visited Oct. 20, 2018); Google Fiber, GOOGLE, <https://fiber.google.com/about/> (last visited Oct. 20, 2018).

<sup>30</sup> Freeman, *supra* note 29. Approximately 18% of Americans now have access to gigabit Internet; however, the FCC has maintained the current standard of 25 Mbps/3 Mbps as it satisfies the statutory requirement. FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1667–68.

<sup>31</sup> FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 774 (2016) (statement of Chairman Tom Wheeler).

<sup>32</sup> *Id.* at 701.

<sup>33</sup> FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1681 tbl.1.

<sup>34</sup> The FCC currently defines rural communities using the 2010 Census block identification. FCC 2016 Broadband Progress Report, 31 FCC Rcd. at 731 n.238. The U.S. Census Bureau defines urban areas based on several measures of density, and then all other areas are designated as rural. MICHAEL RATCLIFFE ET AL., U.S. CENSUS BUREAU, *DEFINING RURAL AT THE U.S. CENSUS BUREAU 2* (2016).

<sup>35</sup> FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1681 tbl.1.

<sup>36</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 9.

<sup>37</sup> *Id.*

<sup>38</sup> Jeff Stricker, Note, *Casting a Wider ‘Net’: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified*, 81 GEO. WASH. L. REV. 589, 596–97 (2013).

<sup>39</sup> *Id.* at 597.

## B. *Municipal Broadband Networks*

Many underserved areas have begun to tackle the broadband access gap by creating municipal broadband networks.<sup>40</sup> These networks can take one of several forms: a publicly owned entity, a public-private partnership, or a cooperative.<sup>41</sup> In a publicly owned municipal broadband network, the local government builds, finances, and operates the network.<sup>42</sup> Public-private partnerships can take many forms, but are commonly characterized by a private entity contracting with the local government to provide broadband service in exchange for some form of economic incentive—whether an infusion of public capital or access to existing public infrastructure.<sup>43</sup> Cooperatives follow a model inspired by electric and telephone cooperatives that originated in the 1930s to serve rural communities, and are owned and governed by their customers.<sup>44</sup> In many rural communities, electric cooperatives can use their preexisting infrastructure to begin offering broadband service to their members at lower cost than new entrants into the market.<sup>45</sup>

Today, municipal broadband networks have proliferated in small- and mid-sized rural communities.<sup>46</sup> As of 2015, nearly 500 municipalities had established some form of municipal broadband network.<sup>47</sup> Many of these networks have been built out through preexisting public utilities, like the Electric Power Board

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<sup>40</sup> LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 1 (2016).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 2; *see also* SCOTT CARLSON & CHRISTOPHER MITCHELL, INST. FOR LOCAL SELF-RELIANCE & NEXT CENTURY CITIES, RS FIBER: FERTILE FIELDS FOR NEW RURAL INTERNET COOPERATIVE 10–12 (2016) (providing an overview of the structure and development of a multi-municipality broadband cooperative in rural Minnesota).

<sup>45</sup> Jay Schwarz, Wireline Advisor to FCC Chairman Ajit Pai, FCC, Remarks at the 2018 CEO Close-Up Conference of the National Rural Electric Cooperative Association 2–3 (Jan. 8, 2018). *See generally* Cecilia Kang, *How to Give Rural America Broadband? Look to the Early 1900s*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/technology/how-to-give-rural-america-broadband-look-to-the-early-1900s.html> (discussing the emergence of utility cooperatives as broadband providers).

<sup>46</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 2. This was not always the case, however. In the mid-2000s, several major cities—Philadelphia, Chicago, Houston, and San Francisco, among others—contracted with Earthlink, a small private ISP, to build citywide wireless networks. John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 86, 104–06 (2009). Unfortunately, these projects were scuttled due to a combination of “unduly restrictive” contracts and Earthlink’s inability to deliver on its promises. Christopher Teters, *Municipal Broadband in Kansas: The Fight for Community Manifest Destiny*, 25 KAN. J.L. & PUB. POL’Y 89, 103 (2015).

<sup>47</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 13, 20–33.

(EPB) network in Chattanooga, Tennessee,<sup>48</sup> the Greenlight network in Wilson, North Carolina,<sup>49</sup> and the BVU Authority in Bristol, Virginia.<sup>50</sup>

The most compelling argument in support of municipal broadband networks is that they can bridge the “digital divide” in underserved communities where private ISPs are either unwilling or unable to provide broadband services.<sup>51</sup> Furthermore, municipal broadband services can offer the benefits of competition by providing an alternative in the vast majority of communities that only have one broadband provider.<sup>52</sup> For example, in Wilson, North Carolina, Time Warner Cable responded to the creation of a municipal broadband network by holding rates steady, while they increased rates in neighboring service areas without a second provider option.<sup>53</sup> Finally, proponents argue that municipal broadband can bridge the financial digital divide—the access gap defined by socioeconomic status, as opposed to the previously discussed geographic digital divide—by providing low-income residents access to affordable broadband services without the profitability constraints of a private ISP.<sup>54</sup>

Opponents principally rely on two somewhat counterintuitive arguments.<sup>55</sup> First, opponents of municipal broadband networks claim that the government is incapable of providing broadband services more efficiently than the private sector.<sup>56</sup> Second, these opponents argue that due to the government’s regulatory advantages, the private sector would be crowded out by their entrance into the broadband market.<sup>57</sup> On the government capability argument, opponents point to prominent municipal broadband failures, like those in Philadelphia<sup>58</sup> and St. Cloud, Florida,<sup>59</sup> which demonstrate that building out a broadband network can be a high-risk venture with the potential of wasting millions of taxpayer dollars.<sup>60</sup> Additionally, broadband technology’s rapid development poses a

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<sup>48</sup> *Id.* at 13–14.

<sup>49</sup> *Id.* at 14–15.

<sup>50</sup> Teters, *supra* note 46, at 100.

<sup>51</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 5; *see also* Anthony Sciarra, *Municipal Broadband: The Rush to Legislate*, 17 ALB. L.J. SCI. & TECH. 233, 255–57 (2007) (explaining how municipal broadband can improve service in the long run by filling service gaps in the short-run and increasing competition).

<sup>52</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

<sup>53</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 15. Time Warner Cable also increased the broadband speeds they offered, “because of the competitive environment.” *Id.*

<sup>54</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Teters, *supra* note 46.

<sup>59</sup> *Id.*

<sup>60</sup> KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

unique challenge for government entities, which lack the flexibility of the private sector in adopting new technologies due to cost and bureaucratic constraints.<sup>61</sup> On the competition side, opponents argue that municipal broadband networks have inherent advantages over private ISPs, including ease of avoiding regulatory burdens and access to public capital.<sup>62</sup> They further argue that government investments in broadband infrastructure would create disincentives for private investment in that same infrastructure, ultimately leading to even greater costs for the taxpayer.<sup>63</sup>

### C. State Legislative Efforts to Restrict Municipal Broadband

Today, nineteen states have some form of law that restricts the ability of municipalities to establish broadband networks.<sup>64</sup> These legislative restrictions have often been the result of substantial lobbying efforts by private ISPs, who would prefer not to compete with municipal broadband networks.<sup>65</sup> The American Legislative Exchange Council (ALEC), a free-market advocacy group, has developed a model that has inspired many of the recent laws restricting municipal broadband.<sup>66</sup> ALEC's model legislation includes four major prongs to protect private sector ISPs and local taxpayers.<sup>67</sup> First, the ALEC model proposes that municipalities should not be able to cross-subsidize its broadband network from any other municipal funds.<sup>68</sup> Second, it recommends that before establishing a municipal broadband network, the proposal should be subject to a substantial deliberative process that prioritizes public-private partnerships and mandates public hearings and referenda.<sup>69</sup> Third, the model proposes that municipal broadband networks should not be provided any

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Community Network Map*, *supra* note 7. The nineteen states include the following: Alabama, Arkansas, Colorado, Florida, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.*

<sup>65</sup> See Blevins, *supra* note 46, at 109 (discussing the “intensive lobbying effort in multiple states to enact further restrictions on municipal entry into the broadband market”); Stricker, *supra* note 38, at 598 (describing efforts by private ISPs in Wisconsin and Pennsylvania to pass legislation restricting municipal broadband projects).

<sup>66</sup> *About ALEC*, AM. LEGIS. EXCHANGE COUNCIL, <http://www.alec.org/about/> (last visited Oct. 20, 2018); Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, ARS TECHNICA (Feb. 12, 2014, 7:00 AM), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states/>.

<sup>67</sup> *Principles on Municipal/Government Owned Networks*, AM. LEGIS. EXCHANGE COUNCIL (May 5, 2017), <https://www.alec.org/model-policy/municipal-telecommunications-private-industry-safeguards-act/>.

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* (describing principles to encourage public participation in the deliberative process).

advantages not available to private ISPs.<sup>70</sup> Finally, it suggests that municipal broadband networks must be thoroughly transparent as to their finances and make all records available for public review.<sup>71</sup>

In practice, these statutes vary in structure and effect from state to state.<sup>72</sup> Four states—Arkansas, Missouri, Nebraska, and Texas—have complete bans on municipalities establishing broadband networks.<sup>73</sup> Most restrictions on municipal broadband raise entry costs through a variety of methods, including public referenda requirements and limits on funding mechanisms.<sup>74</sup> Some scholars have noted that some of these existing restrictions, while facially applicable to broadband, do not apply to municipal broadband networks in practice.<sup>75</sup> In Arkansas, for example, several municipalities have experimented with wireless municipal networks, despite the purported ban on such activities.<sup>76</sup>

## II. SECTION 706 AND THE FCC’S 2015 PREEMPTION ORDER

The Telecommunications Act of 1996 was the first major change to the nation’s communications law since the passage of the Communications Act of 1934.<sup>77</sup> Its passage reflected the understanding that emerging telecommunications technology would present both new opportunities for users and challenges for regulators.<sup>78</sup> Section 706 of the Act, titled “[a]dvanced telecommunications incentives,” serves as the primary source of FCC authority to regulate broadband technology.<sup>79</sup> This Part proceeds in two sections. Section A examines the grant of regulatory authority over broadband technology granted by Section 706 of the Telecommunications Act of 1996. Section B then describes and analyzes the FCC’s exercise of this power to preempt the restrictive municipal broadband statutes in North Carolina and Tennessee in its 2015 order.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Blevins, *supra* note 46, at 109.

<sup>73</sup> Stricker, *supra* note 38, at 608.

<sup>74</sup> Blevins, *supra* note 46, at 109–10.

<sup>75</sup> *Id.* at 111.

<sup>76</sup> *Id.*

<sup>77</sup> ANGELE A. GILROY, CONG. RESEARCH SERV., 96–223, THE TELECOMMUNICATIONS ACT OF 1996 (P.L. 104-104): A BRIEF OVERVIEW 1 (1998).

<sup>78</sup> *Id.*

<sup>79</sup> 47 U.S.C. § 1302(a) (2012).

A. *Section 706 of the Telecommunications Act of 1996*

Congress passed the Telecommunications Act of 1996 to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>80</sup> Section 706 of the Act instructs the FCC to act as follows:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.<sup>81</sup>

It further instructs the FCC to undertake an annual study to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” and if not, “it shall take immediate action to accelerate deployment . . . by removing barriers to infrastructure investment.”<sup>82</sup>

Section 706 defines advanced communications capability “as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>83</sup> The FCC retains the authority to interpret “the meaning of terms such as advanced, high-speed, and high-quality.”<sup>84</sup> The FCC has explained that it believes Congress intended that it define “advanced” based on the demands and needs of users, rather than a technological baseline, and thus it has taken a holistic approach that defines advanced by the speeds available to users.<sup>85</sup>

In 1998, the FCC determined that “in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’[s] policy objectives . . . Section 706 [did] not constitute an independent grant of authority.”<sup>86</sup> This interpretation was revised in the Commission’s 2010 Open

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<sup>80</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>81</sup> 47 U.S.C. § 1302(a).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 705 (2016).

<sup>85</sup> *Id.*; *see supra* Section I.A.

<sup>86</sup> Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, 13 FCC Rcd. 24,012, 24,047 (1998).

Internet Order, when it held that “Section 706(a) authorizes [it] . . . to take actions . . . that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.”<sup>87</sup> The D.C. Circuit upheld this new interpretation in *Verizon v. FCC*, holding that it was reasonable to conclude that Congress intended Section 706(a) to be an affirmative grant of authority to regulate broadband.<sup>88</sup> The court emphasized the importance of two limiting principles outlined by the FCC in the Open Internet Order.<sup>89</sup>

The first principle mandates that Section 706 “must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to ‘interstate and foreign communication by wire and radio.’”<sup>90</sup> The second principle requires that “any regulations must be designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”<sup>91</sup>

As a somewhat distinct matter, the Open Internet Order elaborates that Section 706(b) of the Act can also serve as an independent grant of authority if the FCC determines that advanced telecommunications services are not being deployed in a reasonable and timely fashion to all Americans.<sup>92</sup> In 2010, the FCC determined that broadband had not been deployed in a reasonable and timely manner, and that the Section 706(b) powers had been triggered providing “express authority for . . . pro-investment, pro-competition rules.”<sup>93</sup> The D.C. Circuit upheld this interpretation, finding that “the provision may certainly be read to accomplish as much, and given such ambiguity we have no basis for rejecting the Commission’s determination that it should be so understood,” provided that the two limiting principles apply to Section 706(b) as well.<sup>94</sup>

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<sup>87</sup> Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. 17,905, 17,969 (2010).

<sup>88</sup> 740 F.3d 623, 639 (D.C. Cir. 2014).

<sup>89</sup> *Id.* at 640.

<sup>90</sup> *Id.* (quoting 47 U.S.C. § 152(a) (2012)).

<sup>91</sup> *Id.* (quoting 47 U.S.C. § 1302(a) (2012)).

<sup>92</sup> Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. at 17,972.

<sup>93</sup> *Id.* In its 2018 Broadband Deployment Report, the FCC found for the first time since 2010 “that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” FCC 2018 Broadband Deployment Report, 33 FCC Rcd. 1660, 1707 (2018). This finding was based on the policy changes that the FCC has made since the issuance of the 2016 Broadband Progress Report, rather than statistical findings from its deployment analysis. *Id.* While this positive finding means that the Section 706(b) grant of authority has theoretically been deactivated, this change does not affect this Comment’s retrospective analysis.

<sup>94</sup> *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014).

## B. *FCC Order City of Wilson, North Carolina*

It is with this understanding of Section 706 that the FCC issued its 2015 order preempting two state statutes restricting municipal broadband. This order was issued in response to petitions from the EPB of Chattanooga, Tennessee and the City of Wilson, North Carolina asking that the FCC preempt restrictive statutes limiting their existing services.<sup>95</sup> This section will proceed by providing a brief overview of the services provided by these respective municipal broadband networks and of the laws in question in Tennessee and North Carolina. It will then examine the order issued by the FCC, including the arguments presented by the two dissenting commissioners from the five-member panel.

### 1. *EPB, Chattanooga, Tennessee*

The EPB began building out its fiber network in 1996 to improve the capabilities of its existing electric grid and begin offering Internet service to its customers.<sup>96</sup> By deploying broadband in conjunction with its electric smart grid,<sup>97</sup> EPB was able to take advantage of efficiency gains, share costs between the two systems, and raise additional revenue.<sup>98</sup> EPB first offered fiber services in 2009, and in 2010 was the first broadband provider in the nation to offer gigabit service to all its customers.<sup>99</sup> EPB claims that the expansion of its broadband services has created thousands of new jobs and attracted large corporations, such as Amazon and Volkswagen, to the Chattanooga area.<sup>100</sup> EPB also highlights the benefits to local schools, which all have 100 Mbps Internet speeds through EPB, and public libraries, which have become a model for libraries nationwide.<sup>101</sup>

Tennessee law currently allows municipal electric systems to provide Internet service, but prohibits them from offering these services in areas where they do not provide electric service.<sup>102</sup> However, these same municipal electric

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<sup>95</sup> City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2414 (2015) (mem. op. and order).

<sup>96</sup> *Id.* at 2416.

<sup>97</sup> “Smart grid” refers to the newest generation of electricity infrastructure. Smart grid systems incorporate two-way communications technology, control systems, and computer processing to better monitor electricity and rapidly respond to problems. OFFICE OF ELEC., DEP’T OF ENERGY, GRID MODERNIZATION AND THE SMART GRID, <https://energy.gov/oe/activities/technology-development/grid-modernization-and-smart-grid> (last visited Oct. 20, 2018).

<sup>98</sup> *City of Wilson*, 30 FCC Rcd. at 2416.

<sup>99</sup> *Id.*; see *supra* Section I.B.

<sup>100</sup> *City of Wilson*, 30 FCC Rcd. at 2417.

<sup>101</sup> *Id.* at 2418.

<sup>102</sup> *Id.* at 2419.

systems have the authority to offer other telecommunications services anywhere in the state, regardless of their electric service territories.<sup>103</sup> EPB explained in its preemption request that it receives frequent requests to expand its broadband network to neighboring communities, which it argues are in “a digital desert.”<sup>104</sup> Thus, while EPB wanted to expand its broadband services to these neighboring communities, it was prohibited from doing so, even though Tennessee law allows it to provide telecommunications services to these same communities.<sup>105</sup> As such, EPB asked the FCC to preempt the phrase “within its service area” in the relevant Tennessee statute, allowing it to expand the service area for its broadband product.<sup>106</sup>

## 2. *Greenlight, Wilson, North Carolina*

The City of Wilson began exploring options for construction of its own municipal broadband network in the 1990s in response to local “complaints about the high cost and low quality of available voice and video services.”<sup>107</sup> Wilson began its municipal broadband network by constructing a “fiber optic backbone connecting all City-owned facilities” in 2005, which was later expanded into a network offering service directly to consumers called Greenlight.<sup>108</sup> Wilson credits the creation of Greenlight with a variety of economic benefits, including reduced Internet prices for local residents, savings in government expenses, and widespread usage of the network in Wilson’s business community.<sup>109</sup> Notably, Wilson attributes the competition from its municipal broadband network with holding broadband prices from private ISPs steady, while prices increased for neighboring communities.<sup>110</sup>

The North Carolina legislature passed H.B. 129 in 2011 to limit the ability of municipalities to establish broadband networks.<sup>111</sup> The bill was the subject of intensive lobbying efforts, with Time Warner Cable, CenturyLink, and AT&T spending over \$1 million collectively to push the measure through.<sup>112</sup> The statute contains a panoply of restrictions on municipal broadband networks, which the FCC grouped into three general categories: measures to raise economic costs,

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 2423.

<sup>107</sup> *Id.* at 2423–24.

<sup>108</sup> *Id.* at 2424.

<sup>109</sup> *Id.*

<sup>110</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 15.

<sup>111</sup> *City of Wilson*, 30 FCC Rcd. at 2425–26.

<sup>112</sup> *Id.* at 2426.

“level playing field” obligations, and measures to impose delay.<sup>113</sup> The measures to raise economic costs included prohibitions on pricing services below cost, requirements that they impute the costs typically encountered by private ISPs, and geographic limits on the service area.<sup>114</sup> The level playing field obligations essentially prohibit the municipality from doing anything to support its broadband network without also offering that same service to private ISPs.<sup>115</sup> Finally, the measures to impose delay require the municipality to conduct feasibility studies, hold hearings on those studies, hold referenda on incurring debt to finance the projects, and solicit proposals from private businesses to provide the services.<sup>116</sup> The City of Wilson’s already existing network was grandfathered in under H.B. 129, but the statute prohibits the City from providing broadband services in neighboring communities where it already provides electricity.<sup>117</sup> Wilson requested that the FCC preempt H.B. 129 by finding that it served “to thwart or unreasonably delay broadband investment and competition.”<sup>118</sup>

### 3. *The FCC Takes Action*

In February 2015, the FCC adopted the *City of Wilson, North Carolina* order in response to these two petitions on a three-to-two party-line vote.<sup>119</sup> The three Democratic commissioners—Chairman Wheeler, Commissioner Clyburn, and Commissioner Rosenworcel—voted for the order granting in whole the petition from EPB and granting in part the petition from the City of Wilson.<sup>120</sup> The two Republican commissioners—Commissioner Pai and Commissioner O’Rielly—dissented and issued separate statements explaining their opposition.<sup>121</sup> This section first describes the arguments laid out in the FCC’s holding and then turns to the arguments advanced by the two dissenting commissioners.

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<sup>113</sup> *Id.* at 2447–51.

<sup>114</sup> *Id.* at 2447–48.

<sup>115</sup> *Id.* at 2448.

<sup>116</sup> *Id.* at 2449–50.

<sup>117</sup> *Id.* at 2427.

<sup>118</sup> *Id.* at 2430.

<sup>119</sup> *Id.* at 2408. The FCC is composed of five commissioners appointed by the President for a term of five years; no more than three commissioners may be members of the same political party. 47 U.S.C. § 154 (2012). Historically, most votes on FCC orders were unanimous. Scott Wallsten, *The Partisan FCC*, TECH. POL’Y INST. (Feb. 16, 2016), <https://techpolicyinstitute.org/2016/02/16/the-partisan-fcc/>. However, under Chairman Wheeler, FCC votes became increasingly partisan, with Democratic Commissioners Wheeler, Clyburn, and Rosenworcel in opposition to Republican Commissioners Pai and O’Rielly. *Id.*

<sup>120</sup> *City of Wilson*, 30 FCC Rcd. at 2408.

<sup>121</sup> *Id.* at 2506 (Pai, Comm’r, dissenting); *id.* at 2519 (O’Rielly, Comm’r, dissenting).

*a. Reasoning of the Order*

In the order, the FCC explained both the legal reasoning for its power to preempt state laws regulating the provision of broadband services by a state's municipal subdivisions under Section 706 and applied that reasoning to the laws challenged in the two petitions.<sup>122</sup> The FCC employed a three-step argument to demonstrate its preemptory powers. First, the majority asserted that Congress granted the FCC broad authority to regulate broadband in Section 706 and affirmatively mandated that they take action to ensure deployment of broadband by removing barriers to broadband infrastructure investment and promoting competition.<sup>123</sup> Second, the majority explained that since Congress had granted the FCC broad authority to act in this sphere, the FCC can “preempt state laws regarding interstate communication where they conflict with federal communications policy” consistent with their other powers.<sup>124</sup>

Finally, the FCC reasoned that it could preempt state laws regulating the provision of broadband services by their political subdivisions when those laws meet two independent criteria.<sup>125</sup> The first criterion is that the law must effectuate communications policy, which falls under the jurisdiction of the FCC for regulatory purposes, rather than merely exercising a state's core power over its political subdivisions.<sup>126</sup> Thus, the FCC cannot require a state to grant a political subdivision authority to provide broadband services, as that would be a matter of the state's core power over its political subdivisions.<sup>127</sup> However, once a state has granted a subdivision authority to provide broadband services, the state policy must be consistent with federal communications policy.<sup>128</sup> The second criterion, informed by the congressional mandate in Section 706, is that the law must serve as a barrier to broadband infrastructure investment or be an impediment to competition.<sup>129</sup>

Applying this legal analysis to the challenged laws, the FCC concluded that preemption would remove barriers to broadband infrastructure investment and promote competition in the broadband market.<sup>130</sup> First, the FCC found that EPB and the City of Wilson had invested in broadband infrastructure in their

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<sup>122</sup> *Id.* at 2463 (majority opinion).

<sup>123</sup> *Id.* at 2466–67.

<sup>124</sup> *Id.* at 2469.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2470.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2469.

<sup>130</sup> *Id.* at 2430.

respective communities in response to market failures on the part of private ISPs.<sup>131</sup> In the absence of these statutory limits on the exercise of their existing authority to provide broadband services, EPB and the City of Wilson had indicated an intention to invest in broadband infrastructure to begin serving neighboring communities that continued to suffer from those same market failures.<sup>132</sup> Further, the FCC found that the entrance of EPB and the City of Wilson into the broadband market had spurred a “virtuous cycle of competition,” which prompted private ISPs to improve the quality of their services and reduce rates for customers.<sup>133</sup>

The FCC also responded to the policy arguments that preemption would be anti-competitive and that municipal broadband projects are prone to failure.<sup>134</sup> In this instance, the FCC argued, the anti-competitive concerns were not applicable, as both EPB and the City of Wilson had initiated their broadband services in response to market failures, investing where private ISPs had elected not to.<sup>135</sup> Similarly, they reasoned that the fears of municipal broadband failure were not applicable to the EPB or City of Wilson petitions, since both services were financially sound.<sup>136</sup>

*b. Reasoning of the Dissent*

The two dissenting commissioners—Commissioner Pai and Commissioner O’Rielly—issued independent statements, but both relied on the same three major arguments.<sup>137</sup> First, the dissenting commissioners argued that the distinction the FCC created between laws that effectuate communications policy and those that deal with core powers of state authority over their municipal subdivisions is untenable.<sup>138</sup> Both pointed out that this distinction yields an absurd result: the FCC has no power to preempt a state law that completely denies a political subdivision the authority to provide broadband services, but a state would “relinquish [its] absolute discretion simply by affording a

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<sup>131</sup> *Id.* at 2431.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2433–35.

<sup>134</sup> *Id.* at 2435–37.

<sup>135</sup> *Id.* at 2433.

<sup>136</sup> *Id.* at 2438–39.

<sup>137</sup> *See id.* at 2519 (O’Rielly, Comm’r, dissenting). Commissioner O’Rielly also expressed his “profound opposition” to the concept of any government entity offering broadband services, comparing it to economic practices in Cuba, China, Russia, and Venezuela. *Id.* However, this policy position is not central to the legal arguments in his dissent. *Id.*

<sup>138</sup> *Id.* at 2511 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

municipality some, rather than plenary, authority to offer broadband service.”<sup>139</sup> As both asserted that these laws do involve matters of core state sovereignty, they argued that there must be a clear statement of congressional intent to grant this authority, per the holding in *Nixon v. Missouri Municipal League*.<sup>140</sup>

Commissioners Pai and O’Rielly further argued that Section 706 does not grant the FCC any preemptory authority.<sup>141</sup> Commissioner Pai highlighted Section 601(c)(1) of the Act, which states that the Act should not be construed to “modify, impair, or supersede Federal, State, or local law” unless expressly provided.<sup>142</sup> Turning to the provisions of Section 706, Commissioner Pai argued that each of the provisions are constructed in such a way to make it unlikely that Congress intended to convey preemptory authority.<sup>143</sup> Commissioner Pai also interpreted the legislative history of the statute to suggest that the removal of an explicit grant of preemption authority indicated that Congress did not intend to grant any preemption authority.<sup>144</sup>

Finally, both commissioners argued that Section 706 does not grant the FCC any independent authority whatsoever.<sup>145</sup> Despite the apparently affirmative language instructing the FCC to take action to encourage broadband deployment, both dissenting commissioners argued that the language of Section 706 does not expressly grant the FCC power to engage in rulemaking, order conduct, or enforce compliance and is therefore “hortatory” in nature.<sup>146</sup> This argument is contradicted by the D.C. Circuit’s holding in *Verizon v. FCC*, discussed above, where the court upheld the Commission’s interpretation that Section 706 contained an affirmative grant of power.<sup>147</sup>

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<sup>139</sup> *Id.* at 2509 (Pai, Comm’r, dissenting).

<sup>140</sup> *Id.* at 2507; *id.* at 2521 (O’Rielly, Comm’r, dissenting); *see infra* Section III.A.

<sup>141</sup> *City of Wilson*, 30 FCC Rcd. at 2511 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

<sup>142</sup> *Id.* at 2512 (Pai, Comm’r, dissenting).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 2513–14. *But see* Lee Dean Whatling, Note, *Tennessee v. FCC and the Clear Statement Rule*, 51 GA. L. REV. 947, 966 (2017) (arguing that removal of explicit preemption language from Section 706 could have resulted from legislative drafters’ incomplete understanding of the clear statement rule).

<sup>145</sup> *City of Wilson*, 30 FCC Rcd. at 2514 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

<sup>146</sup> *Id.* at 2514–15 (Pai, Comm’r, dissenting); *id.* at 2519–20 (O’Rielly, Comm’r, dissenting).

<sup>147</sup> *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014). As a brief aside, the two Republican commissioners at the time—Robert McDowell and Meredith Attwell Baker—also opposed the notion that Section 706 granted any regulatory authority to the FCC. Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. 17,905, 18,052 (2010) (McDowell, Comm’r, dissenting); *id.* at 18,093 (Attwell Baker, Comm’r, dissenting).

### III. ADOPTING A NARROWER APPLICATION OF THE CLEAR STATEMENT RULE

The Sixth Circuit overturned the FCC's preemption order in 2016, finding that the FCC's preemption order dealt with an issue of core state sovereignty, and therefore the FCC required a clear statement of congressional intent before it could act.<sup>148</sup> The majority declined to address a number of questions, including whether Congress could act in this policy sphere and whether Section 706 granted the FCC any preemption authority.<sup>149</sup> However, in her partial dissent, Judge White argued that Congress could act in this sphere, that Section 706 did confer preemption authority on the FCC, and that the court should apply a narrower reading of the clear statement rule to uphold preemption of those laws that exclusively effectuate communications policy.<sup>150</sup>

Pursuant to its Commerce Clause powers, Congress created the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio.”<sup>151</sup> By enacting the 1996 Telecommunications Act, Congress plainly delegated to the FCC the authority to take action with regards to broadband technology to “promote competition in the local telecommunications market [and] remove barriers to infrastructure investment.”<sup>152</sup> As such, the courts should apply a narrower reading of the clear statement rule, as suggested by Judge White. This narrower application of the clear statement rule would have directed the Sixth Circuit to uphold the FCC's exercise of its preemption power to promote competition and remove barriers to infrastructure investment in the broadband market as it applies to those state laws that exclusively effectuate communications policy.<sup>153</sup>

This Part proceeds in four sections. Section A analyzes the Sixth Circuit's holding in *Tennessee v. FCC*, including the partial dissent from Judge White that this Comment proposes should be adopted. This Part then addresses two of the questions left unanswered by the Sixth Circuit's majority holding. Section B establishes that Congress has the authority to regulate broadband technology and section C demonstrates that the affirmative grant of power in Section 706 includes preemption authority. Finally, section D argues that the narrower application of the clear statement rule suggested by Judge White better comports

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<sup>148</sup> *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016); *see infra* note 191 and accompanying text.

<sup>149</sup> *Tennessee*, 832 F.3d at 613–14.

<sup>150</sup> *Id.* at 614 (White, J., concurring in part and dissenting in part).

<sup>151</sup> 47 U.S.C. § 151 (2012).

<sup>152</sup> 47 U.S.C. § 1302(a) (2012).

<sup>153</sup> *See Tennessee*, 832 F.3d at 615 (White, J., concurring in part and dissenting in part). *Contra id.* at 610 (majority opinion).

with congressional intent and assuages some of the concerns raised by dissenting justices in earlier clear statement rule cases.

A. *The Sixth Circuit's Decision in Tennessee v. FCC*

After the FCC issued the order preempting the North Carolina and Tennessee laws, North Carolina filed an appeal to the Fourth Circuit and Tennessee filed an appeal to the Sixth Circuit.<sup>154</sup> The cases were consolidated in the Sixth Circuit, which ultimately vacated the FCC's preemption order.<sup>155</sup>

Petitioners argued that the order violated the Tenth Amendment by infringing on the states' right to determine the boundaries of their political subdivisions.<sup>156</sup> Further, they reasoned that even if Congress did have the authority to redefine the authority of a state's political subdivisions, Section 706 does not contain a clear statement of that intent as required by *Gregory v. Ashcroft* and applied in *Nixon v. Missouri Municipal League*.<sup>157</sup> The FCC argued that its preemption order affected only statutes that effectuated communications policy contrary to federal communications policy, and therefore it did not affect any issues of state sovereignty over political subdivisions.<sup>158</sup>

This section proceeds by first providing an overview of the Sixth Circuit's holding, including a discussion of the principal precedent relied on by the court in *Nixon v. Missouri Municipal League*. It then turns to and advocates for the adoption of the partial dissent from Judge White, which accepted the FCC's distinction between statutes that effectuate communications policy versus those that deal with core sovereign authority.

1. *The Majority's Holding*

The Sixth Circuit's decision in *City of Wilson* rested primarily on the Supreme Court's holding in *Nixon v. Missouri Municipal League*.<sup>159</sup> The *Nixon* case mirrored the case before the court in many ways, but dealt with a different part of the 1996 Telecommunications Act.<sup>160</sup> Section 101(a) of the Act authorized the FCC to preempt "state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications

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<sup>154</sup> *Id.* at 609 (majority opinion).

<sup>155</sup> *Id.* at 609–10.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 610; *see infra* Section III.A.1.

<sup>158</sup> *Tennessee*, 832 F.3d at 611.

<sup>159</sup> *Id.* at 610.

<sup>160</sup> *Id.* at 610–11.

services.”<sup>161</sup> Relying on this Section of the Act, the Missouri Municipal League petitioned the FCC to preempt a Missouri law which prohibited the state’s political subdivisions from providing or offering for sale any telecommunications services.<sup>162</sup> The FCC declined to preempt the Missouri statute after determining that the phrase “any entity” was not meant to include political subdivisions of a state.<sup>163</sup> The Missouri Municipal League appealed to the Eighth Circuit, which reversed the FCC’s decision, holding that the phrase “any entity” did contemplate political subdivisions.<sup>164</sup>

The Supreme Court subsequently overturned the Eighth Circuit’s decision, applying the clear statement rule enunciated in *Gregory v. Ashcroft*<sup>165</sup> to hold that “any entity” was not sufficiently clear to interpose the federal government between a state and its political subdivisions and justify the anomalous results this interpretation would create.<sup>166</sup> In *Gregory*, two Missouri state judges challenged the state’s mandatory retirement provision on the grounds that it violated the federal Age Discrimination in Employment Act (ADEA).<sup>167</sup> The Court held that applying ADEA to redefine the requirements for the state’s constitutional officers would “upset the usual constitutional balance of federal and state powers.”<sup>168</sup> Thus, to rule that ADEA preempted the mandatory retirement provision, the Court required that there be an unmistakably clear statement of Congress’s intent to do so in the statute.<sup>169</sup> This principle became the clear statement rule that the Court then applied in *Nixon v. Missouri Municipal League*.<sup>170</sup>

The Court in *Nixon* highlighted three anomalous byproducts that upholding the Eighth Circuit’s interpretation would produce.<sup>171</sup> First, the Court found in the absence of a state prohibition on municipal telecommunications services, such as Missouri’s, municipalities would still require an affirmative grant of power from the state to provide telecommunications services and therefore preemption would not have any practical effect.<sup>172</sup> Further, the Court held that

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<sup>161</sup> *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128 (2004).

<sup>162</sup> *Id.* at 129.

<sup>163</sup> *Id.* at 130.

<sup>164</sup> *Id.* at 131.

<sup>165</sup> 501 U.S. 452, 470 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983)).

<sup>166</sup> *Nixon*, 541 U.S. at 138.

<sup>167</sup> 501 U.S. at 455–56.

<sup>168</sup> *Id.* at 460.

<sup>169</sup> *Id.*

<sup>170</sup> 541 U.S. at 140–41.

<sup>171</sup> *Id.* at 138.

<sup>172</sup> *Id.* at 135.

preemption would “treat States differently depending on the formal structures of their laws authorizing municipalities to function.”<sup>173</sup> Finally, the Court decided that preemption would create a “national crazy quilt” that “would result not from free political choices[,]” but from conflicts between federal preemption authority and municipal authority.<sup>174</sup> Justice Stevens dissented, arguing that “any entity” plainly encompassed municipal-run utilities, and the Court’s decision should therefore be based solely on the law before it rather than a series of hypotheticals used to illustrate the potential for an absurd result.<sup>175</sup>

The Sixth Circuit found that the fact pattern in *Nixon* was sufficiently analogous to require that the clear statement rule apply in *Tennessee v. FCC*.<sup>176</sup> Like the statute at issue in *Nixon*, the statutes in Tennessee and North Carolina defined the powers of the states’ political subdivisions, even if they also effectuated communications policy.<sup>177</sup> Furthermore, allowing the FCC to preempt these statutes would have had similar results to the proposed preemption in *Nixon*.<sup>178</sup> By preempting these statutes, the FCC would create an anomalous situation whereby a state could completely ban a political subdivision from providing broadband services, but once that state opened the door to municipal broadband, it could have no influence on broadband implementation.<sup>179</sup> Additionally, the court found that without this anomalous result, the clear statement rule would still be triggered, as preemption would interpose federal regulators between the state and its political subdivisions.<sup>180</sup>

Turning to the language of Section 706, the Sixth Circuit held that it does not contain a clear statement authorizing preemption of state laws regulating the provision of broadband services by its municipal subdivisions.<sup>181</sup> The court found that the language of Section 706 was unclear regarding whether infrastructure investment referred to both public and private infrastructure, or merely private infrastructure.<sup>182</sup> Additionally, it reasoned that the reference to promoting competition was not a directive to preempt “a state’s allocation of powers between itself and its subdivisions.”<sup>183</sup> Once again, comparing to the

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<sup>173</sup> *Id.* at 138.

<sup>174</sup> *Id.* at 136.

<sup>175</sup> *Id.* at 148 (Stevens, J., dissenting).

<sup>176</sup> *Tennessee v. FCC*, 832 F.3d 597, 611 (6th Cir. 2016).

<sup>177</sup> *Id.* at 611.

<sup>178</sup> *Id.* at 610–11.

<sup>179</sup> *Id.* at 611.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 613.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

statute at issue in *Nixon*, the court held that the “any entity” language, which the Supreme Court had held did not encompass public utilities, was broader than the language at issue in Section 706. As a result, preemption was not authorized under the Act.<sup>184</sup>

Importantly, the Sixth Circuit limited its holding to this issue. The court did not question the policy rationale asserted by the FCC in favor of municipal broadband expansion and emphasized that it did not address the following legal questions:

- (1) [W]hether § 706 provides the FCC any preemptive power at all[;]
- (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case[;]
- (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case[;]
- and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.<sup>185</sup>

The court’s decision to refrain from addressing these issues left open many questions about the extent of the FCC’s power under Section 706 and the future efforts by the federal government to expand municipal broadband. This Comment discusses these ambiguous issues in greater detail in the remainder of Part III.

## 2. *The Argument from the Partial Dissent*

Judge White issued a partial dissent in which she agreed with many of the conclusions from the FCC order.<sup>186</sup> First, she concluded that Section 706 was an affirmative grant of preemptory power if state laws acted as a barrier to infrastructure investment and competition.<sup>187</sup> Judge White concurred with the majority that the clear statement rule, as applied in *Nixon*, applies to actions taken by the FCC that would interfere with a state’s authority to define the powers of its political subdivisions.<sup>188</sup> She further concurred that in many cases, a statute can both effectuate communications policy and address a state’s power over its political subdivisions.<sup>189</sup> In cases that deal with both a core state interest and effectuate communications policy, such as Tennessee’s territorial limitations on the provision of broadband services, *Nixon* requires that the FCC’s

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 613–14.

<sup>186</sup> *Id.* at 614–15 (White, J., concurring in part and dissenting in part).

<sup>187</sup> *Id.* at 614.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

authority come from a clear statement of congressional intent, even if the communications policy is paramount.<sup>190</sup>

However, Judge White argued that there is an actual distinction between statutes that effectuate a communications policy and those that deal with a state's core sovereign powers.<sup>191</sup> Judge White agreed with the FCC's conclusion that some of these statutes solely effectuated communications policy.<sup>192</sup> For example, she argued that North Carolina's provisions, which required municipalities to impute costs that would traditionally be encountered by private ISPs, were solely an expression of communications policy and had little to do with the state's sovereign power over its political subdivisions.<sup>193</sup> Judge White concluded that since the provisions concerned exclusively regulatory and commercial matters, Section 706 granted the FCC the authority to preempt them.<sup>194</sup> This distinction leaves open the question of how the FCC should distinguish between statutes that are exclusively regulatory and commercial versus those with a dual purpose, and whether those determinations would be granted any judicial deference.

#### *B. Congress's Ability to Grant this Authority*

Among the issues that the Sixth Circuit declined to address in its opinion was the question of "whether Congress . . . could give the FCC the power to preempt as it did in this case."<sup>195</sup> Thus, as a threshold issue, Congress's authority to regulate the broadband market must be established. It is settled law that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."<sup>196</sup> As outlined in the FCC's authorizing statute, the Communications Act of 1934, the agency was created pursuant to Congress's power under the Commerce Clause.<sup>197</sup> The Supreme Court has since established three broad categories of activity that may be regulated under the Commerce Clause: (1) "the use of the channels of interstate commerce[;]" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce[;]" and (3) "those activities having a substantial relation to interstate commerce."<sup>198</sup> It has been well established that the Internet is a channel or

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 615.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 614.

<sup>195</sup> *Id.* at 613 (majority opinion).

<sup>196</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>197</sup> 47 U.S.C. § 151 (2012).

<sup>198</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

instrumentality of interstate commerce, and thus the FCC has the authority to impose its will on the states with regards to broadband deployment policy.<sup>199</sup>

*C. The FCC's Preemption Power Under Section 706*

While the FCC's preemption authority under Section 706 is central to this discussion, no court has answered the question of whether the FCC has any preemptory authority under Section 706. As discussed above, two subsections of Section 706 confer regulatory authority on the FCC.<sup>200</sup> The FCC took a circuitous route to its current interpretation of the Section 706 grant of authority.<sup>201</sup> Shortly after the 1996 Act's passage, the FCC interpreted Section 706(a) to confer no independent authority,<sup>202</sup> but then revised that interpretation in its 2010 Open Internet Order, which the D.C. Circuit upheld in *Verizon v. FCC*.<sup>203</sup> The FCC also interpreted Section 706(b) for the first time in the 2010 Order, concluding that it was also an independent grant of authority.<sup>204</sup>

On the face of the statute, the language of Sections 706(a) and (b) both appear to broadly grant regulatory authority.<sup>205</sup> Section 706(a) instructs the Commission to "encourage . . . deployment on a reasonable and timely basis" of broadband technology, using one of several enumerated methods, or "other regulating methods that remove barriers to infrastructure investment."<sup>206</sup> Similarly, Section 706(b) says that the Commission "shall take immediate action to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."<sup>207</sup> The D.C. Circuit, the only court to have directly addressed the validity of the FCC's broad interpretation of Section 706 authority, concluded that the interpretation was valid.<sup>208</sup> In *Tennessee v. FCC*, the Sixth

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<sup>199</sup> See, e.g., *United States v. Person*, 714 F. App'x 547, 551 (6th Cir. 2017) ("[T]he Internet . . . [is a] channel of interstate commerce." (citing *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006))); *United States v. Giboney*, 863 F.3d 1022, 1026 (8th Cir. 2017) ("The [I]nternet is an instrumentality and channel of interstate commerce." (quoting *United States v. Havlik*, 710 F.3d 818, 824 (8th Cir. 2013))); *United States v. Morgan*, 748 F.3d 1024, 1033 (10th Cir. 2014) ("We have decided the Internet is an instrumentality of interstate commerce.").

<sup>200</sup> 47 U.S.C. § 1302(a)–(b) (2012); see *supra* Section I.D.

<sup>201</sup> See *supra* Section II.A.

<sup>202</sup> *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24,012, 24,047 (1998).

<sup>203</sup> *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

<sup>204</sup> *Pres. the Open Internet: Broadband Indus. Practices*, 25 FCC Rcd. 17,905, 17,972 (2010).

<sup>205</sup> 47 U.S.C. § 1302(a)–(b) (2012).

<sup>206</sup> 47 U.S.C. § 1302(a).

<sup>207</sup> 47 U.S.C. § 1302(b).

<sup>208</sup> *Verizon*, 740 F.3d at 639.

Circuit did not reach the issue,<sup>209</sup> though the partial dissent concurred with the FCC's interpretation that Section 706's grant of authority included preemptory powers.<sup>210</sup>

Based on the text of the Section 706 and the apparent judicial consensus that it contains a broad grant of authority, this Comment assumes that Section 706 does in fact contain a clear grant of preemptory authority that the FCC may exercise.

#### *D. Applying Judge White's Narrower Clear Statement Rule*

Judge White's narrower reading of the clear statement rule strikes a proper balance between unmistakably clear congressional intent and concerns about preserving the proper balance between federal and state sovereignty. Judge White found that Section 706 unmistakably conferred preemption authority on the FCC for generally restrictive state statutes.<sup>211</sup> She did, however, agree with the majority that it was unclear whether this preemption authority was meant to extend to state laws restricting municipal authority.<sup>212</sup> Judge White proposed that the court could and should draw a line between two types of statutes considered.<sup>213</sup> She argued that "certain powers and spheres are historically so clearly confided to the States that Congress should not be understood to preempt the States' authority to act freely in those areas unless its intent is clear."<sup>214</sup> However, Judge White distinguished these types of statutes from those that happen to affect local governments but solely effectuate policy decisions about how the communications market should operate.<sup>215</sup> Under this narrowed reading of the clear statement rule, Judge White proposed that these statutes could be preempted under the FCC's Section 706 power.<sup>216</sup> This narrow reading would preserve the authority that has plainly been granted to the FCC to preempt barriers to investment and competition in the broadband market, while simultaneously protecting the sovereign interests of states.

This narrower reading of the clear statement rule would also address some of the primary concerns raised in the dissents in both *Nixon v. Missouri Municipal League* and *Gregory v. Ashcroft*. In his dissent in *Nixon*, Justice

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<sup>209</sup> 832 F.3d 597, 613 (6th Cir. 2016).

<sup>210</sup> *Id.* at 614 (White, J., concurring in part and dissenting in part).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 615.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *See id.*

Stevens argued that the statute at issue—Section 253 of the 1934 Communications Act, as amended by Section 101 of the 1996 Act—contained an unmistakably clear purpose and mandate, which the Court should not toss aside.<sup>217</sup> The statute at issue instructed the FCC to preempt any “State or local statute or regulation . . . [that would] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>218</sup> The majority held that the phrase “any entity” was sufficiently vague to invoke the clear statement rule enunciated in *Gregory v. Ashcroft*, and decided that Congress did not intend for the statute to cover municipally owned utilities.<sup>219</sup> In his dissent, Justice Stevens argued that the legislative history showed that Congress specifically contemplated the role of public utilities in expanding access to telecommunications services.<sup>220</sup> Therefore, he argued, the phrase “any entity” should be read to encompass them.<sup>221</sup>

Justice Stevens’s dissent echoes concerns that were raised by Justice White in his partial dissent in *Gregory v. Ashcroft*, when the clear statement rule was initially proposed.<sup>222</sup> Justice White worried that the enunciation of the clear statement doctrine as applied in *Gregory* constituted a judicially created restraint on Congress’s legislative authority, amounting to an intrusion on a coequal branch of government.<sup>223</sup> Instead, Justice White argued that the Court should apply unambiguous statutes as written against the states and not create new hurdles for Congress to clear.<sup>224</sup>

Applying the narrower reading of the clear statement rule would help alleviate the concerns raised by these two dissents, while still striking a balance in favor of preserving constitutional federalism. As applied to Justice Stevens’s dissent, the narrow reading of the clear statement rule would have encouraged the Court to acknowledge the plain meaning of the statute—that any entity meant *any* entity—while also allowing the Court to reach the same conclusion, which preserved the core interest of the state in determining how it orders its political

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<sup>217</sup> *Nixon v. Mo. Mun. League*, 541 U.S. 125, 142–43 (2004) (Stevens, J., dissenting).

<sup>218</sup> 47 U.S.C. § 253(a) (2012).

<sup>219</sup> *Nixon*, 541 U.S. at 141 (majority opinion).

<sup>220</sup> *Id.* at 143 (Stevens, J., dissenting).

<sup>221</sup> *Id.* (“The assertion that Congress could have used the term ‘any entity’ to include utilities generally, but not municipally owned utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting §253. Both propositions are manifestly implausible . . .”).

<sup>222</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 474–77 (1991) (White, J., dissenting).

<sup>223</sup> *Id.* at 477.

<sup>224</sup> *Id.* at 478.

subdivisions. As applied to Justice White's dissent, this narrowed clear statement rule would have lessened the threat of a judicially created restraint on congressional power by applying statutes as written when possible, while still preserving the Court's desire to refrain from unnecessarily upsetting the balance of state and federal power.

Thus, under this revised regime, the FCC's preemption of North Carolina and Tennessee's statutes limiting Wilson and Chattanooga from expanding their broadband services would have been upheld in part as it pertained to those North Carolina statutes that solely effectuated communications policy.<sup>225</sup> As discussed above, Congress may regulate the Internet under its Commerce Clause authority, as it is a channel or instrumentality of interstate commerce, and therefore Congress would have been able to take this preemptory action.<sup>226</sup> Further, Section 706 contains a broad grant of power, limited by the policy directives to expand access to broadband and other limits contained within the Communications Act, which clearly empowers the FCC to preempt statutes that contravene federal communications policy.<sup>227</sup> Thus, while adopting the narrow reading of the clear statement rule would allow the FCC to exercise this power as it pertains to state statutes that solely effectuate communications policy, it would still preserve the balance between state and federal power on issues of core state sovereignty.<sup>228</sup>

#### IV. IMPLICATIONS

Narrowing the application of the clear statement rule in *Tennessee v. FCC* as proposed by Judge White would have three major implications, each on a different level of federal policy. On the most micro level, it would expand the FCC's ability to effectuate the stated broadband policy goals of the federal government.<sup>229</sup> On a slightly broader level, it would expand the authority of the FCC—and potentially other federal agencies—to preempt state statutes that affect local governments but do not affect core issues of state sovereignty. On a systemic level, this narrower application of the clear statement rule would increase the level of scrutiny applied by the courts, raising concerns about judicial economy, but resulting in positive effects for legislative economy. This Part will address each implication in turn.

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<sup>225</sup> *Tennessee v. FCC*, 832 F.3d 597, 614–15 (6th Cir. 2016) (White, J., concurring in part and dissenting in part).

<sup>226</sup> *See supra* Section III.B.

<sup>227</sup> *See supra* Section III.C.

<sup>228</sup> *Tennessee*, 832 F.3d at 614–15 (White, J., concurring in part and dissenting in part).

<sup>229</sup> *See* 47 U.S.C. § 1302(a) (2012) (stating the policy goals of the statute).

### A. *Expanding Broadband Access*

Consistent with the stated purpose of Section 706, narrowing the application of the clear statement rule to this grant of authority would increase the ability of the FCC to guarantee access to advanced communications technologies for all Americans. Congress instructed the FCC to take action to eliminate those gaps where possible.<sup>230</sup> The FCC in turn determined that municipal broadband networks serve as a viable answer to those gaps in some circumstances.<sup>231</sup> By empowering the FCC to exercise its congressionally granted power to preempt statutes that solely effectuate communications policy, it could eliminate barriers to investment in broadband infrastructure, such as the measures to impute cost in the North Carolina statute.<sup>232</sup>

Of course, this limited preemption would still leave in place many municipal broadband restrictions that do concern issues of core state sovereignty.<sup>233</sup> Ultimately, states have a legitimate sovereign interest in determining how their municipalities interact with one another and in setting procedural and financial requirements for their political subdivisions.<sup>234</sup> However, these procedural hurdles are not insurmountable barriers. For example, Colorado law requires municipalities to hold referenda before providing broadband services.<sup>235</sup> In 2017, Fort Collins, Colorado placed a municipal broadband measure on the ballot, which attracted nearly half a million dollars in campaign spending by opposition groups.<sup>236</sup> Despite this substantial opposition from incumbent ISPs, the measure passed in Fort Collins with approximately 57% of the vote.<sup>237</sup> Thus, Colorado municipalities remain able to explore innovative alternatives to spur increased or improved broadband access, even as Colorado's referendum requirement—which undoubtedly concerns core state sovereignty—remains in effect.

Furthermore, opponents of the FCC's preemption order argued that preemption would create an anomaly whereby states could completely prohibit their municipalities from entering the broadband marketplace, but once they

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<sup>230</sup> 47 U.S.C. § 1302(a)–(b).

<sup>231</sup> City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2411 (2015).

<sup>232</sup> *Id.*

<sup>233</sup> *See Tennessee*, 832 F.3d at 614–15 (White, J., concurring in part and dissenting in part).

<sup>234</sup> *Id.* at 614.

<sup>235</sup> COLO. REV. STAT. ANN. § 29-27-201 (West 2017); *see also* Jon Brodtkin, *Sorry, Comcast: Voters Say “Yes” to City-Run Broadband in Colorado*, ARS TECHNICA (Nov. 8, 2017, 11:18 AM), <https://arstechnica.com/tech-policy/2017/11/voters-reject-cable-lobby-misinformation-campaign-against-muni-broadband/>.

<sup>236</sup> Brodtkin, *supra* note 235.

<sup>237</sup> *Id.*

allow them any authority, the state would be constrained in dictating how those same municipalities exercise that authority.<sup>238</sup> It is accurate that the FCC would not be able to compel a state to allow its municipalities to enter the broadband market if it maintains an outright ban on the practice, as this would infringe on the state's core sovereignty.<sup>239</sup> However, as previously mentioned, only four states currently have outright bans,<sup>240</sup> and thus this change would expand the ability of municipalities to fill market gaps in other states with some type of municipal broadband limit in force that exclusively effectuates communications policy.<sup>241</sup> Thus, while this power would not solve the problem of state limits on municipal broadband entities in every instance, it would tackle a sufficient number to be a worthwhile exercise of the FCC's preemptory power.

### *B. Expanded FCC Power*

This more limited application of the clear statement rule would mean that the FCC could successfully preempt certain state statutes that courts would currently protect with the clear statement rule.<sup>242</sup> The Commission would have to discern which statutes deal with core aspects of state sovereignty from those that merely effectuate regulatory communications policy. While this Comment does not suggest that such a determination should be afforded *Chevron* deference,<sup>243</sup> ultimately the decision by the agency about which category the statute falls into would necessarily be afforded some level of deference by the reviewing court.<sup>244</sup> Providing any deference to agency determinations about

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<sup>238</sup> City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2510 (2015) (Pai, Comm'r, dissenting).

<sup>239</sup> *Tennessee*, 832 F.3d at 610; *see also id.* at 614 (White, J., concurring in part and dissenting in part); *City of Wilson*, 30 FCC Rcd. at 2473 (suggesting that in the case of a flat ban on municipal broadband the Commission would be powerless to preempt).

<sup>240</sup> Stricker, *supra* note 38, at 608.

<sup>241</sup> *See City of Wilson*, 30 FCC Rcd. at 2475 (“[W]e find that the preemption of state communications regulation on municipal broadband providers—where the state has given an underlying authorization—will have the effect of promoting competition and infrastructure investment and is consistent with the state’s grant of authority to municipalities . . . .” (footnote omitted)); *see also Community Network Map*, *supra* note 7 (showing those states with restrictions less than a flat ban).

<sup>242</sup> *See Tennessee*, 832 F.3d at 615 (White, J., concurring in part and dissenting in part) (stating that applying this narrower reading would have allowed FCC to preempt law that the Sixth Circuit found was protected by the clear statement rule).

<sup>243</sup> *See id.* (arguing that *Chevron* deference does not apply to the FCC’s determination that it has authority to preempt, as distinguished from its decision whether to use that authority, because the statute’s silence or ambiguity is what triggers the clear statement rule). *See generally* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing the test for deference accorded to agency interpretations of unclear authorizing statutes).

<sup>244</sup> *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (establishing that courts may defer to administrative decisions that do not carry the force of law if they find that they were reached through a thorough, valid, and consistent decision-making process). While the preemption at issue in *Tennessee v. FCC* was not an

which statutes deal with issues of core sovereignty and which solely effectuate policy that contravenes the federal interest would be a wholly new power for federal agencies.

*C. Concerns About Judicial and Legislative Economy*

Applying this narrower clear statement rule would require courts to apply a higher level of scrutiny to the statutes in preemption cases. As Judge White notes in her partial dissent in *Tennessee v. FCC*, courts would have to determine which state statutes deal with core issues of state sovereignty and which merely effectuate a policy that affects local governments.<sup>245</sup> While this distinction could often be easy to draw, as evidenced by the statutes at issue in *Tennessee*, reasonable judges may often disagree as to whether the statutes affect a core issue of state sovereignty or merely effectuate broadband regulatory policy.<sup>246</sup> Arguably, making this distinction could raise concerns about judicial economy, as it will require judges to inquire as to the purpose and effect of restrictive statutes to determine whether their effect on local governments is core or tangential to the state's sovereign powers. This inquiry could potentially yield unclear and inconsistent results across districts and circuits.

However, the current system is comparably unclear. Scholars have argued that rules such as the clear statement rule are meant to serve as notice to Congress to better construct statutes in order to clearly convey intent to the courts.<sup>247</sup> However, a survey of legislative drafters found that the clear majority of them were completely unaware of the clear statement rule.<sup>248</sup> Further, while courts have repeatedly made clear what does not satisfy the clear statement rule, what does satisfy the rule remains ambiguous.<sup>249</sup> Applying this narrower reading of the clear statement rule would ensure that apparent congressional intent is effectuated to the fullest extent possible without running afoul of constitutional federalism concerns. It would also ameliorate the concerns raised in *Gregory* by Justice White, that the clear statement rule would act as a judicially created restraint on Congress's legislative authority.<sup>250</sup>

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interpretive rule subject to *Skidmore* deference, the lesser form of deference adopted in *Skidmore* is illustrative of the more searching inquiry that may be required in these cases. *Id.*; see also Dunne, *supra* note 11, at 1159 (suggesting that "a reviewing court might need to accord some level of deference to the agency determination").

<sup>245</sup> 832 F.3d at 615 (White, J., concurring in part and dissenting in part).

<sup>246</sup> *Id.* at 611–12, 615.

<sup>247</sup> Whatling, *supra* note 144, at 962–63.

<sup>248</sup> *Id.* at 964.

<sup>249</sup> *Id.* at 972–75.

<sup>250</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 477 (1991) (White, J., dissenting).

## CONCLUSION

Section 706 of the 1996 Telecommunications Act contains a clear directive to the FCC to ensure that broadband technology is deployed to all Americans, along with a broad grant of authority to accomplish this directive. In its order preempting the Tennessee and North Carolina statutes that restricted the abilities of their municipal broadband providers to expand their services to neighboring communities, the FCC exercised this authority to accomplish Congress's stated policy ends. However, the Sixth Circuit's decision in *Tennessee v. FCC* undercut the ability of the FCC to eliminate barriers to investment and competition in the broadband market.

The clear statement rule, as applied to the congressional grant of authority to the FCC in Section 706, has served to create a shield for states to contradict federal communications policy. At the behest of private ISPs, states have passed statutes restricting the abilities of their municipalities to enter the broadband market or expand their services, creating a less competitive environment for the incumbent ISPs. By applying the narrower reading of the clear statement rule as proposed by Judge White, the courts would empower the FCC to the full extent that Congress intended, allowing it to better ensure universal access to broadband technology for all Americans.

JOHN T. COBB\*

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\* Articles Editor, *Emory Law Journal*, Volume 68; Emory University School of Law, J.D., 2019; College of William & Mary, B.A., 2013. I want to express my deepest gratitude to Professor Thomas C. Arthur for providing invaluable wisdom and guidance throughout the process of writing this Comment. Additionally, I would like to thank all of my colleagues on *ELJ* for offering insightful feedback that refined this Comment and improved my writing.

**Department of Justice**

Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, April 24, 2015

**Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns**

Comcast Corporation (Comcast) abandoned its plans to acquire Time Warner Cable Inc. (Time Warner Cable) for approximately \$45.2 billion after the Department of Justice informed the companies that it had significant concerns that the merger would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers.

"The companies' decision to abandon this deal is the best outcome for American consumers," said Attorney General Eric Holder. "The Antitrust Division of the United States Department of Justice has demonstrated, time and again, that it can and will defend the interests of the American consumer no matter the complexity of the issue or the size of the opponent. This is a victory not only for the Department of Justice, but also for providers of content and streaming services who work to bring innovative products to consumers across America and around the world. I commend the Antitrust attorneys and investigators whose outstanding work led to this outcome, and I know that the Department of Justice will continue to fight for fair access and free competition in every industry and every market."

"I want to thank our colleagues at the Federal Communications Commission for their close and productive cooperation throughout this investigation," said Renata Hesse, Acting Assistant Attorney General of the Department of Justice's Antitrust Division. "The collective expertise of the career staff at both agencies enabled us to analyze the complex issues presented by this transaction and to deliver a consistent message regarding the impact of the transaction on competition and the broader public interest. We are also grateful for the close cooperation we had with teams from many State Attorneys General offices during the course of our investigation."

Comcast is a Pennsylvania corporation headquartered in Philadelphia. With approximately 21.7 million video subscribers and 20.7 million broadband subscribers, Comcast is both the largest video and wired broadband Internet-access provider in the nation.

Time Warner Cable is a New York corporation with headquarters in New York. With approximately 11.4 million video subscribers and 11.6 million broadband subscribers, Time Warner Cable is the fourth-largest video and the third-largest wired broadband Internet-access provider in the nation.

**Topic(s):**  
Antitrust

**Press Release Number:**  
15-509



## **Comcast and Charter Reach Agreement on Divestitures**

### **Comcast to Divest 3.9 Million Customers of Merged Comcast - Time Warner Cable Charter to Enhance Scale and Improve Geographic Footprint Divestiture will be Executed through Three Separate Transactions, Including the Creation of a New, Independent, Publicly-Traded Cable Provider**

PHILADELPHIA and STAMFORD, Conn., April 28, 2014 /PRNewswire/ -- Comcast Corporation (Nasdaq: CMCSA, CMCSK) and Charter Communications (Nasdaq: CHTR) today announced that the companies have reached an agreement (the "Agreement") on a series of tax-efficient transactions, whereby the combined Comcast-Time Warner Cable entity, following completion of Comcast's previously announced merger with Time Warner Cable, will divest systems resulting in a net reduction of approximately 3.9 million video customers. The divestiture follows through on Comcast's willingness to reduce its post-merger managed subscriber total to less than 30 percent of total national MVPD subscribers, while maintaining the compelling strategic and financial rationale of its proposed merger with Time Warner Cable.

Pursuant to the Agreement, and following the close of the Comcast-Time Warner Cable merger, Charter will acquire approximately 1.4 million existing Time Warner Cable subscribers, increasing Charter's current residential and commercial video customer base from 4.4 million to approximately 5.7 million, and making Charter the second largest cable operator in the United States.[1] Charter and Comcast will also each transfer approximately 1.6 million customers respectively. In addition, Charter, through a tax free reorganization, will form a new holding company (New Charter) that will own 100% of Charter, and acquire an approximate 33 percent stake in a new publicly-traded cable provider to be spun-off by Comcast serving approximately 2.5 million customers ("SpinCo"). Charter will provide management services to SpinCo. In aggregate, today's announced transactions will significantly enhance Charter's scale and improve both companies geographic footprint, driving operational efficiencies for Comcast, Charter and SpinCo.

The Agreement has been approved by the Boards of Directors of both companies and Time Warner Cable's Board has consented to the Agreement as required under the Comcast-Time Warner Cable merger agreement.

The Agreement will be executed via three separate transactions, which are subject to the completion of the proposed Comcast-Time Warner Cable merger:

1. Comcast will divest Time Warner Cable systems serving approximately 1.4 million existing Time Warner Cable customers directly to Charter for cash. Charter expects to fund the purchase with proceeds from debt, and to have approximately a 5 times debt to EBITDA leverage ratio at closing.
2. Comcast and Charter will transfer assets serving approximately 1.6 million existing Time Warner Cable customers and 1.6 million Charter customers in a tax-efficient like kind exchange, improving the geographic presence of both companies, leading to greater operational efficiencies, improved technology deployment and enhanced customer service.
3. Comcast will form and spin off to its shareholders a new, independent, publicly-traded company that will operate systems serving approximately 2.5 million existing Comcast customers. Comcast shareholders, including the former Time Warner Cable shareholders, are expected to own approximately 67 percent of SpinCo, while New Charter is expected to directly own approximately 33 percent of SpinCo. SpinCo expects to incur leverage of approximately 5 times estimated pro-forma EBITDA, and New Charter will then acquire its interest in SpinCo by issuing New Charter stock to Comcast shareholders (including former Time Warner Cable shareholders). SpinCo's nine-member Board of Directors will include six independent directors and three directors designated by Charter. Comcast will hold no ownership interest in SpinCo (or Charter) and will have no role in managing SpinCo.

The transfer of systems, asset purchase and SpinCo acquisition will be valued at a 7.125 times 2014 EBITDA multiple (as defined by the parties), and Charter will make additional payments to Comcast over time as tax benefits from the asset sale are realized.

As a result of these transactions, following the completion of the merger between Comcast and Time Warner Cable, Comcast's managed residential subscribers will be below 30 percent of the total MVPD subscribers in the United States, and approximately the same market share as Comcast's subscriber base after its completion of both the 2002 AT&T Broadband transaction and the 2006 Adelphia transaction - and Charter's subscriber base will increase by 1.4 million to a total of 5.7 million.



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As a result of these transactions, following the completion of the merger between Comcast and Time Warner Cable, Comcast's managed residential subscribers will be below 30 percent of the total MVPD subscribers in the United States, and approximately the same market share as Comcast's subscriber base after its completion of both the 2002 AT&T Broadband transaction and the 2006 Adelphia transaction - and Charter's subscriber base will increase by 1.4 million to a total of 5.7 million.

Comcast has reaffirmed that, after taking into account the transactions with Charter, it continues to expect its merger with Time Warner Cable to generate approximately \$1.5 billion in operating efficiencies. Comcast shareholders will receive meaningful value with shares in New Charter, as well as new shares in SpinCo. In addition, Comcast intends to use proceeds from these transactions to reduce its debt in a leverage-neutral manner and expand its share buyback program.

"Today's Agreement follows through on our willingness to divest subscribers, while also marking an important step in our merger with Time Warner Cable," said Brian Roberts, Chairman and Chief Executive Officer, Comcast Corporation. "These transactions enable us to deliver meaningful value to our shareholders. The realignment of key cable markets achieved in these transactions will enable Comcast to fill in our footprint and deliver operational efficiencies and technology improvements. We look forward to working with the management teams at Time Warner Cable, Charter and the new entity to close these transactions and ensure a smooth transition for the customers and employees of all companies."

"Charter's new customers will benefit from our philosophy of providing highly valued products, featuring enhanced on-demand, interactive video and increased broadband speeds, all in a simplified package designed to provide better value and service," said Tom Rutledge, President and Chief Executive Officer of Charter Communications. "The transactions announced today will provide Charter with greater scale, growth opportunities and improved geographical rationalization of our cable systems, which in turn will drive value for shareholders and more effective customer service. And through our meaningful ownership in and board representation at SpinCo, we can help it achieve similar market share growth in the markets it serves."

The transactions are subject to a number of conditions, including the closing of the Comcast-Time Warner Cable merger, receipt of Hart-Scott-Rodino, FCC and other required regulatory approvals, Charter shareholder approval, and various other matters.

J.P. Morgan and Paul J. Taubman acted as financial advisors to Comcast and Davis Polk & Wardwell LLP and Willkie Farr & Gallagher LLP are its legal advisors.

Goldman Sachs and LionTree Advisors are serving as lead financial advisors to Charter in connection with this transaction. Guggenheim Securities is also a financial advisor to Charter. BofA Merrill Lynch, Credit Suisse, and Deutsche Bank Securities Inc. are also financial advisors to Charter, and together with Goldman Sachs, are leading the financing for the transaction. The law firms Wachtell, Lipton, Rosen & Katz and Kirkland & Ellis LLP are also representing Charter.

#### **Teleconference and Webcast for Financial Community**

Charter and Comcast will host a conference call on Monday, April 28, 2014 at 8:00 a.m. Eastern Time (ET) related to the contents of this release.

The conference call will be webcast live via Charter's website at [charter.com](http://charter.com). The webcast can be accessed by selecting "Investor & News Center" from the lower menu on the home page. The call will be archived in the "Investor & News Center" in the "Financial Information" section on the left beginning two hours after completion of the call. Participants should go to the webcast link no later than 10 minutes prior to the start time to register.

The conference call and related materials will also be broadcast live and posted on Comcast's Investor Relations website at [www.cmcsa.com](http://www.cmcsa.com) or [www.cmcsk.com](http://www.cmcsk.com).

Those participating via telephone should dial 866-919-0894 no later than 10 minutes prior to the call. International participants should dial 706-679-9379. The conference ID code for the call is 35997372. A replay of the call will be available at 855-859-2056 or 404-537-3406 beginning two hours after the completion of the call through the end of business on May 28, 2014. The conference ID code for the replay is 35997372.

#### **About Comcast Corporation**

Comcast Corporation (Nasdaq: CMCSA, CMCSK) is a global media and technology company with two primary businesses, Comcast Cable and NBCUniversal. Comcast Cable is the nation's largest video, high-speed Internet and phone provider to residential customers under the XFINITY brand and also provides these services to businesses. NBCUniversal operates 30 news, entertainment and sports cable networks, the NBC and Telemundo broadcast networks, television production operations, television station groups, Universal Pictures and Universal Parks and Resorts. Visit [www.comcastcorporation.com](http://www.comcastcorporation.com) for more information.

#### **About Charter Communications**

Charter (NASDAQ: CHTR) is a leading broadband communications company and the fourth-largest cable operator in the United States. Charter provides a full range of advanced broadband services, including advanced Charter TV® video entertainment programming, Charter Internet® access, and Charter Phone®. Charter Business® similarly provides scalable, tailored, and cost-effective broadband communications solutions to business organizations, such as business-to-business Internet access, data networking, business telephone, video and music entertainment services, and wireless backhaul. Charter's advertising sales and production services are sold under the Charter Media® brand. More information about Charter can be found at

# Measuring Monopsony: Using the Antitrust Toolbox to Protect Market Competition and Help the Television Consumer

Jacob M. Derr

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# NOTES

## MEASURING MONOPSONY: USING THE ANTITRUST TOOLBOX TO PROTECT MARKET COMPETITION AND HELP THE TELEVISION CONSUMER

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## INTRODUCTION

After a long day at the office, Carl Chicago comes home to spend a few minutes catching up on world events courtesy of CNN. Settling into the couch cushion, he turns on the TV, only to find the network blacked out. A message from his cable provider, Comcast, tells him that it is currently disputing its agreement with the station, and gives him a number to call to register his complaint. Carl is undeterred, and decides that he would rather just kick back with Finn and Jake on *Adventure Time* instead. But as he turns to Cartoon Network for some much-needed entertainment, he runs into a similar message from his cable provider. Carl, growing increasingly frustrated, decides to call his sister in Virginia, Wendy Williamsburg, who can see both of the stations fine. Carl begins complaining to her about the amount he pays for stations he cannot even access. “Well how much do you pay?” she asks. Carl tells her he pays about \$75 per month for the standard expanded cable. Wendy checks her own bill. Up until about a year ago, she had been paying roughly the same amount, around \$76.50 or so. However, for the same package of channels, she notices she is now paying almost \$84. “How can this be?” she asks Carl, wondering why his enormous cable conglomerate can offer such lower prices than hers. “Don’t ask me,” Carl retorts, “I didn’t pick them.”

Carl, as well as most of his neighbors and friends throughout the country, did not choose his cable company. That is because most localities have only one cable provider, and although there were previously hundreds, if not thousands, of different cable companies nationwide, most people today are served by one of only a few national conglomerates. More concerning than this lack of competition is that federal regulators at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have sanctioned this situation by choosing to measure a cable company’s growth only in individual markets, potentially ignoring nationwide gains.

The merger between Comcast and Time Warner Cable would have been the largest merger of two cable providers in history.<sup>1</sup>

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1. See *Comcast and Time Warner Cable Transaction Fact Sheet*, COMCAST, <http://corporate.comcast.com/images/Transaction-Fact-Sheet-2-13-14.pdf> [http://perma.cc/H3RZ-

Before Comcast abandoned its plans after the tepid reaction of both the DOJ and the Federal Communications Commission (FCC),<sup>2</sup> the merger garnered substantial consumer opposition<sup>3</sup> and concerned policy analysts and economists over the power such a large company would have.<sup>4</sup> The cable industry began as a collection of small conglomerates serving one or a few localities,<sup>5</sup> until providers began to combine.<sup>6</sup> There are now only about seven companies serving most of the cable-using public nationwide, of which the four largest are Comcast, Time Warner Cable, Cox Communications, and Charter Communications.<sup>7</sup>

When companies merge, they must submit notice of the merger to the federal government.<sup>8</sup> Either the DOJ Antitrust Division or the FTC Bureau of Competition investigates the merger,<sup>9</sup> and then either approves it or sues to block it.<sup>10</sup> Regulators determine the

CFMT] (last visited Sept. 27, 2015).

2. Shalini Ramachandran, *Comcast Kills Time Warner Cable Deal*, WALL ST. J. (Apr. 24, 2015, 4:40 PM), <http://www.wsj.com/articles/comcast-kills-time-warner-cable-deal-1429878881> [<http://perma.cc/3CNE-MWN5>].

3. David Ingram, *Americans Take Dim View of Comcast, Time Warner Cable Deal*, REUTERS (Mar. 26, 2014, 1:04 AM), <http://www.reuters.com/article/2014/03/26/us-usa-antitrust-idUSBREA2P0BD20140326> [<http://perma.cc/9ZJ9-7A6V>].

4. See, e.g., Jon Brodtkin, *How the U.S. Could Block the Comcast/Time Warner Cable Merger*, ARS TECHNICA (Feb. 18, 2014, 3:20 PM), <http://arstechnica.com/tech-policy/2014/02/how-the-us-could-block-the-comcasttime-warner-cable-merger> [<http://perma.cc/VK2B-24TQ>]; Art Brodsky, *7 Ways the Feds Can Make a Comcast-Time Warner Merger Less Terrible*, WIRED (Apr. 19, 2014, 6:30 AM), <http://www.wired.com/2014/04/7-limits-the-fcc-should-impose-on-a-comcast-time-warner-merger/> [<http://perma.cc/EKH5-HC62>]; Warren Grimes, *Competition Will Not Survive the Comcast-Time Warner Merger*, FORBES OP. (Feb. 27, 2014, 10:59 AM), <http://www.forbes.com/sites/realspin/2014/02/27/competition-will-not-survive-the-comcast-time-warner-merger/> [<http://perma.cc/FSD2-FE7L>].

5. See *The Cable History Project*, CABLE CTR., <http://www.cablecenter.org/cable-history/108-the-cable-history-project-overview.html> [<http://perma.cc/ZWP3-PNPY>] (last visited Sept. 27, 2015).

6. See *United States: Cable Television*, MUSEUM OF BROAD. COMM'NS, <http://www.museum.tv/eotv/unitedstatesc.htm> [<http://perma.cc/AR5L-4F3T>] (last visited Sept. 27, 2015).

7. Press Release, Major Pay-TV Providers Lost About 150,000 Subscribers in 3Q 2014, Leichtman Research Grp. (Nov. 14, 2014), [www.leichtmanresearch.com/press/111414release.html](http://www.leichtmanresearch.com/press/111414release.html) [<http://perma.cc/UF9U-TPYR>] [hereinafter Leichtman Research Grp.].

8. Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a(d) (1976).

9. *Id.* § 18a(b)(1)(A).

10. The FCC also reviews telecommunications (telco) mergers for possible effects on the telco market and the provision of services to consumers. Not only is FCC analysis usually duplicative of DOJ/FTC analysis, see Laura Kaplan, Note, *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and a Proposal for Reform*, 53 B.C. L. REV. 1571, 1573-74 (2012), but it is frequently rejected by courts as being arbitrary and

potential anticompetitive effects of mergers by turning to ratios of companies' market shares<sup>11</sup> to predict the effect a merger will have on all other sellers in that market.<sup>12</sup> If the analysis shows the companies' merger would have anticompetitive effects, regulators generally sue to block the merger.<sup>13</sup> The argument between the merging companies and regulators is always over *which* market regulators measure.<sup>14</sup> Unlike most industries, in which the merger effects are measured nationally, the DOJ/FTC measures a cable merger for its local impacts, looking at whether it will decrease competition in Richmond, Virginia, as opposed to competition on a national scale.<sup>15</sup> Most markets have only one cable provider,<sup>16</sup> so Comcast and Time Warner Cable, for instance, do not compete in any market nationwide.<sup>17</sup> In fact, very few cable companies share territory nationwide.<sup>18</sup> Theoretically, the DOJ should have approved the Comcast-Time Warner Cable merger on the grounds that it would not have

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capricious when it departs from DOJ/FTC analysis. *See infra* Part III.A.

11. DOJ & FTC, HORIZONTAL MERGER GUIDELINES 18-19 (2010), <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c> [<http://perma.cc/272R-8DT6>] [hereinafter HORIZONTAL MERGER GUIDELINES] (describing use of the Herfindahl-Hirschman Index (HHI) to measure the market).

12. THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 19 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014); *see also infra* Part I.B.1.

13. THE ANTITRUST REVOLUTION, *supra* note 12, at 12.

14. Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, in HANDBOOK OF ANTITRUST ECONOMICS 6, 7 (Paolo Buccirossi ed., 2008) (explaining that merging companies often define their market broadly, while the federal government often defines it more narrowly, each of them implicitly negotiating over the impact of the merger on the market).

15. *Why the Feds Won't Be Able to Block a Comcast-Time Warner Merger*, FORTUNE MAG. (Feb. 13, 2014, 5:36 PM), <http://fortune.com/2014/02/13/why-the-feds-wont-be-able-to-block-a-comcast-time-warner-merger/> [<http://perma.cc/2XW8-9S32>].

16. Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 2, 10 (2007). This is so because cable is a "natural monopoly," where a market with a single provider is more economically efficient than one with multiple providers. *See infra* Part I.A.1 (explaining the concept of a natural monopoly).

17. *Comcast and Time Warner Cable in Top 50 TV Markets*, CNN MONEY, <http://money.cnn.com/infographic/news/comcast-time-warner-coverage-map/> [<http://perma.cc/LV3P-VW5C>] (last visited Sept. 27, 2015).

18. *See, e.g.,* Zachary M. Seward, *The Charts and Maps You Need to Understand Why Charter is Buying Time Warner Cable and Bright House*, QUARTZ (May 25, 2015), <http://qz.com/411712/the-charts-and-maps-you-need-to-understand-why-charter-is-buying-time-warner-cable-and-bright-house/> [<http://perma.cc/9CNU-E3KZ>].

decreased competition in any localities.<sup>19</sup> Where there is no competition to begin with,<sup>20</sup> a merger cannot make competition worse.<sup>21</sup>

While this may be the case on a theoretical level, the problem is that a cable company's national power *does* matter. The cable market is two-sided: a cable company negotiates nationally with programming companies to buy their content, and then sells it to consumers in localities.<sup>22</sup> A cable company with sufficient power nationwide could decide that it is tired of paying \$5.54 per month per customer for ESPN<sup>23</sup> and, because of its size, have a substantial ability to extract lower prices from ESPN.<sup>24</sup> ESPN would then have to either decrease operations or, to the extent it can, use its own power over smaller cable companies to extract higher fees from customers.

Programming companies' ordinary response in this situation would be to merge.<sup>25</sup> However, they cannot do so without raising

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19. Geoffrey Manne, *Why the Antitrust Realities Support the Comcast-Time Warner Merger*, TRUTH ON THE MKT. (Apr. 14, 2014), <http://truthonthemarket.com/2014/04/14/why-the-antitrust-realities-support-the-comcast-time-warner-cable-merger> [<http://perma.cc/VSG8-D2G6>]. Although then-Attorney General Eric Holder indicated that the DOJ was considering suing to block the Comcast-Time Warner Cable merger, it was ultimately the FCC's indication that it would seek to frustrate merger plans that caused Comcast to abandon its attempt. See Ramachandran, *supra* note 2.

20. Although satellite and telco rivals provide alternatives in some localities, the discussion in Part III will demonstrate why these are not effective sources of competition in the long term.

21. Maurice E. Stucke & Allen P. Grunes, *Crossing the Rubicon: Why the Comcast/Time Warner Cable Merger Should Be Blocked* 1-2 (Univ. of Tenn. Legal Studies, Research Paper No. 245, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2422868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422868) [<http://perma.cc/88Z6-XDGG>].

22. Andre Boik, *Intermediaries in Two-Sided Markets: An Empirical Analysis of the U.S. Cable Television Industry* 2 (Univ. of Toronto, Working Paper, 2013), <http://kelley.iu.edu/BEPP/documents/boik%20paper.pdf> [<http://perma.cc/82KG-KWCV>].

23. L.A. Ross & Tony Maglio, *Your Unfair Cable Bill: Most Expensive Channels Aren't the Most Watched*, THE WRAP (Mar. 13, 2014, 3:21 PM), <http://www.thewrap.com/cable-bill-battle-subscribers-providers-carriage-fees/> [<http://perma.cc/5542-DM66>] (using data compiled by SNL Kagan).

24. Meg James, *Comcast-Time Warner Cable Merger Is No Longer Viewed as Inevitable*, L.A. TIMES (Jan. 27, 2015, 5:00 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-comcast-time-warner-cable-merger-opposition-20150127-story.html#page=1> [<http://perma.cc/Y3WY-ZN95>] (describing discussions between federal investigators and heads of programming companies expressing concerns that Comcast can use its power to undercut how much programming companies are paid for their channels).

25. BARBARA S. PETITT & KENNETH R. FERRIS, VALUATION FOR MERGERS AND ACQUISITIONS 6-7 (2d ed. 2013).

significant antitrust concerns of their own, because regulators measure them—as they do companies in most industries—on a national level.<sup>26</sup> Programming companies are thus roughly stuck in place while a sufficiently large cable company, which is unfettered by the current enforcement scheme, can theoretically obtain unprecedented power to dictate prices to programmers, leaving the programmers to pass costs on to other cable companies' customers, like Wendy Williamsburg. This may have seemed unlikely until the proposed Comcast-Time Warner Cable merger, which would have made the two largest cable companies one. Even though that merger was scuttled, the immediate presence of another buyer for Time Warner Cable—Charter, the fourth-largest company—indicates that this merger activity will likely continue.<sup>27</sup>

Government regulators, however, have a little-used tool in their antitrust toolbox to measure buyer power in the market. This Note proposes that government regulators measure potential mergers for monopsony power—the ability of a single buyer to impact a would-be seller in a market—to ensure that they consider all economic effects of any future cable mergers.<sup>28</sup> Although monopsony has never been applied to the cable industry, the economic realities support dusting off this doctrine and putting it to work. This Note analyzes the abandoned Comcast-Time Warner Cable merger, which, as a proposed merger between the two largest cable providers in the country, put these issues front and center for regulators for the first time. Although the parties abandoned that merger, Charter Communications' proposed merger with Time Warner Cable would enlarge the merged company to almost the same size as Comcast.<sup>29</sup> These issues remain prevalent, as the future of cable seems to promise more of such activity.

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26. See *infra* notes 115-17 and accompanying text (describing a proposed merger between two programming companies in the wake of the Comcast-Time Warner Cable announcement, which raised substantial antitrust concerns that would have needed to be addressed before the merger could have proceeded).

27. See Sydney Ember, *In Time Warner Cable Deal, Charter Seeks National Heft*, N.Y. TIMES (May 25, 2015), [http://www.nytimes.com/2015/05/26/business/media/in-cable-deal-charter-seeks-its-legitimacy.html?\\_r=0](http://www.nytimes.com/2015/05/26/business/media/in-cable-deal-charter-seeks-its-legitimacy.html?_r=0) [<http://perma.cc/32SZ-HDFB>].

28. The monopsonist can dictate terms to its suppliers. Consequently, if federal regulators determine that a cable merger might create monopsony power, they will be able to effectively curtail this growth as they have not been able to do before. See *infra* Part III.B.

29. See Ember, *supra* note 27.

Part I of this Note discusses the history and goals of cable regulation, including why conglomerates are traditionally allowed, and how programming companies are measured differently than cable companies. Part II examines the problems with measuring cable market-to-market. It begins by explaining how and why this structure does not check the size of cable providers, and how courts have eliminated prior rules. The only reasonable market solution to cable power is programming power, and if their mergers are blocked under standard antitrust doctrine, regulators may have inadvertently enshrined cable dominance over programming and consumers. This Part also discusses the potential losers in a large-scale cable merger.

Finally, Part III argues that, although other regulators have failed to stop cable's unchecked growth, antitrust laws should have more success. This Note proposes that the DOJ Antitrust Division and FTC<sup>30</sup> be required to measure both sides of the cable market—the influence of cable both market-to-market via consumer delivery, and the nationwide effects on programming purchasing via monopsony power. If either of these raises the concentration of the market beyond the established antitrust thresholds, the DOJ should sue to block the merger. This proposal will allow more robust consumer protection, uphold a free market, and keep cable companies from shifting economic equity towards themselves and away from their customers and competitors. The proposal also squares with the purpose of the antitrust laws, which should vest the authority to change their market analysis within the DOJ and FTC without their rules being struck down by the courts. This Part will also address alternatives, explaining why this proposal is more sustainable than others.

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30. This Note applies to both the DOJ Antitrust Division and the FTC, but because the DOJ considered the Comcast-Time Warner merger, this Note makes shorthand references to the DOJ.

## I. CABLE'S REGULATORY TRADITION: MEASURING COMPETITION MARKET-TO-MARKET

### A. *Cable as a Natural Monopoly*

Two concepts in economics, efficiency<sup>31</sup> and equity,<sup>32</sup> are usually in tension with one another in regulators' calculations of economic policy. In the case of cable franchises, both of these actually work in tandem to establish cable as a "natural monopoly," where the best solution is a single provider in a locality. As a result, most localities in the United States are served by only one cable company.<sup>33</sup> These concepts are explored in detail below.

#### 1. *Efficiency: The Cheapest Good for the Greatest Number*

Cable, as a natural monopoly, validates efficiency concerns. Like other utilities, cable is the almost quintessential example of a natural monopoly, meaning that the most efficient market exists when only one provider serves a locality.<sup>34</sup> Because a cable system requires large capital expenditures up front to install coaxial cable and other equipment to transmit a cable signal,<sup>35</sup> the cost for each consumer decreases as it is amortized over increasing numbers of

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31. Economic efficiency is the requirement that the market maximizes producer and consumer surplus—in other words, that producers sell the product for as low as possible, and that the maximum number of consumers willing to buy at that price are able to buy at that price. Put in more basic, non-economic terms, this intuitively means that the *most* people are made the *most* happy, as far as happiness can be measured through economic systems. See AVINASH DIXIT, MICROECONOMICS: A VERY SHORT INTRODUCTION 52-55 (2014).

32. Equity, as used in this Note, refers to the economic concept of equity, rather than ownership of a company. Economic equity describes how the benefits buyers and sellers get from competition accrue to each party (in other words, are they equal, or does one party benefit more than others?). See *infra* notes 123-25 and accompanying text.

33. OWEN M. FISS, THE IRONY OF FREE SPEECH 70 (1996); see also Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 245, 265 (2003) (citing FCC data that only 2 percent of "cable community units" have more than one provider nationwide, and noting that only one in twenty customers responding to a Consumer Reports survey reported having a choice among more than one cable option).

34. Shaun Christensen, *Cable Television: Competition and the First Amendment*, 37 S.D. L. REV. 566, 576-77 (1992).

35. W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 535 (4th ed. 2005).

customers.<sup>36</sup> Consequently, if two or more companies were to compete head-to-head, installing their own different sets of coaxial cable and equipment, they would have to amortize their costs over fewer consumers.<sup>37</sup> This would raise the cost of doing business for each company, and raise the price for consumers, to a point at which the price would be too high for consumers to pay and the costs too great for the companies to bear.<sup>38</sup> Efficiency considerations thus dictate that only one cable company exist in order to spread these capital expenditures among the highest number of customers, ensuring the lowest possible price for those customers.<sup>39</sup> Most local governments thus aim to have only one cable provider, and they have been fairly successful in that regard.<sup>40</sup>

## 2. *Equity: Providing the Local Voice*

Equity considerations have also guided federal regulators to a natural monopoly. The courts have long supported the FCC's decision to favor consumer equity<sup>41</sup> over economic efficiency.<sup>42</sup> The earliest of these decisions, *Carter Mountain Transmission Corp. v. FCC*, upheld an FCC rule prohibiting an outside corporation from importing its own offerings, delivered via microwave and providing better service than the local cable provider, because it "would result in the 'demise' of the local television station ... and the loss of service to a substantial rural population not served by the community antenna systems."<sup>43</sup> The court upheld the rule as a proper exercise of the FCC's regulatory power.<sup>44</sup> This decision is important because

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36. *Id.*

37. For instance, if a company spends \$1,000,000 to start, and can sell to 100,000 customers in an area, their bill is \$10 (plus the ongoing costs of the cable company, profit, and so on). If two companies compete and each win half of the customers, they have each still spent \$1,000,000, but now only sell to 50,000 customers. Those customers pay an additional \$10, which might make them less likely to buy cable.

38. VISCUSI ET AL., *supra* note 35, at 535.

39. *Id.*

40. *See generally* Dibadj, *supra* note 33; *infra* notes 50-51 and accompanying text.

41. *See supra* note 32 (explaining the concept of equity).

42. *See Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963).

43. *Id.*

44. *Id.* at 362-63. The court upheld the decision despite the fact that the FCC's duties include considering both equity *and* efficiency concerns: "Relevant, too, is the congressional mandate that the Commission 'make such distribution of licenses, frequencies, ... and of power

pure efficiency, which reigns in most laissez-faire markets, would dictate that the government allow this arguably superior competitor to thrive because it could provide citizens with a better product than their local provider.<sup>45</sup>

Economic theory most often presumes that lower prices make for the best civic good.<sup>46</sup> The FCC's rule, and the *Carter Mountain* court's imprimatur, indicates a continuing desire by social planners to protect decisions that may actually cost consumers more money or provide worse service in order to keep a local voice in the community.<sup>47</sup> Regulators have long taken the view that cable's provision of the local voice vindicates a consumer right. Cable came into existence because not all communities received adequate broadcast signal<sup>48</sup>—the towns in *Carter Mountain* were Wyoming mountain towns that otherwise did not have strong television signals.<sup>49</sup> In exchange for cable companies incurring the substantial up-front fixed costs for laying the infrastructure necessary to provide cable service,<sup>50</sup> local government franchising authorities that dictate which firms are allowed to broadcast in a certain area granted them exclusive access to municipal rights of way.<sup>51</sup>

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among the several States and communities as to provide a *fair, efficient, and equitable distribution of ... service* to each of the same.” *Id.* (emphasis added). This same impulse guides the “must-carry” provisions imposed by the FCC on local providers, which mandates that cable companies carry the local broadcast stations and their news media, even if they could execute a cheaper arrangement with a non-local news station. Interview with Brian Hendricks, Head of Tech. Policy & Gov't Relations N. Am., Nokia, in Williamsburg, Va. (May 5, 2014).

45. Economic equity, on the other hand, considers what each of the buyers and sellers gets—in this case, the local voice is “worth paying for,” even though each party gets a lower total surplus because they could have obtained a product for cheaper, and, as discussed in *supra* note 31, is what makes buyers “happiest” in economic theory. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 38 (16th ed. 1998) (discussing the macroeconomic objectives of “promoting efficiency, achieving a fairer distribution of income, and pursuing macroeconomic objectives of economic growth and stability”).

46. *Efficiency*, ECON. ONLINE, [http://www.economicsonline.co.uk/Business\\_economics/Efficiency.html](http://www.economicsonline.co.uk/Business_economics/Efficiency.html) [<http://perma.cc/WY4K-C3KE>] (last visited Sept. 27, 2015) (defining alternative efficiency).

47. Interview with John Michael Parman, Assistant Professor, Dep't of Econ., College of William & Mary, in Williamsburg, Va. (Mar. 17, 2014); see also DANA ROYAL ULLOTH, *COMMUNICATION TECHNOLOGY: A SURVEY* 82-85 (1992).

48. *Evolution of Cable Television*, FCC ENCYCLOPEDIA, <http://www.fcc.gov/encyclopedia/evolution-cable-television> [<http://perma.cc/ZF3F-GQEV>] (last updated Mar. 14, 2012).

49. *Carter Mountain*, 321 F.2d at 361.

50. See VISCUSI ET AL., *supra* note 35, at 535.

51. *Id.*

These barriers persist today, partially because of franchising protection.<sup>52</sup> Cable companies often enjoy solicitous relationships with their local franchising authorities.<sup>53</sup> In addition, the cost of “overbuilding”<sup>54</sup> on existing cable lines effectively stymies competitors and raises their marginal cost for adding customers, because additional customers usually only come from the existing customer base.<sup>55</sup> As a result, 98 percent of municipalities are served by only one cable provider.<sup>56</sup> The fact that cable is considered a natural monopoly, and the policy desire embodied in *Carter Mountain* to reward franchises, combine to keep competition low.

## *B. History of Cable Regulation and Deregulation*

### *1. Cable Regulation*

Though cable may have started as a small market characterized by a loose federation of local franchises, it is now quite different. Most of these small local companies have been absorbed over the years by larger “multi-system operators” (MSOs), such as Time Warner Cable, Charter, and Comcast, which may operate hundreds of “mini-franchises” in these localities.<sup>57</sup> This allows the cable compa

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52. *Evolution of Cable Television*, *supra* note 48.

53. Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1358-59 (1986).

54. Overbuilding is the practice of a separate cable company laying down lines using the same community rights of way. *See generally* Kevin Caves & Hal Singer, *Life After Comcast: The Economist's Obligation to Decompose Damages Across Theories of Harm*, 28 ANTITRUST 90 (2014) (discussing barriers to entry and the cost of overbuilding).

55. The primary deterrent for overbuilding is the fact that companies must absorb this cost before they are guaranteed any customers, and there are few “new” customers in a “mature” industry like cable. The cost to *both* cable companies in an area will be higher because they will have smaller customer bases than the single cable company would. *See* Dorothy Pomerantz, *If You Overbuild It*, FORBES (Apr. 16, 2001, 12:00 AM), <http://www.forbes.com/forbes/2001/0416/144.html> [<http://perma.cc/VGL2-Y5QV>]. Despite these challenges, some evidence suggests that not only are some companies attempting to overbuild and enter the cable arena, but also that large cable companies are trying to keep them out. *See* Brodsky, *supra* note 4 (explaining that Comcast and Time Warner Cable have spent money fighting overbuilders and creating an artificially singular provision of service).

56. *See* Eli Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q. 18 (1997), [http://www.citi.columbia.edu/elinoam/articles/media\\_monopoly.htm](http://www.citi.columbia.edu/elinoam/articles/media_monopoly.htm) [<http://perma.cc/H2J8-5FH6>]; *see also* Dibadj, *supra* note 33, at 265.

57. Stuart Smith, *Introduction to the Cable MSO Industry*, MINTEK (July 21, 2010), <http://www.mintek.com/blog/cpe-management/introduction-cable-mso-industry/> [<http://perma.cc/>

nies to price their packages in each locality according to what consumers are willing to pay, while giving them substantial national market power because they can control their corporate policies at a national level.<sup>58</sup> This creates an inherent problem, as federal regulations were established to protect the monopolies of individual cable providers, which were usually small. These cable providers have been snapped up by the national firms, which have accumulated national largesse as a result. If left unchecked by the current legal scheme, this could allow cost increases for all customers whose bills do not come from the largest competitor in the market, particularly if that largest competitor has behind it the economic power created by one of these new mergers.<sup>59</sup>

Cable regulation historically has not been particularly robust, struggling with issues of fit in a dynamic market.<sup>60</sup> The only regulation has concerned the price of a basic cable package,<sup>61</sup> demonstrating that the FCC's primary focus is consumer access to basic channels and broadcast networks, and the presence of a "local voice" in the community.<sup>62</sup> The most impactful regulations are those enforced by the DOJ Antitrust Division and the FTC Bureau of Competition. These regulators administer the federal antitrust

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58. *See Company Overview*, COMCAST, <http://corporate.comcast.com/news-information/company-overview> [<http://perma.cc/F59X-6VGE>] (last visited Sept. 27, 2015) (describing Comcast as "a global media and technology company," despite the fact that its biggest business, Comcast Cable, delivers "to residential customers").

59. *See infra* Part II.C.2 (explaining that Comcast could have forced concessions from programming companies as a result of its greater power, and that the programming companies in turn would use their power against smaller cable companies to charge more than they had before).

60. *See generally* Dibadj, *supra* note 33, at 250; Hazlett, *supra* note 16.

61. *Regulation of Cable TV Rates*, FCC (Dec. 30, 2014), <http://www.fcc.gov/guides/regulation-cable-tv-rates> [<http://perma.cc/88NV-4FTY>].

62. This is not necessarily a bad thing. During periods when cable prices were unregulated, they rose, but so did the provision of better channels like HBO and ESPN, and the actual price per channel of a cable package went down. During periods of regulation, the price remained the same. Not only did cable development stagnate during these periods, but the most desirable offerings—such as HBO—were moved off of the basic cable package and into premium packages. This means that now, the broadcast networks and local channels are some of the *only* offerings available to consumers under a regulated basic package, but the amount of money and time Americans spend on cable suggests that they receive substantial value from these packages—they *want* to pay for HBO. *See generally* *Evolution of Cable Television*, *supra* note 48.

statutes,<sup>63</sup> which originally rose during the era of Standard Oil and railroad cartels in order to keep companies from creating a monopoly that restrained trade.<sup>64</sup> In furtherance of these laws, regulators not only watch for agreements or conduct between two or more companies that restrain trade,<sup>65</sup> but also review mergers to assess whether they will enhance or restrain competition.<sup>66</sup>

## 2. Antitrust Oversight of Cable

Antitrust laws provide the most robust means for regulating a cable company's size, but, as is the case with all federal merger approvals, the way the merging companies and regulators define the relevant market determines whether regulators will allow the companies to merge. When companies plan to merge, they usually must file paperwork with federal authorities under the Hart-Scott-Rodino Act, which amended the Clayton Antitrust Act.<sup>67</sup> The DOJ or FTC then use the Herfindahl-Hirschman Index (HHI) to accurately measure the merger's effect on market concentration. The HHI provides a number between 0 and 10,000 for market concentration, with higher numbers demonstrating greater market power in fewer hands.<sup>68</sup> Regulators have termed markets between 0 and 1500 points "not concentrated," markets between 1500 and 2500 "moder-

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63. The three primary statutes are the: (1) Sherman Antitrust Act, Pub. L. No. 107-203, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)), which prohibited businesses from engaging in anti-competitive conduct; (2) Clayton Antitrust Act, Pub. L. No. 63-323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (2012) and 29 U.S.C. §§ 52-53 (2012)), which first established provisions for the government to block mergers; and (3) Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2012)), which established the FTC.

64. *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52 (1911) (introducing the "three evils" of monopolies the public cried out against at English common law: higher prices, reduced output, and reduced quality).

65. 15 U.S.C. §§ 1-2 (2012).

66. *Id.* § 18.

67. *Id.* § 18a.

68. Market concentration "is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers." *Herfindahl-Hirschman Index*, DOJ: ANTITRUST DIVISION, <http://www.justice.gov/atr/public/guidelines/hhi.html> [<http://perma.cc/3B5Q-9WZ8>] (last visited Sept. 27, 2015). For example, for a market in which there are four firms with market shares of 30 percent, 30 percent, 20 percent, and 20 percent, respectively, the HHI would be calculated as follows:  $30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$ . *Id.* Thus, the HHI would be 2600, making this a highly concentrated market. *Id.*

ately concentrated,” and markets over 2500 points “highly concentrated.”<sup>69</sup> In determining whether a merger is concerning enough to give rise to suit, the DOJ and FTC consider both (1) whether the market is already highly concentrated and (2) how much the merger would increase market concentration.<sup>70</sup> For instance, an increase of more than 200 points in a highly concentrated market is “presumed to be likely to enhance market power.”<sup>71</sup> In less concentrated markets, regulators look for a greater increase in market concentration before they are concerned.<sup>72</sup>

Federal policy does not inhibit firms from combining, except when the new firm could unreasonably restrain trade.<sup>73</sup> For instance, regulators famously blocked AT&T’s attempted purchase of T-Mobile out of concern that the merger would take away a valuable competitor in an already concentrated market and essentially allow a “duopoly”<sup>74</sup> between AT&T and Verizon.<sup>75</sup> However, regulators often approve mergers with certain requirements, such as divestiture of some of the merged company’s assets. When American Airlines merged with U.S. Airways, for example, it divested itself of some of its gates and flights at Ronald Reagan Washington National Airport because the combined company would have had an inordinate presence compared to other airlines.<sup>76</sup>

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69. *Id.*

70. HORIZONTAL MERGER GUIDELINES, *supra* note 11, at 7.

71. *Id.* at 19.

72. *Id.*

73. *See generally id.* (discussing the lack of concern for mergers in less concentrated markets).

74. Just as in a monopoly where one company controls most of the market, a duopoly exists where two companies effectively control the market. *See* George J. Stigler, *Notes on the Theory of Duopoly*, 48 J. POL. ECON. 521, 521 (1940).

75. *See* Michael J. de la Merced, *AT&T Ends \$39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011, 4:44 PM), <http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/> [<http://perma.cc/2V2A-EHCJ>] (explaining that AT&T and Verizon Wireless would have had almost three-quarters of the cellular market between them if AT&T had absorbed T-Mobile).

76. Ashley Halsey III, *American Airlines Ends Direct Service to 17 Cities from National Airport Under Merger Deal*, WASH. POST (Jan. 15, 2014), [http://www.washingtonpost.com/local/trafficandcommuting/american-airlines-ends-direct-service-to-17-cities-from-national-airport-under-merger-deal/2014/01/15/345610f4-7df4-11e3-9556-4a4bf7bcbd84\\_story.html](http://www.washingtonpost.com/local/trafficandcommuting/american-airlines-ends-direct-service-to-17-cities-from-national-airport-under-merger-deal/2014/01/15/345610f4-7df4-11e3-9556-4a4bf7bcbd84_story.html) [<http://perma.cc/WJJ2-G9UM>].

The whole battle of a merger is often won and lost over the definition of the market itself.<sup>77</sup> Companies seeking a merger generally argue that they are members of a larger market in order to increase the number of players, decrease the market concentration, and win when the DOJ performs its HHI calculations.<sup>78</sup> Regulators for the DOJ or FTC who want to block the merger will define the market as narrowly as possible, amplifying the effect of the proposed merger.<sup>79</sup> The DOJ Antitrust Division uses the HHI to measure cable market-to-market,<sup>80</sup> because each franchise exists in its own mini-market with its own natural monopoly.<sup>81</sup> Cable companies are frequently the only provider in their respective market.<sup>82</sup> For instance, when advocating for the Comcast-Time Warner Cable merger, Comcast Vice President David Cohen correctly stated that “Time Warner and Comcast do not compete in any relevant market,” such that any consumer who paid Time Warner Cable would simply just start paying Comcast post-merger, since Comcast was *never a player in their market to begin with*.<sup>83</sup> To put it succinctly, where there was never substantial competition to begin with, a merger between two cable companies cannot make such competition worse, which the-

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77. See THE ANTITRUST REVOLUTION, *supra* note 12, at 26-29; see also Baker & Bresnahan, *supra* note 14, at 7.

78. See Jon Brodtkin, *Comcast: Without Time Warner, We Can't Compete Against Google, Netflix*, ARS TECHNICA (Apr. 8, 2014, 1:16 PM), <http://arstechnica.com/tech-policy/2014/04/comcast-without-time-warner-cable-we-cant-compete-against-google-netflix/> [<http://perma.cc/T5FE-VJD9>] (noting Comcast's statement to the FCC that, in addition to competing against other cable companies, its relevant market includes Google, Netflix, Verizon, Apple, and Sony).

79. Federal regulators have not yet indicated how they would define the market, but another example would be the airline industry: regulators typically do not include train and bus travel as adequate “substitutes” for airline travel, which would otherwise define the market for national travel more broadly, making the airline merger less impactful. See, e.g., Complaint at 10, *United States v. US Airways*, 38 F. Supp. 3d 69 (D.D.C. 2014) (No. 13-cv-1236).

80. Kevin Roose, *This Math Formula Shows Why the Comcast-Time Warner Cable Deal Should Be Blocked*, N.Y. MAG. (Feb. 13, 2014, 9:59 AM), <http://nymag.com/daily/intelligencer/2014/02/why-comcasttime-warner-cable-should-be-blocked.html> [<http://perma.cc/8AN7-AX7X>]. Roose notes that the telco industry has also argued that it should be considered market-to-market. *Id.*

81. See *supra* Part I.A.

82. Dibadj, *supra* note 33; see also *Comcast and Time Warner Cable in Top 50 TV Markets*, *supra* note 17; *supra* note 18 and accompanying text.

83. *Why the Feds Won't Be Able to Block a Comcast-Time Warner Merger*, *supra* note 15.

oretically quashes any possible checks inherent in antitrust doctrine.

### C. Comcast-Time Warner Cable and Future Mergers

The aborted merger between Comcast and Time Warner Cable would have allowed the single largest cable provider in the U.S. (23 million customers) to merge with the second largest provider (11 million customers).<sup>84</sup> Comcast had agreed to divest itself of 3 million customers as part of the arrangement, meaning the merged company would have had just over 30 million subscribers.<sup>85</sup> This would have given Comcast control of one-third of all U.S. cable subscribers, while the second-largest, Cox Communications, would have had just 5 percent of subscribers.<sup>86</sup> A Comcast-Time Warner Cable company would have dwarfed all others, serving twenty of the top twenty-five markets nationwide.<sup>87</sup>

The aborted merger should have set off major alarm bells for regulators.<sup>88</sup> Rough estimates demonstrate that the merger would have increased market concentration by over 500 HHI points, up to an HHI score of 2454—almost to the DOJ's 2500 threshold delineat-

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84. See Leichtman Research Grp., *supra* note 7; see also Brian Stelter, *Comcast Buys Time Warner Cable for \$45 Billion*, CNN MONEY (Feb. 13, 2014, 3:09 PM), <http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/> [<http://perma.cc/HR5E-9TY5>].

85. Stelter, *supra* note 84. This arrangement was designed to appease regulators, but there is little to bind Comcast long-term, and it is unlikely, given their past history of concessions, that they will voluntarily bind themselves long-term. See *infra* notes 95-98 and accompanying text.

86. George Winslow, *The Top 20 Multichannel Providers*, MULTICHANNEL (Aug. 6, 2012, 12:01 AM), <http://www.multichannel.com/news/cable-operators/top-20-multichannel-providers/326351> [<http://perma.cc/2TE4-36SP>] (citing statistics compiled by the consultancy SNL Kagan).

87. *Turn It Off: American Regulators Should Block Comcast's Proposed Deal with Time Warner Cable*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/leaders/21598997-american-regulators-should-block-comcasts-proposed-deal-time-warner-cable-turn-it> [<http://perma.cc/6DLN-C9QR>].

88. Importantly, the DOJ never actually had to reveal its exact position on the merger, as it was the FCC's proposed order for a hearing that would have delayed the merger far enough into the future that it became unpalatable for Comcast and Time Warner Cable to continue. See Roger Yu & Mike Snider, *How Comcast, Time Warner Cable Deal Unraveled*, USA TODAY (Apr. 25, 2015, 12:27 PM), <http://www.usatoday.com/story/money/2015/04/24/how-comcast-deal-to-buy-time-warner-cable-fell-apart/26313471/> [<http://perma.cc/9YR6-L2MN>] (quoting antitrust attorney Amanda Wait as stating that “the DoJ got the FCC to do the dirty work here.... The DoJ never had to show their hand”).

ing highly concentrated industries.<sup>89</sup> By all calculations, such an increase should essentially have mandated that the government block any such merger—if they measured the merger nationally. Although the merger was called off and the two largest competitors did not merge, Charter Communications quickly stepped into the breach to make its own bid for Time Warner Cable and another provider, which would make the post-merger Charter a close second in size to Comcast nationwide.<sup>90</sup> This merger activity seems poised to continue, so regulators will still have to confront the state of anti-trust doctrine as it applies to cable mergers, which is the focus of the next Part.

## II. THE FAILURE OF CURRENT GOVERNMENT MEASURES

### A. *In Search of a Limiting Principle*

The fundamental problem with cable growth is that, without a measure that tracks the company's national footprint, and concomitantly, without a legal mechanism to address this growth, cable company growth has no limiting principle.<sup>91</sup> If all that matters is that a company does not create less competition in any one locality, a single large cable company could theoretically expand to merge with every cable provider that serves customers in an area in which it does not. A ruling from a D.C. Circuit case interpreting rulemaking by the FCC nominally limits Comcast to a 60 percent market share,<sup>92</sup> but even a company half this size has the potential to dominate the cable industry.<sup>93</sup>

National cable companies now control most local monopolies and operate these franchises individually only with regards to pricing for consumers: each cable company acts mostly as a national

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89. Tim Fernholz, *Why the Time Warner-Comcast Merger Isn't Going to Happen—At Least the Way It Looks Today*, QUARTZ (Feb. 13, 2014), <http://qz.com/177162/why-the-time-warner-comcast-merger-isnt-going-to-happen-at-least-the-way-it-looks-today/> [<http://perma.cc/4BC2-TGKG>].

90. See *supra* note 29 and accompanying text.

91. Stucke & Grunes, *supra* note 21, at 2.

92. See *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

93. See *infra* Part III.A. Under federal antitrust laws, as long as a merger does not “unreasonably restrain trade,” there is no clear limit to how much of the national market a cable company can have.

company, not a collection of local ones.<sup>94</sup> Moreover, there are few contractual remedies to limit these companies' growth. In presenting its merger with Time Warner Cable to the DOJ, Comcast agreed to divest itself of 3 million of its own customers to other cable companies,<sup>95</sup> presumably to make the merger more palatable to regulators.<sup>96</sup> This arrangement mirrored Comcast's decision when acquiring NBC Universal in 2011 to agree to uphold the FCC's then-effective net neutrality rules until 2017.<sup>97</sup> This self-imposed limit of 30 million customers would probably have expired at some point after the merger was approved, as it is unlikely that Comcast would have permanently limited itself to 30 million customers. After all, a corporation could not guarantee continued growth and returns to its stockholders if it limited itself from growing permanently.<sup>98</sup> Therefore, not only does a limiting principle not apply to companies like Charter Communications, but it would not have applied even to Comcast after a certain point. Regulators are unlikely to be able to contract out of this issue, which would primarily impact the other side of the market: programming companies.

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94. See *Company Overview*, *supra* note 58.

95. Ryan Lawler, *Comcast and Time Warner Cable to Divest 3.9 Million Subscribers Through Charter Deal*, TECHCRUNCH (Apr. 28, 2014), <http://techcrunch.com/2014/04/28/comcast-twc-charter/> [<http://perma.cc/2W5M-G9RD>]. Time Warner would give Charter 1.4 million customers, Time Warner and Charter would "trade" about 1.6 million customers to increase Charter's overall geographic reach, and Comcast would spin off 2.5 million customers into a new company, two-thirds of which Comcast would own and one-third of which Charter would own. *Id.*

96. See *Comcast Offers to Divest Customers to Win TWC Approval*, CNBC (Apr. 28, 2014, 10:35 AM), <http://www.cnbc.com/2014/04/28/comcast-strikes-deals-to-divest-39-million-subscribers.html> [<http://perma.cc/DV3R-2KSV>].

97. See Emily Siner, *How the Big Cable Deal Could Actually Boost Open-Internet Rules*, NPR: ALL TECH CONSIDERED (Feb. 13, 2014, 3:24 PM), <http://www.npr.org/blogs/alltechconsidered/2014/02/13/276453747/how-the-big-cable-deal-could-actually-boost-open-internet-rules> [<http://perma.cc/X3H4-UEWM>]. Courts have since struck down these rules. See *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). Because Comcast contracted with the FCC to abide by the rules, however, they remain in effect with regards to Comcast, and any Time Warner Cable customers it picks up in the merger through 2017. See Siner, *supra*.

98. Comcast ultimately is beholden to its shareholders and would be leaving profits on the table by permanently limiting its growth. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (establishing the principle that, generally, a company's duty is to maximize shareholder value).

*B. Tales from the Other Side*

Many early responders focused on the costs the Comcast-Time Warner merger would extract from consumers,<sup>99</sup> but no cable company would practically be able to raise the price on its customers without risking losing those customers.<sup>100</sup> The true cost of a merger between such large cable companies would probably be to programming companies, the other side of the cable market. Cable is a classic example of the two-sided market, meaning that cable companies both transact with programming companies (nationally) and deliver their product to consumers (locally).<sup>101</sup> If there is no check on the cable companies, they will gain *national* power and a much stronger bargaining position with programming companies. If a cable company like Comcast had been allowed to merge with Time Warner Cable, it would have represented a full one-third of all U.S. cable customers—and the *most lucrative* one-third of those customers, given that it would have controlled twenty of the top twenty-five

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99. See, e.g., *Join the Fight to Stop the Comcast-Time Warner Cable Merger*, FREE PRESS, <http://www.freepress.net/resource/105883/join-fight-stop-comcast-time-warner-cable-merger> [<http://perma.cc/JUG3-S8MZ>] (last visited Sept. 27, 2015).

100. See Matt Richtel & Brian Stelter, *In the Living Room, Hooked on Pay TV*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/2010/08/23/business/media/23couch.html> [<http://perma.cc/95TH-AFG9>] (quoting Comcast CEO Brian L. Roberts describing cable-only customers as “very price-sensitive,” meaning they react strongly to changes in price). Much has been made of the increase in cable “cord cutters,” the industry colloquialism for those who, while not actually cutting their cable cords, forego cable and instead rely primarily on Internet streaming video services for their entertainment. See, e.g., Timothy Stenovec, *Yes, Netflix and Hulu Are Starting to Kill Cable*, HUFFINGTON POST (Apr. 17, 2014, 3:44 PM), [http://www.huffingtonpost.com/2014/04/17/netflix-cable\\_n\\_5168725.html](http://www.huffingtonpost.com/2014/04/17/netflix-cable_n_5168725.html) [<http://perma.cc/226B-BFXY>]. This is somewhat misleading, as the true cost may be borne in younger customers who become accustomed to living without cable, choosing “over the top” video services like Apple TV or Google Chromecast, rather than current cable customers choosing to “cut the cord.” See Joan E. Solsman, *Cord-Cutter Wannabes Are Still a Small Group, but Growing*, CNET (Sept. 10, 2014, 9:00 PM), <http://www.cnet.com/news/cord-cutter-wannabes-are-still-a-small-group-but-growing/> [<http://perma.cc/4B3M-EC6V>]. This is in part because of the careful dance cable companies have undertaken to make sure that they do not raise prices on consumers past their willingness to pay, and why customers enter their zip code in order to get the price of a cable package that “their” market will bear. The chance, therefore, that an enlarged company is suddenly able to charge these customers more, without losing their business, remains unlikely. Additionally, most cord-cutting customers will continue to need internet service, which most often comes from their cable provider.

101. See Mark Armstrong, *Two-Sided Markets: Economic Theory and Policy Implications*, in RECENT DEVELOPMENTS IN ANTITRUST: THEORY AND EVIDENCE 39 (Jay Pil Choi ed., 2007).

markets.<sup>102</sup> Cable companies of this size would have substantial leverage over Disney, for instance, which owns ESPN. The merged Comcast could have decided it wanted to pay less to purchase ESPN<sup>103</sup> for its customers in New York, Chicago, and Los Angeles, and would have had a fairly good chance of extracting money from ESPN by threatening to cut off customers in these markets. As will be explained herein, the negotiations then become a matter of which company can outlast the other.<sup>104</sup>

Laissez-faire economic markets only work when each player is a price taker.<sup>105</sup> When there are many players in the market, each of whom is fairly similar to one another, they are forced to *take* the prices set by the market, rather than set the prices themselves.<sup>106</sup> If, on the other hand, a company is able to affirmatively set its own prices, regardless of the actions of consumers or their competitors, they are beholden to no one, and the theory of perfect competition breaks down.<sup>107</sup> A large enough cable company could have the power to dictate pricing terms to programming companies such as Viacom, the Walt Disney Company, News Corp., Time Warner, and CBS.<sup>108</sup>

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102. *Turn It Off*, *supra* note 87.

103. *See* Ross & Maglio, *supra* note 23 (noting ESPN's high cost per subscriber).

104. The fact that Comcast depends on subscribers for its income, rather than advertisers, as its programming counterparts do, would give it substantial leverage allowing it to weather the storm of public opinion much longer. *See infra* notes 110-14 and accompanying text.

105. *Perfect Competition*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/perfectcompetition.asp> [<http://perma.cc/PM73-SKYZ>] (last visited Sept. 27, 2015) (explaining the concept of price takers). In the economic ideal of perfect competition, all sellers in the market should be "price takers," meaning they all buy and sell products at the same equilibrium price. When there are 1000 firms that all sell the same widget and buy the same parts to make it, no one can truly charge more than the other 999 because customers will buy from any number of them—the firms all "take" the same price at which they buy and sell. When one of these 1000 sellers is more powerful than the others and can dictate what this equilibrium price is, raising it without customers being able to buy from the other 999, there are serious theoretical and real-world economic problems. *See* WAYNE C. CURTIS, MICROECONOMIC CONCEPTS FOR ATTORNEYS 9-10 (1984).

106. CURTIS, *supra* note 105, at 9-10.

107. *Marginal Revenue Under Single-Pricing*, LIVING ECON., <http://livingeconomics.org/article.asp?docId=319> [<http://perma.cc/Z46M-89V5>] (last visited Sept. 27, 2015).

108. Viacom owns over 160 cable channels including MTV, VH1, Nickelodeon, Comedy Central, and Spike TV. *Who Owns the Media?*, FREE PRESS, <http://www.freepress.net/ownership/chart> [<http://perma.cc/2HMT-9KSH>] (last visited Sept. 27, 2015). Walt Disney Company owns EPSN, Disney, ABC Family, and minority stakes in A&E, Lifetime, and the History Channel. *Id.* News Corp. owns FOX, Fox News, and twenty-five other cable channels. *Id.* Holding power over these entities *is* the ball game for cable.

The company could, for instance, decide that it no longer liked the idea of paying \$5.54 per customer to ESPN,<sup>109</sup> one of the highest cable rates. The cable company would thus have the power to shut out sports fans.

Comcast-Time Warner Cable would have represented over a third of the nationwide customer base, and a merger between Charter and Time Warner Cable would give the merged company close to a quarter of customers nationwide—if negotiations with programming companies break in a way that the cable company does not find favorable, it could simply black out that station to its customers. Even if the cable company were to *lose* in the court of public opinion and take the lion's share of the blame for the blackout, it still depends primarily on cable subscribers for its revenues, rather than advertisers.<sup>110</sup> If the top markets cannot watch ESPN, for example, its advertisers will walk away more quickly than the cable company's customers.<sup>111</sup> Cable has spent a lot of time and money to lock consumers into its ecosystem: consumers have a difficult time switching proprietary cable boxes, incur costs in switching to satellite, and, because of the buy-in they have already made with the company, are simply less likely to walk away from their cable company over what they perceive as a temporary blackout.<sup>112</sup> If a cable company controls *some* geographic areas, but not all, and if programming companies know they are dealing with several different

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109. Ross & Maglio, *supra* note 23.

110. Tasneem Chipty & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REV. ECON. & STAT. 326, 333 (1999) (calculating the profit functions of programming companies based almost entirely on their income from advertisers, and noting that, although other revenue represents a growing portion of their revenue, "advertising revenue continues to be the largest portion of supplier revenue").

111. Hazlett, *supra* note 16, at 65 n.222 (defining elasticity of demand as the percentage change in quantity demanded for a percentage change in price). Although cable customers are somewhat demand-elastic, meaning they respond to price changes, they are not as sensitive as advertisers. See Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* 31 n.60 (Time Warner, Working Paper, 2010), [http://97.74.209.146/downloads/broadcaster\\_brinkmanship.pdf](http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf) [<http://perma.cc/YDH3-ZU9Y>] (discussing how advertisers will depart from cable much more quickly than customers).

112. Andrew S. Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite—It's More Complicated than You Think* 1 (FCC Media Bureau Staff, Working Paper No. 2005-1, 2005), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-255869A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf) [<http://perma.cc/DYK3-EDTP>].

MSOs with about the same power nationwide, that begins to look like a fair market.<sup>113</sup> But there is little chance programming companies can afford to face off against the largesse of a sufficiently big cable company without harming their profits.

It seems obvious, then, that the typical response from most programming companies would be to merge themselves.<sup>114</sup> If Comcast-Time Warner Cable had wanted to use its 30 million subscribers as its ammunition, a Disney Company merged with Viacom could threaten to cut families off from ESPN, VH1, TLC, and Nickelodeon all at once. If the whole family is missing their favorite channels, they will be quicker to call DirecTV, and this will look more like a competitive market. Herein lies the other side of the coin that result's from cable's lack of a limiting principle.

### *C. Programmers Are Limited by Antitrust Law*

#### *1. Legal Limitations*

When faced with this scenario, most programming companies are likely to consider mergers to increase their own size, and, consequently, their nationwide negotiating power. It is unclear that they may do so, but it is not for lack of trying. Rupert Murdoch announced that his 21st Century Fox proposed to acquire Time Warner, Inc. over the summer of 2014.<sup>115</sup> Although Time Warner ultimately rejected Murdoch's advances, critics were nearly unanimous in their position that the merger would have created antitrust issues for regulators by concentrating too much media in the hands of one company. This is because programming companies are measured nationally, and if they were measured locally, Time Warner's products compete *in every local market* with those of 21st Century Fox—most cable packages actually group CNN and Fox News near

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113. See *supra* notes 101-04 and accompanying text.

114. THE ANTITRUST REVOLUTION, *supra* note 12, at 51.

115. Time Warner, Inc. is a separate entity from Time Warner Cable. Time Warner, Inc. owns Warner Brothers Television, the CW Network, TBS, TNT, Cartoon Network, and HBO. See *Who Owns the Media?*, *supra* note 108. All future references to "Time Warner" concern Time Warner, Inc., while the company involved in cable acquisition continues to be referred to as "Time Warner Cable."

one another.<sup>116</sup> The combination of the two companies would have given 21st Century Fox control over a substantial portion of the pay cable packages, and thus they would probably have too much leverage over cable providers.<sup>117</sup> This is not to suggest that regulators counter cable company mergers by allowing programmers to bulk up as well; the regulations currently in place to limit this growth are there for a good reason and should remain in place. On the contrary, cable companies should be held to the same standard, not handed a loophole by virtue of having separate franchises in each market.

Given that there is an increasingly small contingent of major television and movie studios,<sup>118</sup> the market is already what regulators would call “highly concentrated.”<sup>119</sup> Since it is so concentrated, regulators are much more likely to scrutinize a programming merger and sue to block it because it harms competition in the national market. Current programmers would thus be locked into their current sizes, while cable companies could be allowed virtually unlimited growth nationwide.

The real fear, however, stems from the belief that the market operates best when these two sides compete on a fair playing field *against one another* to provide the lowest cost and the highest level of service for their customers. This is the accidental enshrinement of unfairness mentioned in the Introduction. Federal antitrust law tends to favor cable companies because the rights of way awarded to cable companies—which created a natural monopoly—were intended for small providers, not national conglomerates. This has granted these cable companies exceptional power over the other

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116. See, e.g., Ryan Chittum, *Murdoch Moves on Time Warner*, COLUM. JOURNALISM REV. (July 17, 2014, 4:04 PM), [http://www.cjr.org/the\\_audit/murdoch\\_and\\_time\\_warner.php](http://www.cjr.org/the_audit/murdoch_and_time_warner.php) [<http://perma.cc/3HXV-72CC>] (noting in its secondary headline that “[a]s pipes companies merge, another round of media consolidation [begins]”); Michael Liedtke, *21st Century Fox Abandons Pursuit of Time Warner*, ASSOCIATED PRESS (Aug. 5, 2014, 10:26 PM), <http://bigstory.ap.org/article/21st-century-fox-abandons-pursuit-time-warner> [<http://perma.cc/88D6-M6JL>]; Andrew Ross Sorkin & Michael J. de la Merced, *Murdoch Puts Time Warner on His Wish List*, N.Y. TIMES (July 16, 2014, 7:02 AM), [http://dealbook.nytimes.com/2014/07/16/rupert-murdoch-said-to-have-made-offer-for-time-warner/?\\_r=0](http://dealbook.nytimes.com/2014/07/16/rupert-murdoch-said-to-have-made-offer-for-time-warner/?_r=0) [<http://perma.cc/TV5B-8JPA>] (noting that Murdoch did plan to spin off CNN, a Time Warner-owned station, to another company in order to avoid antitrust concerns, particularly because of the influence of his own Fox News).

117. Stucke & Grunes, *supra* note 21, at 4.

118. *Who Owns the Media?*, *supra* note 108.

119. See *supra* Part I.B.2.

market players and programmers, who, by these same laws, cannot combine to become much larger than they already are.

## 2. *Two Sets of Losers, Two Doctrines Lost*

Why should consumers and regulators fear this result? After all, the very definition of a natural monopoly means that it may in fact be economically more efficient for everyone to get their cable from one enormous company.<sup>120</sup> However, even if consumers do not feel the full brunt of the effects for some time, the approval of the merger of large cable companies could have far-ranging consequences for antitrust and telecommunications (telco) mergers. Economic regulatory theory recognizes two principal and competing goals: efficiency and equity.<sup>121</sup> Regulators are constantly trying to ensure that markets run as efficiently as possible. This means they want to reach “equilibrium,” the point at which the cost to the producer of producing each additional unit (“marginal cost”) is *equal* to the benefit of that unit to the consumer (“marginal benefit”), such that everyone who values an item at or above the marginal cost will buy the product, and others will not. Everyone is happy, either buying or not buying based on their prerogative.<sup>122</sup>

At the same time, other regulators would structure for maximum equity.<sup>123</sup> The degree to which a consumer’s marginal benefit exceeds what they paid for an item is called their “surplus.” Producers also have surplus, the degree to which they can sell a product for more than it costs to produce. There is a “total surplus” calculating the surplus across all consumers and producers.<sup>124</sup> Equity is the distribution of this surplus—who benefits more and who benefits less when prices are lower than value, or prices are higher than what it costs the producer to sell it.<sup>125</sup> Cable regulations allow a sufficiently large company to ignore both of these prerogatives, and consumers and programmers would pay for it.

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120. See *supra* Part I.A.

121. See Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191-92 (1977); see also *supra* Part I.A.

122. SAUL ESTRIN ET AL., MICROECONOMICS 3-5 (5th ed. 2008).

123. See SAMUELSON & NORDHAUS, *supra* note 45, at 37-38.

124. See ROGER A. ARNOLD, ECONOMICS 88 (12th ed. 2014).

125. *Id.* at 74-76.

A cable merger thus has the potential to create two sets of losers: other cable industry competitors would lose because programming companies, as explained below, are not going to absorb the costs the larger company extracts from them, so they are going to pass them along to smaller, weaker cable companies. Programming companies are also going to lose because not all market players will be price takers.<sup>126</sup> From an equity standpoint, one cable company could control 20 million subscribers, controlling the way that almost a quarter of the country accesses cable.<sup>127</sup> If a merged company is able to force lower prices on programmers, programmers will pass this cost on to all smaller cable providers, who will in turn pass those costs on to their consumers. Any customer not within the service area of the largest competitor will likely pay more in the long term for their cable, by virtue of their provider being a fraction of the size of the biggest players. Furthermore, the largest cable companies are not likely to pass their own gains on to their customers<sup>128</sup>—their prices will remain the same, with the company pocketing the money it receives as profit.<sup>129</sup> Such a merger thus also threatens efficiency. Current laws do not seem to limit the size of cable providers at all, but national content providers are limited by traditional antitrust doctrine, keeping them from competing with cable companies that may, by law, grow unchecked. This does not ensure that all firms in the market are price takers, which is economists' goal for antitrust law.<sup>130</sup>

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126. See *supra* notes 105-07 and accompanying text.

127. *Comcast and Time Warner Cable Transaction Fact Sheet*, *supra* note 1.

128. Spencer Woodman, *Exclusive: Politicians Are Supporting Comcast's TWC Merger with Letters Ghostwritten by Comcast*, VERGE (Jan. 26, 2015, 11:46 AM), <http://www.theverge.com/2015/1/26/7878239/comcast-twc-fcc-merger-letters-politicians-ghostwritten> [<http://perma.cc/3Y57-7WS9>] (quoting Columbia University Law Professor Tim Wu that, in the case of the Comcast-Time Warner Cable merger, "Comcast could have said this merger will lower prices and committed itself to lower prices but it has made no sign that it will do this").

129. Of course, each negotiation between a programming company and a cable provider over rates will lead to slightly different outcomes for consumers—there is nothing to guarantee that a programming company gives the same price to each cable company. Nor should there be; that is properly within the realm of negotiation. This Note will demonstrate, however, that there is a *substantive* difference in the negotiating power of an entity like the merged Comcast and another like Cox, which has one-sixth as many customers.

130. Elzinga, *supra* note 121 (discussing economists' goal of maximizing efficiency, which results in maximizing total output).

This is the heart of Carl Chicago and Wendy Williamsburg's hypothetical problem. Wendy is served by Cox Communications, while Carl is a Comcast customer. If Comcast had merged, it would have been able to extract higher gains for itself in the form of profit. Carl would not see any of this money but, as a result, he would have experienced the ups and downs of negotiations on Comcast's terms. Wendy's cable provider, on the other hand, does not have the power to negotiate these terms, so she has all of the channels, but her cable company has to pay more for the profits Comcast extracts from CNN and Cartoon Network. Even though the Comcast-Time Warner Cable merger did not come to pass, this remains an enforcement loophole. Regulators ought to consider cable's national power to prevent customers from experiencing such wildly different results based on where they live.

### III. THE DOJ MUST MEASURE BOTH CABLE MONOPOLY AND MONOPSONY WHEN CALCULATING THE HHI (AND REJECT A MERGER EXCEEDING EITHER THRESHOLD)

The lack of adequate legal enforcement to stop current mergers is concerning. Beyond a few limited FCC rules, the lack of any future limiting principle to keep operators from expanding nationally is potentially disastrous.<sup>131</sup> Our procompetitive antitrust laws are the best defense against these anticompetitive practices.

This Note therefore proposes that the DOJ analyze cable, a two-sided market, by performing two HHI analyses. The first analysis would compare the market for cable delivery to consumers market-to-market. The second would have regulators, for the first time, consider the impact of the cable merger on buyer power over programming content nationally, by determining whether the merger would give the company monopsony power over programming companies. If either of these HHI analyses indicates that competition would decrease as a result of the merger, the DOJ should sue to block the merger.

One of the chief benefits of this plan is that it should be feasible to implement without new authority from Congress; the DOJ has

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131. *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009) (establishing the only current limit on a cable company's national market share at 60 percent).

the authority to decide how to measure the markets, and what markets to consider.<sup>132</sup> The dual analyses do not depend on one another per se. They merely consider for the first time the impact of any cable merger on both sides of the market. The DOJ conducts separate market analyses for each, and then may draw its own conclusions about whether to grant approval or sue to block. This, of course, would not necessarily stop a merger. As discussed above in relation to the AT&T-T-Mobile and American-US Airways mergers,<sup>133</sup> litigation follows a DOJ lawsuit just as often as settlement or abandonment of the merger attempt. No plan is foolproof, but this proposal helps ensure that the DOJ has the ability to consider all potential market impacts when evaluating a cable merger.

### *A. The Legal Authority*

Monopoly laws are in place to prevent anticompetitive practices by firms<sup>134</sup> as well as mergers that will restrain competition in an industry.<sup>135</sup> The Clayton Antitrust Act, as amended by the Hart-Scott-Rodino Act,<sup>136</sup> prohibits any merger from taking place if it would substantially reduce competition in any one market,<sup>137</sup> as measured by the HHI described above. Competitive advantages given to large cable conglomerates, but disallowed to their strongest market opponents, ought to be considered to violate the antitrust laws for several reasons.

First, there could never be any effective competition if programming companies know that they are prohibited from becoming any larger while cable companies are essentially unlimited in their growth.<sup>138</sup> Second, if the most powerful cable company could dictate, rather than merely negotiate, prices, it would be difficult for other cable companies to retain current levels of pricing and services. The

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132. 15 U.S.C. § 18a (2012); HORIZONTAL MERGER GUIDELINES, *supra* note 11.

133. *See supra* notes 73-76 and accompanying text.

134. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2012). These are also often termed practices “in restraint of trade.”

135. Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (2012); *see also* 29 U.S.C. §§ 52-53 (2012).

136. *See supra* notes 67-72 and accompanying text (describing the application of the Hart-Scott-Rodino Act in further detail).

137. *See supra* notes 67-72 and accompanying text.

138. Stucke & Grunes, *supra* note 21, at 2-3.

very basis for a competitive market is the idea that no single player in the market has the ability to set prices—in other words, all companies are “price takers.”<sup>139</sup> Whenever one company can affect what its competitors will pay through its own actions, it is no longer a price taker, and the market suffers.<sup>140</sup> Regulators need to be able to limit such uninhibited growth, and the antitrust laws provide them with the tools necessary to do so.

The FCC previously tried to use its own regulatory authority to limit the growth of cable, with disastrous results. In 1992, Congress passed the Cable Television Consumer Protection and Competition Act to require cable systems to carry local broadcast signals<sup>141</sup> and keep cable operators from charging local broadcasters to carry the signal.<sup>142</sup> The Act also gave the FCC the power to limit cable provider growth:

In order to enhance effective competition, the Commission shall, within one year after October 5, 1992, conduct a proceeding—(A) to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.<sup>143</sup>

After cable companies challenged the Act on its face, the D.C. Circuit held that the rule was content-neutral.<sup>144</sup> The FCC soon set a national ownership cap for cable providers at 30 percent of the market, based on their econometric analysis that programming companies needed to be able to access at least 70 percent of the market to remain viable.<sup>145</sup>

The FCC’s rule was purportedly based on an analysis of whether, if one or more cable providers denied access to a programming

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139. ESTRIN ET AL., *supra* note 122, at 308.

140. *Id.*

141. This is called the “must-carry provision.” See *supra* notes 47-51 and accompanying text (discussing how cable companies are prohibited from transmitting an alternative local news station to localities even if it is cheaper than carrying the local station’s signal).

142. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

143. 47 U.S.C. § 533(f)(1) (1992).

144. *Time Warner Entm’t Co. v. United States*, 211 F.3d 1313, 1313 (D.C. Cir. 2000) [hereinafter *Time Warner I*].

145. *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

network, it would otherwise be able to reach alternative video programmers of a sufficient size to allow it to survive in the market.<sup>146</sup> The underlying idea was to ensure that “no single cable operator ‘can, by simply refusing to carry a programming network, cause it to fail.’”<sup>147</sup> The FCC was to complete this analysis by considering the “minimum viable scale,” the number of viewers a channel needs to remain economically viable, the total number of subscribers available in the U.S. market, and the “penetration rate,” the number of subscribers the network will actually reach and cable providers will allow.<sup>148</sup>

The D.C. Circuit rejected the FCC’s choice of the 30 percent cap as “arbitrary and capricious” because it failed to take into account the increasing popularity of satellite and telco alternatives, which serve up to 33 percent of the market.<sup>149</sup> The court instead proposed a cap of up to 60 percent, based on evidence that satellite and telco alternatives meant that programming networks needed to reach only 40 percent of cable customers to survive and remain economically viable.<sup>150</sup> The FCC failed to rebut this evidence.<sup>151</sup> This eliminated a 30 percent subscriber cap and enshrined, for the time being, a subscriber cap that would have allowed Comcast to double its *post-Time Warner* subscriber base without running afoul of FCC regulations.<sup>152</sup>

At first blush, this looks like the death knell for any arguments that the government can regulate the size of a cable company until it serves around 60 percent of the cable market. Upon closer inspection, though, there are two major reasons that the court’s rejection of the FCC’s rulemaking authority should not burden rulemaking under antitrust laws. First, the D.C. Circuit’s analysis of satellite and telco alternatives concerned consumers’ ability to switch to those services if cable simply refused to carry the programming. The FCC’s central focus was not negotiations over rates between cable and programming—it was to “ensure that no cable operator ... can

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146. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130-31 (D.C. Cir. 2001) [hereinafter *Time Warner II*].

147. *Comcast Corp.*, 579 F.3d at 4 (citing 23 F.C.C.R. 2134, 2154 (2008)).

148. *Id.*

149. *Id.* at 6-8.

150. *Id.* at 4.

151. *Id.* at 8.

152. *Id.*

unfairly impede ... the flow of video programming from the video programmer to the consumer.”<sup>153</sup> The FCC was concerned about a long-term blackout used by the cable companies to choke off competitors in the context of a larger bill *about cable choking off the local voice*, not about cable companies trying to extract money. The antitrust concerns focus on the competitive negotiations between cable and programming for their share of the total surplus.

Second, much of the D.C. Circuit’s analysis turned on the Commission’s admittedly feeble analysis that satellite was not a viable alternative to cable.<sup>154</sup> None of this matters in addressing the problems of negotiating power and distribution of total surplus. If Comcast gets a reduction in the amount it pays for ESPN, *all other providers* will bear these costs, whether they are a cable company like Cox or a satellite company like Dish Network.<sup>155</sup> There is nowhere for consumers to run (at least those who buy a package containing ESPN). The FCC’s analysis is largely inapposite to the current situation, but merely represents the completeness of regulators’ failure to limit cable’s rise in the past. If regulators are ever going to limit cable’s growth, they should look once again to the nation’s antitrust laws and their application instead of the FCC’s regulatory authority.

## *B. Enter Monopsony*

### *1. Background*

Most lay readers could be forgiven for not knowing monopsony—when it was first proposed during the Comcast-Time Warner Cable merger, most media treated it as a foreign concept.<sup>156</sup> The concept is basically the opposite of a monopoly: whereas a monopoly is concerned with the power of a single seller over multiple buyers,

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153. 47 U.S.C. § 533(f)(2)(A) (2012).

154. *Comcast Corp.*, 579 F.3d at 6-7.

155. Because satellite and telco companies must also negotiate with programming companies for the prices of their shows, they are price takers as well. Therefore, if Comcast can dictate the market, but no other purchaser of programming can do so, customers at telco and satellite companies are hurt just as much as those at smaller cable companies.

156. See, e.g., David Ingram, *Not a Typo, Monopsony in Spotlight in U.S. Cable Deal*, REUTERS (Feb. 21, 2014, 3:21 PM), <http://www.reuters.com/article/2014/02/21/us-usa-comcast-monopsony-analysis-idUSBREA1K1VI20140221> [<http://perma.cc/F3JB-NBMF>].

monopsony is the power of a single buyer over multiple sellers.<sup>157</sup> A monopsonist is able to restrict the output of their product below competitive levels—by blacking out signal, as an example—which gives them the leverage to lower input prices below competitive levels as well.<sup>158</sup>

Monopsony analysis is most often conducted in two situations. First, economists examine monopsony power in the labor context, such as various examinations of Wal-Mart's ability, as the dominant employer in a local labor market, to exert wage power over workers and artificially suppress its output of paid positions.<sup>159</sup> Monopsony has also been applied in agricultural contexts.<sup>160</sup> It has never been applied to a cable merger. In fact, relatively few mergers have ever been challenged on the grounds that they will increase buyer power,<sup>161</sup> and few cases have ever gotten close to a finding of monopsony violation.<sup>162</sup>

However, the power to measure monopsony is actually present in the DOJ-FTC Horizontal Merger Guidelines.<sup>163</sup> More careful consideration of monopsony power is a fairly recent phenomenon: while once the DOJ-FTC merely addressed the assessment of monopsony concerns in one short paragraph, a longer discussion of buyer power

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157. *Roundtable on Monopsony and Buyer Power: Note by the United States 2* (Directorate for Fin. and Enter. Affairs Competition Comm., Working Paper, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf> [<http://perma.cc/U3GX-R3TG>] [hereinafter *Note by the United States*].

158. Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 305 (1991).

159. See, e.g., Alessandro Bonanno & Rigoberto A. Lopez, *Wal-Mart's Monopsony Power in Local Labor Markets 1* (presented at the Am. Agric. Econ. Ass'n Annual Meeting, July 27-29, 2008), <http://ageconsearch.umn.edu/bitstream/6219/2/469304.pdf> [<http://perma.cc/TWL9-FA3W>].

160. DOJ, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 8 (2012), <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf> [<http://perma.cc/UR5E-TFCS>].

161. *Note by the United States*, *supra* note 157, at 6-7.

162. Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric* 13-14 (presented at the 61st Annual Antitrust Law Spring Meeting, Apr. 12, 2013), <http://www.wsgl.com/attorneys/BIOS/PDFs/jacobson-0413.pdf> [<http://perma.cc/P7W6-G4TB>] (noting that, with the exception of a jury verdict sustained by the court of appeals but overturned by the Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312 (2007), the Court has never found a violation).

163. See HORIZONTAL MERGER GUIDELINES, *supra* note 11, at 32.

appeared for the first time in the 2010 Guidelines.<sup>164</sup> It is time for the DOJ and FTC to reacquaint themselves with this doctrine to more rigorously examine cable mergers.

## 2. DOJ/FTC Framework

The agencies would conduct their analysis in much the same manner as they do for monopoly, by measuring the number of buyers available to programming companies to sell their products.<sup>165</sup> As monopsony is in many ways the mirror image of monopoly,<sup>166</sup> the key definition in this case, as in all others, is the market.<sup>167</sup> Herein lies the benefit of monopsony measurement—the DOJ and FTC are to include in the market definition any *reasonably interchangeable* products that consumers could turn to if the buyer restricted output—in this case, in the form of a cable blackout.<sup>168</sup> Because cable companies typically have a natural monopoly in all of the areas where they provide to customers, *consumers do not have reasonable alternatives* to cable-line programming delivery.

A cable company might argue that the relevant geographic market is the same as in monopoly cases—in other words, because it does not currently compete to *buy* in the Chicago market with another company it intends to merge with, its merger cannot change this situation. However, the analysis of a monopsony measures the number of good substitutes to which to sell *from the point of view of the sellers*.<sup>169</sup> In this case, the “relevant market” from the sellers’ point of view is all the land where the merging companies provide service to customers. In this market, post-merger, the sellers go from negotiating with two companies in the proposed cable coverage

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164. Compare DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 0.1 (issued Apr. 2, 1992, revised Apr. 8, 1997), with DOJ & FTC, HORIZONTAL MERGER GUIDELINES §§ 8, 12 (2010). Section 12, on monopsony power, remains substantially shorter than portions discussing monopoly power. *Id.*

165. Note that this looks substantially like the FCC rule struck down by the D.C. Circuit. See *supra* Part III.A. However, the key difference is that the harm the regulators are working to combat in this case is not the limitation of speech by a complete blackout, but the use of a limited, short-term blackout to depress prices below cost for programming companies.

166. See Maurice E. Stucke, *Looking at the Monopsony in the Mirror* 4 (Univ. of Tenn. Research & Creative Exch., Working Paper, 2013).

167. Blair & Harrison, *supra* note 158, at 323-24.

168. *Id.*

169. *Id.*

areas, to negotiating with only one in this coverage area. The market for sale of programming in the proposed coverage area would be the relevant market from the point of view of the programming companies.

Finally, a cable company may claim that there is no need for the regulators to concern themselves with its monopsony power, because it is traditionally understood that if it results in decreased prices for consumers, monopsony is a good thing.<sup>170</sup> Comcast, however, specifically noted that consumers would not receive lower prices as a result of its merger with Time Warner Cable.<sup>171</sup> Therefore, any gains it would have made would have been, in part, because of its ability to extract lower prices from content providers, an ability the combined Charter-Time Warner Cable, or any other large MSO, could also have.<sup>172</sup> Whether this power extends from the competitor's legitimate negotiating skills, or from monopsony power, where it can decrease output in the form of a blackout to consumers, is something the DOJ and FTC will have to measure if they take up a torch for monopsony.

### *C. Balancing Efficiency and Equity*

This plan achieves balance between the two primary concerns animating all decisions by social planners and state economists—efficiency and equity. One or the other of these concerns is the major driver of economic policy for economists,<sup>173</sup> and many economic issues fail to appease both sets of interests.<sup>174</sup> A plan that requires the DOJ to conduct an HHI analysis for both sides of the relevant two-sided market vindicates both concerns.

Economists who follow the efficiency model, many of whom fall into the Chicago School,<sup>175</sup> believe that antitrust laws exist not to

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170. Ingram, *supra* note 156 (quoting Professor Herbert Hovenkamp's explanation that monopsony is only a "problem when it threatens to decrease output").

171. *See supra* notes 127-29 and accompanying text.

172. As with most mergers, there would also be gains from scale and efficiency—closing down redundant factories, combining staff, and other measures. These gains are not the focus of this Note.

173. *See* VISCUSI ET AL., *supra* note 35, at 5.

174. *Id.*

175. The Chicago school of economics, named because of its creation through the work of faculty at the University of Chicago, is an economic theory that argues that free markets best

protect *consumers*, but to protect *competition*, and that maximizing the total surplus of the market is the most valuable and feasible goal for social planners.<sup>176</sup> Total surplus is maximized when consumers get the most utility and producers sell at the highest price possible.<sup>177</sup> There has already been a demonstration of how allowing a cable company to set what it is willing to pay will impact the market—costs will rise for programming companies and will be passed on to consumers at other cable companies, thus upsetting the natural equilibrium where each person willing to sell at a certain price matches each person willing to buy at a certain price.<sup>178</sup> If this match is lost, consumers who would buy cable at the ordinary price, but not at this higher price, will opt out, decreasing total surplus.

Economists who are primarily concerned with equity do not believe that our antitrust laws merely exist to protect the market but that the highest goal of this doctrine is consumer protection,<sup>179</sup> ensuring that the total surplus is distributed roughly equally among consumers.<sup>180</sup> In this context, it is perhaps even easier to see how the natural endpoint of the current law leaves consumers unprotected. By making sure that programming companies are on roughly the same footing, and that cable companies are in roughly the same bargaining position, this proposal ensures that consumers nationwide, who do not have any realistic choices among cable companies, will have roughly the same experience for roughly the same price.

#### *D. The Time Is Now, Not the Future*

Counterarguments and alternatives to the proposal in this Note are not as compelling. Although there have been previous econometric analyses concluding that the post-merger cable company might

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allocate resources with minimal government intervention, and prizes total surplus as the most valuable measure of economic welfare. *See generally* Richard Ebeling, *Milton Friedman and the Chicago School of Economics*, FREEMAN (Dec. 1, 2006), <http://fee.org/freeman/detail/milton-friedman-and-the-chicago-school-of-economics> [<http://perma.cc/9JEW-B92Q>].

176. Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 51, 51 (Robert Pitofsky ed., 2008).

177. Elzinga, *supra* note 121, at 1192-94; *see also* notes 124-25 and accompanying text.

178. *See supra* notes 127-29 and accompanying text.

179. Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713-15 (1997).

180. Elzinga, *supra* note 121, at 1192-94.

be the one to lose ground, these studies are outdated and do not resolve the fundamental equity distribution problems. Further, the concept of a luxury tax on the post-merger profits of a cable company deemed “too large” presents line-drawing problems and puts social planners into a dangerously active position. Finally, despite advancements in over-the-top video alternatives like Apple TV or Netflix, consumers still depend on cable, and would not be as empowered to cut the cord as commentators suggest.

### *1. Cable Companies Will Lose Ground*

Some of the most common counterarguments to putting legal structures in place to protect consumers from the unimpeded growth of cable fail to take into account just how unprotected the current market is. The most comprehensive examination of cable as a two-sided market suggests that larger cable companies will actually *lose* ground when negotiating with programming providers.<sup>181</sup> This point requires some explanation. The traditional understanding in business circles has been that “downstream concentration is negatively correlated with upstream profitability.”<sup>182</sup> This simply means that as downstream providers, such as cable companies, become larger, there is a negative impact on the profits that the upstream programming companies see as a result.<sup>183</sup> Tasneem Chipty and Christopher Snyder used the profit functions of roughly twenty-one providers over a nine-year period to estimate the impact of a cable merger on those profit functions.<sup>184</sup> The authors concluded that merging actually worsens the cable company’s bargaining position relative to the programming company.<sup>185</sup> The only reasons cable companies merge, they argue, are for the efficiencies they gain and the money they save—they can combine physical properties and sell unnecessary

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181. Chipty & Snyder, *supra* note 110, at 326.

182. *Id.*

183. See, e.g., Douglas G. Brooks, *Buyer Concentration: A Forgotten Element in Market Structure Models*, 1 *INDUS. ORG. REV.* 151, 160 (1973); Robert D. Buzzell et al., *Market Share—A Key to Profitability*, 53 *HARV. BUS. REV.* 97 (1975), <https://hbr.org/1975/01/market-share-a-key-to-profitability> [<http://perma.cc/MQ9N-CWS9>]; Steven H. Lustgarten, *The Impact of Buyer Concentration in Manufacturing Industries*, 15 *REV. ECON. & STAT.* 125, 130-31 (1975).

184. Chipty & Snyder, *supra* note 110, at 328-32.

185. *Id.* at 337-38.

buildings, eliminate redundant jobs, and free up those resources for the rest of the market to use.<sup>186</sup>

There is good reason to dispute the conclusion that Chipty and Snyder reach, or at least to doubt that it solves the problem of growing cable companies. To begin with, they conducted the study in 1999, using panel data<sup>187</sup> that ended in 1992.<sup>188</sup> At that time, cable companies were significantly smaller than they are in 2015, and there was more competition on the whole: there were both more cable providers and more programming companies,<sup>189</sup> making the power concentration of both in relation to one another much lower. The authors estimated that “for the bargaining effect to be positive ... cable providers would need to serve ... [at least] 39.1 million subscribers.”<sup>190</sup> This number may have been inconceivable in 1991, but Comcast would have been within striking distance post-merger, and nothing stops another company from reaching the same threshold.<sup>191</sup> Furthermore, even if Chipty & Snyder were correct, the equity concerns remain, but are just reversed. That is, if a larger company had to pay *more* instead of *less* than other providers, and therefore its customers paid more than the rest of the people in the market, economists and social planners would consider this just as unpalatable from an equity standpoint as the larger company’s

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186. *Id.*

187. Panel data compares explanatory variables across one independent variable over a long period of time. In this case, the cable companies’ dataset consisted of the same variables drawn from each company over a period of between five and nine years. *See generally id.* (discussing the dataset used for their study).

188. *Id.* at 333.

189. The authors measured twenty-one cable companies. *Id.*

190. *Id.* at 337.

191. Cox Communications has 5.91 million customers. *See* News Release, Cox Enterprises, Cox Sees Lowest Customer Churn in Its History (July 26, 2007), <http://coxenterprises.mediaroom.com/index.php?s=26244&item=67835> [<http://perma.cc/KQ8W-HN94>]. Charter Communications would have had 8.2 million subscribers after the pre-merger divestitures from Comcast and Time Warner Cable. *See* Cynthia Littleton, *Charter to Become Second-Largest Cable Operator in Divestiture Pact with Comcast*, VARIETY (Apr. 28, 2014, 4:41 AM), <http://variety.com/2014/tv/news/charter-to-become-second-largest-cable-operator-in-divestiture-pact-with-comcast-1201165594/> [<http://perma.cc/G9LS-N6RY>].

customers paying less<sup>192</sup> and other customers paying more. Whoever pays more, they are no longer equal.

## 2. *Line-Drawing Problems*

Other counterarguments similarly fail to examine the present nature of the cable market and the previous failures of regulation. Commentators, such as Gary Wax, have argued that the best way to deal with large cable companies would be to impose a luxury tax.<sup>193</sup> The proposal would have the FCC<sup>194</sup> arrange to collect excess-profits taxes from cable companies in lieu of regulation. This approach certainly has some positive attributes, particularly its recognition of the FCC's failure to implement effective ownership caps. The proposal instead encourages bargaining between regulators and companies that harnesses the companies' natural inclination to expand and simply collects a (small) portion of that profit to share with consumers.<sup>195</sup> It also addresses Judge Posner's arguments in favor of natural monopolies, in which he opined that social planners, lacking any real concept of economics and held sway by third-party interests, were inadequate to determine what regulation should attach to industries.<sup>196</sup>

The problem with Wax's concept is that there is no true indication as to where the line should be drawn with regards to "excess profits." In other words, the big question would always be, "When is Charter making outside profits *due entirely to its size, rather than the fact that consumers demand its products?*" This is a line-drawing issue that ultimately requires the FCC to determine when size creates such outsized profits, and when a firm might have reached

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192. Bear in mind that the reference to "customers" is mere shorthand. Comcast customers would, in all likelihood, pay the same amount they always have, with the company itself capturing the gains. Comcast has made no representations that a merger will improve costs for consumers. See *Public Interest Benefits Summary*, COMCAST, <http://corporate.comcast.com/images/Public-Interest-Benefits-Summary.pdf> [<http://perma.cc/VNU3-AU9V>] (last visited Sept. 27, 2015).

193. Gary Wax, *Cable Company Monopoly: Comcast and Time Warner Control the Board*, 28 LOY. L.A. ENT. L. REV. 159, 163 (2008).

194. The local franchising authorities would be responsible for levying the taxes, and the money would go directly to local coffers.

195. Wax, *supra* note 193, at 202.

196. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 549-50 (1969).

that size through vigorous competition—the exact same threshold deemed “arbitrary and capricious” by the D.C. Circuit.<sup>197</sup> Deciding that something is “too big” or too anti-competitive to survive also goes against the HHI analysis the regulators perform on every merger; if a firm could be deemed too large per se, the DOJ and FTC would never have used the HHI in the first place.

### 3. “Would it be so bad?” Counterarguments

Other commentators argue that, were the worst to pass and were cable to become a product consumers were sufficiently unhappy with, they would have ample opportunities to switch to other options—telco and satellite alternatives,<sup>198</sup> over-the-top devices like the Apple TV or Google’s Chromecast, and the myriad streaming options available on most personal computers.<sup>199</sup> These options are simply not replacements. Cable retains advantages, such as the solicitude of the local franchising authority, and an incumbency often supported by local franchising laws and requirements that protect cable (as opposed to the alternatives discussed above).<sup>200</sup> Satellite and telco will never enjoy these advantages, and their customers would lose just as much if a merged company forced ESPN to raise prices on its competitors.

An over-the-top provision is also not a cure-all. Cable companies have worked hard to keep streaming companies and products from getting access to sports programming, one of the most lucrative and widely viewed cable products.<sup>201</sup> The late-breaking introduction of streaming applications by some of the strongest players—the cable stations HBO and Showtime, and the broadcast network CBS—that

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197. See *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (2009).

198. Manne, *supra* note 19.

199. See Geoffrey A. Fowler, *Getting Rid of TV: The Smartest Ways to Cut the Cord*, WALL ST. J. (July 15, 2014, 9:05 PM), <http://online.wsj.com/articles/getting-rid-of-cable-tv-the-smartest-ways-to-cut-the-cord-1405472757> [<http://perma.cc/284Z-BWPX>] (recommending that consumers purchase a home antenna and position it towards broadcast towers or take part in “login borrowing,” the practice of more than one household illegally sharing one user’s credentials for a service like HBO Go).

200. See Hazlett, *supra* note 16, at 9-10.

201. Chris Welch, *The NFL Is Finally Coming to Apple TV, but Not How You Want It*, VERGE (Aug. 4, 2014, 12:11 PM), <http://www.theverge.com/2014/8/4/5967123/nfl-finally-coming-to-apple-tv> [<http://perma.cc/J3ZX-CK4D>].

may be purchased without a cable subscription<sup>202</sup> will surely delight some fans. This has long been hailed as the beginning of the end for cable, or at least the beginning of a shift of power back into consumers' hands.<sup>203</sup>

However, not only is it too early to determine these effects, but one of the unspoken truths about cable packages versus à la carte programming purchases is that channels like HBO actually subsidize less popular but no less necessary cable channels such as the Discovery Channel, A&E, and the National Geographic Channel. Before Walter White, AMC's most profitable character was probably Michael Myers, and its *Halloween* marathons, although perhaps not a national treasure, probably deserve a space in the cable landscape that will be effectively lost if consumers can begin to pay for HBO on its own. For consumers with wide-ranging tastes, the cost of these bundles may quickly add up to a cable subscription. The answer must come from within the current cable structure, not outside of it.

### CONCLUSION

The Comcast-Time Warner Cable merger is no more, but no sooner did that deal fail than Charter Communications began its own bid for Time Warner Cable. It is clear that the merger between massive cable MSOs is now the order of the day, particularly in an era when they feel squeezed on several fronts by new competitors in smaller black boxes.

The average consumer probably does not think much about how they receive their cable, probably not any more than Carl and Wendy do until they are actually on the phone with one another. But over 100 million Americans receive cable, and they spend a substantial amount of time watching it.<sup>204</sup> Future cable mergers are

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202. See Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html> [<http://perma.cc/8JKE-VCHU>].

203. See Brian Merchant, *HBO Finally Killed Cable*, MOTHERBOARD (Oct. 15, 2014, 3:26 PM), <http://motherboard.vice.com/read/hbo-killed-cable> [<http://perma.cc/RMW4-PQRA>].

204. BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY SUMMARY (2015), <http://www.bls.gov/news.release/atus.nr0.htm> [<http://perma.cc/V3PN-VBBQ>] (indicating that Americans spend about 2.8 hours per day watching TV, the leisure activity that took up the most time).

going to impact all of these households whether they understand them or not, and it is not at all clear that federal regulation is adequately prepared for the long-term consequences of measuring cable companies market-to-market. This strategy has no clear end point for the size of Charter, Comcast, or any other cable company. It risks throwing the cable world into one in which the largest provider can extract money from programming companies, which comes out of the pockets of those under lesser rule.

The DOJ and FTC must take this opportunity to change their measures for the future. It is too difficult to say whether Charter-Time Warner Cable, measured nationally, would clear the threshold of the HHI such that regulators would sue to block a similar merger under this new rule; it is entirely possible that they could both approve the merger and amend their market measurement process. Whatever they do, however, they must do with the understanding that consumer news, entertainment, and culture depend on their next move.

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### **STATE RESTRICTIONS ON COMMUNITY BROADBAND SERVICES OR OTHER PUBLIC COMMUNICATIONS INITIATIVES (as of July 1, 2019)**

This list summarizes the laws of the nineteen states that still have substantial barriers to public communications initiatives and public-private broadband partnerships. These measures include explicit prohibitions on telecommunications, cable, broadband, or combinations of these services. They also include restrictions that may superficially appear to be benign—and were promoted by incumbent carriers as necessary to achieve “fair competition” and “a level playing field”—but are in practice highly discriminatory and prohibitory.<sup>1</sup>

The list does not include state laws of general applicability that apply to all local government activities in the state, not just to communications matters. Nor does it include state laws that allow community broadband initiatives and public-private partnerships but bar or restrict their access to state broadband subsidies. While we oppose such restrictions as shortsighted, unwise, and unfair—especially where they would prevent communities from obtaining access to substantially more robust communications capabilities than incumbent carriers would use the subsidies to provide—these restrictions raise different issues than those posed by the barriers discussed in this list.

1. Alabama authorizes municipalities to provide telecommunications, cable, and broadband services, but it imposes numerous territorial and other restrictions that collectively make it very difficult for municipalities to take advantage of this authority or succeed if they can even get started. For example, Alabama prohibits municipalities from using local taxes or other funds to pay for the start-up expenses that any capital intensive project must pay until the project is constructed and revenues become sufficient to cover ongoing expenses and debt service; requires each municipal communications service to be self-sustaining, thus impairing bundling and other

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<sup>1</sup> The Federal Communications Commission analyzed a representative example of these laws in extensive detail in *In the Matter of City of Wilson, NC, Petition for Preemption of North Carolina General Statute 160A-340 et seq. ...*, 30 FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113. The Commission preempted the North Carolina law, finding that “[t]aken together, these purported “level playing field” provisions single out communications services for asymmetric regulatory burdens that function as barriers to and have the effect of increasing the expense of and causing delay in broadband deployment and infrastructure investment.” *Id.*, at ¶ 30. In *State of Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6<sup>th</sup> Cir. 2016), the Sixth Circuit found that the Commission lacked authority to preempt the North Carolina law, but the Court did not question the merits of the Commission’s findings about the negative effects of the law.

common industry marketing practices; and requires municipalities to conduct a referendum before providing cable services.<sup>2</sup> (*Alabama Code § 11-50B-1 et seq.*)

2. Arkansas allows municipalities that operate electric utilities to provide communications services, except that it expressly prohibits them from providing local exchange services. Arkansas does not permit other municipalities to provide communications services. (*Ark. Code § 23-17-409*)
3. Florida by imposes price-raising *ad valorem* taxes on municipal telecommunications services, in contrast to its treatment of all other municipal services sold to the public. (*Florida Statutes §§ 125.421, 166.047, 196.012, 199.183 and 212.08*). In addition, since 2005, Florida has subjected municipalities to requirements that make it difficult for capital intensive communications initiatives, such as fiber-to-the-home projects, to go forward. For example, Florida requires municipalities that wish to provide communications services to conduct at least two public hearings at which they must consider a variety of factors, including “a plan to ensure that revenues exceed operating expenses and payment of principal and interest on debt within four years.” Since fiber-to-the-home (FTTH) projects, whether public or private, often require longer than four years to become cash-flow positive, this requirement either precludes municipalities from proposing FTTH projects or invites endless disputes over whether or not a municipality’s plan is viable. (*Florida Statutes § 350.81*)
4. Louisiana requires municipalities to hold a referendum before providing any communications services and requires municipalities impute to themselves various costs that a private provider might pay if it were providing comparable services. If a municipality does not hold a referendum, it must forgo any incumbent provider’s franchise and other obligations (e.g., franchise fees, PEG access, institutional networks, etc.) as soon as a municipality announces that it is ready to serve even a single customer of the service in question.<sup>3</sup> The suspension remains in

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<sup>2</sup> Referenda are time-consuming, burdensome, and costly for local governments. Moreover, incumbent communications service providers often vastly outspend proponents of public broadband initiatives. But as more than 100 communities in Colorado have shown, a simple majority referendum requirement, standing alone, is not necessarily a substantial barrier to entry. Applying this standard, we have removed Colorado while leaving Minnesota on our list, as Minnesota’s referendum provision requires a 2/3 supermajority vote. We have also continued to include the referendum requirements in Alabama and elsewhere that coupled with other onerous barriers to entry.

<sup>3</sup> Municipalities typically have lower costs than private entities and do not seek the high short-term profits that shareholders and investors expect of private entities. As a result, municipalities can sometimes serve areas that private entities shun and can often provide more robust and less expensive services than private entities are willing to offer. Imputed cost requirements—a form legislatively-sanctioned price fixing—have the purpose and effect of driving municipal rates up to the uncompetitive levels that private entities would charge if they were willing to provide the services at issue. Imputing costs is also difficult, time-consuming, inexact, and highly subjective. As a result, imputed cost requirements give opponents of public communications initiatives virtually unlimited opportunities to raise objections that significantly delay and add to the costs of such initiatives.

force until the monetary value of the municipality's obligations equal the monetary amount value of the obligations incurred by the private operators for the previous ten years. (*La. Rev. Stat. Ann. § 45:484.41 et seq.*)

5. Michigan permits public entities to provide telecommunications services only if they have first requested bids for the services at issue, have received less than three qualified bids from private entities to provide such services, and have subjected themselves to the same terms and conditions as those specified in their request for proposals. (*Mich. Comp. Laws Ann. § 484.2252*)
6. Minnesota requires municipalities to obtain a super-majority of 65% of the voters before providing local exchange services or facilities used to support communications services. (*Minn. Stat. Ann. § 237.19*). Also, the council of a municipality has the power improve, construct, extend, and maintain facilities for Internet access and other communications purposes, if the council finds that: (i) the facilities are necessary to make available Internet access or other communications services that are not and will not be available through other providers or the private market in the reasonably foreseeable future; and (ii) the service to be provided by the facilities will not compete with service provided by private entities. (*Minn. Stat. Ann. § 429.021*)
7. Missouri bars municipalities and municipal electric utilities from selling or leasing telecommunications services to the public or telecommunications facilities to other communications providers, except for services used for internal purposes; services for educational, emergency and health care uses; and "Internet-type" services. (*Mo. Rev. Stat. § 392.410(7)*).
8. Montana allows a city or town to act as an internet services provider only if no private internet services provider is available within the city or town's jurisdiction; if the city or town provided services prior to July 1, 2001; or when providing advanced services that are not otherwise available from a private internet services provider within the city or town's jurisdiction. If a private internet services provider elects to provide internet services in a jurisdiction where a city or town is providing internet services, the private internet services provider must inform the city or town in writing at least 30 days in advance of offering internet services. Upon receiving notice, the city or town must notify its subscribers within 30 days, and may choose to discontinue providing internet services within 180 days of the notice. (*Mon. Code Ann. § 2-17-603*).
9. Nebraska generally prohibits agencies or political subdivisions of the state, other than public power utilities, from providing wholesale or retail broadband, Internet, telecommunications or cable service. Public power utilities are permanently prohibited from providing such services on a retail basis, and they can sell or lease dark fiber on a wholesale basis only under severely limited conditions. For example, a public power utility cannot sell or lease dark fiber at rates lower than the rates that incumbents are charging in the market in question. (*Neb. Rev. Stat. Ann. § 86-575, § 86-594*)
10. Nevada prohibits municipalities with populations of 25,000 or more and counties with populations of 55,000 or more from providing "telecommunications services," defined in a manner similar to federal law. (*Nevada Statutes § 268.086, § 710.147*)

11. North Carolina imposes numerous requirements that collectively have the practical effect of prohibiting public communications initiatives. For example, public entities must comply with unspecified legal requirements, impute phantom costs into their rates, conduct a referendum before providing service, forego popular financing mechanisms, refrain from using typical industry pricing mechanisms, and make their commercially sensitive information available to their incumbent competitors. Some, but not, all existing public providers are partially grandfathered. (*NC Statutes Chapter 160A, Article 16A*) In 2018, the legislature added a requirement that “any lease by a city of any duration for components of a wired or wireless network shall be entered into on a competitively neutral and nondiscriminatory basis and made available to similarly situated providers on comparable terms and conditions and shall not be used to subsidize the provision of competitive service.” (*Section 160A-272(d)*)
12. Pennsylvania prohibits municipalities from providing broadband services to the public for a fee unless such services are not provided by the local telephone company and the local telephone company refuses to provide such services within 14 months of a request by the political subdivision. In determining whether the local telephone company is providing, or will provide, broadband service in the community, the only relevant consideration is data speed. That is, if the company is willing to provide the data speed that the community seeks, no other factor can be considered, including price, quality of service, coverage, mobility, etc. (*66 Pa. Cons. Stat. Ann. § 3014(h)*)
13. South Carolina imposes significant restrictions and burdensome procedural requirements on governmental providers of telecommunications, cable, and broadband services “to the public for hire.” Among other things, South Carolina requires governmental providers to comply with all legal requirements that would apply to private service providers, to impute phantom costs into their prices, including funds contributed to stimulus projects, taxes that unspecified private entities would incur, and other unspecified costs. These requirements significantly detract from the feasibility of public projects and are so vaguely worded that they invite endless disagreements and costly, protracted challenges by the incumbents. (*S.C. Code Ann. § 58-9-2600 et seq.*)
14. Tennessee allows municipalities that operate their own electric utilities to provide cable, two-way video, video programming, Internet access, and other “like” services (not including paging or security services), but only within their electric service areas and only upon complying with various public disclosure, hearing, voting and other requirements that a private provider would not have to meet. (*Tennessee Code Ann. § 7-52-601 et seq.*) Municipalities that do not operate electric utilities can provide services only in “historically unserved areas,” and only through joint ventures with the private sector. (*Tennessee Code Ann. § 7-59-316*) On February 16, 2015, the Federal Communications Commissions preempted the key anti-competitive provisions of § 7-52-601. *In the Matter of City of Wilson, NC, Petition for Preemption of North Carolina General Statute 160A-340 et seq. and The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, 30 FCC Rcd. 2408 (F.C.C.), 2015 WL 1120113. In *State of Tennessee v. Federal Communications Commission*, 832 F.3d 597 (6<sup>th</sup> Cir. 2016), the Sixth Circuit overruled the FCC’s decision, finding that the FCC lacked authority to preempt such state barriers.

15. Texas prohibits municipalities and municipal electric utilities from offering specified categories of telecommunications services to the public either directly or indirectly through a private telecommunications provider. (*Texas Utilities Code, § 54.201 et seq.*)
16. Utah imposes numerous burdensome procedural and accounting requirements on municipalities that wish to provide services directly to retail customers. Most of these requirements are impossible for *any* provider of retail services to meet, whether public or private. Utah exempts municipal providers of wholesale services from some of these requirements, but experience has shown that a forced wholesale-only model is extremely difficult, or in some cases, impossible to make successful. (*Utah Code Ann. § 10-18-201 et seq.*) Legislation enacted in 2013 imposes additional restrictions on the use of municipal bonds. (*Utah Code Ann. § 11-14-103(4)*)
17. Virginia allows municipal electric utilities to become certificated municipal local exchange carriers and to offer all communications services that their systems are capable of supporting (except for cable services), provided that they do not subsidize services, that they impute private-sector costs into their rates, that they do not charge rates lower than the incumbents, and that comply with numerous procedural, financing, reporting and other requirements that do not apply to the private sector. (*VA Code §§ 56-265.4:4, 56-484.7:1*). Virginia also effectively prohibits municipalities from providing the “triple-play” of voice, video, and data services by effectively banning municipal cable service (except by Bristol, which was grandfathered). For example, in order to provide cable service, a municipality must first obtain a report from an independent feasibility consultant demonstrating that average annual revenues from cable service alone will exceed average annual costs *in the first year of operation*, as well as over the first five years of operation. (*VA Code § 15.2-2108.6*) This requirement, without more, makes it impossible for any Virginia municipality other than Bristol (which is exempt) to provide cable service, as no public or private cable system can cover all of its costs in its first year of operation. Moreover, Virginia also requires a referendum before municipalities can provide cable service. (*Id.*)
18. Washington authorizes some municipalities to provide communications services but prohibits public utility districts from providing communications services directly to customers. (*Wash. Rev. Code Ann. §54.16.330*)
19. Wisconsin generally prohibits non-subscribers of the cable television services from paying any cable costs. Further, it requires municipalities to conduct a feasibility study and hold a public hearing prior to providing telecom, cable or internet services. It also prohibits "subsidization" of most cable and telecom services and prescribes minimum prices for telecommunications services. (*Wis. Stat. Ann. § 66.0422*)

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# EXHIBIT 70

# CREATING CAPACITY AND COMPETITION IN BROADBAND TELECOMMUNICATIONS: THE CITY OF TACOMA'S INITIATIVE

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## ABSTRACT

This paper describes the process by which the City of Tacoma, Washington came to build an open access, broadband telecommunications system designed to promote effective competition in the provision of Internet and other telecommunications services. The decision by the City's electric utility to build a state-of-the-art communications system as a strategic response to deregulation in the electric utility industry is detailed. And, the decision to provide open access to the telecommunications system to promote competition in the broadband Internet services market is considered in light of telecommunications deregulation. Tacoma's open access cable system is analyzed in the context of contestable market theory. The state of broadband Internet competition is described, as is the current regulatory framework monopoly.

## INTRODUCTION

*I don't think society has figured out how to come up with a business model that is conducive for companies to make the size of investments that are necessary to solve that problem (a shortage of bandwidth in the 21<sup>st</sup> century) with a reasonable expectation of profit but without ending up with a monopoly position. [4]*

Andy Grove, Chairman of Intel Corp.

Live Internet E\*Trade Interview

Nov. 14, 1998

In this paper the authors place the Tacoma initiative within the context of existing regulations and current competitive conditions within the telecommunications and electric utility industries. The paper begins with a brief case study narrative of the events that transpired in Tacoma. The reader is given insight into the strategic decision-making and political considerations that led to the City's policy makers' decision to approve the telecommunications overbuild—the largest even undertaken by a municipally owned utility.[8] The paper will continue with a broader perspective. Four different broadband, Internet access technologies including cable, telephony (DSL), wireless, and satellite, are described. The rationale for the FCC's refusal to regulate Internet cable access is considered. And the current legal

challenges to the main cable Internet access provider (ATT/TCI) undertaken by the City of Portland and by a coalition of telephony-based DSL Internet access providers are described.

The authors' thesis that Tacoma has developed a viable business model for building broadband capacity without creating monopoly is introduced.

## **TACOMA'S BUSINESS STRATEGY DECISION: A RESPONSE TO DEREGULATION**

### **Background and context**

When President George Bush stood on an oil platform in the Gulf of Mexico to sign the 1992 National Energy Policy Act, Tacoma Power's management team knew that they had to plan for more than the electric utility's centennial celebration scheduled for the following year.[6] The century old municipally owned utility would now have to provide open access transmission service to wholesale or bulk rate providers and customers on an "unbundled" basis. And although "retail wheeling" was excluded from the federal statute, state policy makers were authorized to require the same open access for those providers and potential customers as well.[9] The days of a stable, regulated and monopolized marketplace would soon be ending for Tacoma Power.

Tacoma Power's management team faced this challenge by going to the private sector for advice. They queried a number of managers from other deregulated industries—airlines and banking—in a search for new models to deal with restructuring during uncertainty. What they learned was that the successful enterprises were led by managers who could think strategically. They were also told to know computers and follow technology, invest in process automation, learn to be more efficient and, most importantly, know your customer. The last point—know your customer—led to some disquieting findings from their own market research. While Tacoma Power's customers were satisfied, they were not loyal—in fact only ten percent of their customer based expressed loyalty.[6] The management team concluded that they were facing a true paradigm crisis where "all of the traditional rules blurred, experimentation was spreading rapidly, and practices once so accepted that they were simply a part of the woodwork were (now) being called into question." [3 p. 323]

### **A new strategy evolves**

The utility's managers chose to respond strategically by recognizing that their core business really was the reliant and efficient delivery of electrons. Thus, they sought a new paradigm—one that would steer the business, make it more reliable and customer friendly and, importantly, follow the technology. The technology in this case was fiber optics and the construction of a state-of-the art communication system for the purpose of automating the utility's distribution infrastructure.

Tacoma Power's managers realized that such a system would add considerable value for the customer: instant information on the time and location of power outages, remote connection and disconnection of services, information about electricity consumption patterns, real time pricing and appliance control systems.[2] As the utility's superintendent described it: "So what do we accomplish? We will keep the revenues going, the customers happy and we will be dispatching the crews where the problems are at." [6] In sum, the value-added services would truly put customers in the driver's seat and allow them "to control the resources" (real time pricing and appliance control) as well as to "choose the destination and route." [3 p. 181] The end result would be greater customer loyalty.

### **Building the system**

The question now was how to build such a system. An obvious option was a strategic alliance with the private sector. But those partnerships were not available. The local phone company, cable provider and a number of competitive access providers turned down overtures from Tacoma Power's management team.[6] And so the utility decided to move forward on its own—to build the infrastructure itself. But before making the multi-million dollar investment, the utility's director requested that Tacoma Power's citizen oversight body, the Utility Board, authorize an outside review by a consultant group—the Stanford Research Institute.

The Board approved and soon SRI's consultants came back with an interesting idea: Why not invest more dollars to expand the fiber optic pipe?[6] Then Tacoma Power could offer its customers an array of services—cable television, competitive Internet access, telephony and data transport. The Telecommunications Act signed into law by President Bill Clinton in 1996 had, in fact, given Tacoma Power this option by eliminating barriers to entry into the telecommunications market. This led Tacoma Power's superintendent to proclaim: "The new law afforded us the opportunity to embark on a broader strategy—one that would allow us to add smart electrons to the worker bee electrons the utility was providing for over 100 years." [6]

### **Testing the market**

The next step was to conduct a marketing survey. The findings were more than promising. Tacoma Power far outdistanced the competition as the preferred provider for cable television service.[10] And a financial analysis of the current market showed that a 25 percent penetration of the current customer base for cable service alone would lead to an operating profit within three years.[11] The pro forma income statement forecast over 33,000 cable customers in three years of operation. Within ten years time, the entire investment of \$100 million would be paid off and Tacoma Power would have enough revenue left over to plow into system upgrades.[11] But before embarking on this major undertaking, Tacoma Power borrowed once again from the private sector. The utility pulled together a panel of fourteen experts from an array of disciplines to review and pass on a final business plan. That plan, which was given the stamp of approval by the panel, called for retail and wholesale applications. On the retail side, the planned offerings included more reliable distribution of electricity, cable television, digital audio broadcasts, Internet over television and broadband services with customized point-to-point connectivity. On the wholesale side, Tacoma Power would offer a first-of-its-kind open platform highway for Internet Service Providers and their high speed modems.

### **Political currents**

The political dynamics revolving around Tacoma Power's plans to build a fiber optic system soon changed once the management team broadened their strategy to include an array of telecommunications services. The manager of the incumbent cable provider (TCI) sent a scathing critique of the utilities' business plan to the Tacoma City Manager. The twenty-one page letter ended with the warning: "(Tacoma's policy makers should)...pause and let the euphoria of the benefits you may now expect be replaced by a realistic appreciation of the pitfalls and risks associated with municipal ownership of what is traditionally an entertainment service provided by private enterprise." [5] After numerous public hearings, two declaratory judgements from the state superior court, a plea from the cable provider's national president and an additional due diligence review by three outside consultants, the city policy makers moved forward with the \$100 million overbuild.

The following section will discuss how contestable market theory applies to the Tacoma case and will bring the reader up-to-date on current and national developments.

## **THE ECONOMIC RATIONALE: CREATING CONTESTABILITY IN BROADBAND TELECOMMUNICATIONS AND ENHANCING COMPETITION IN THE CABLE TV MARKET**

### **Creating a Contestable Market in Broadband Telecommunications**

There are often strong parallels between the deregulation experiences of very diverse industries. In the early years of airline deregulation, Elizabeth Bailey, then a member of Civil Aeronautics Board, called for municipalities to bear the sunk costs associated with developing new airports in an effort to make the airline industry more contestable.[1] Entry by new airlines would be much more likely, she reasoned, if they did not have to bear the risk associated with investing in their own airports - investments which presumably could not be recovered if a new airline failed.

Similarly, entry into various branches of the telecommunications industry would be more likely if municipalities bore the sunk costs associated with broadband capacity. New telecom entrants could (for an appropriate charge) simply ride the municipal system much like new airlines contract for terminal space at the municipal airport. Moreover, as the telecom market becomes more contestable (as barriers to entry are reduced through public ownership of broadband capacity), the mere threat of potential competition becomes a more viable disciplinary force within the market. Existing providers of telecom services will be less likely to charge excessive prices or permit X-inefficient practices and less

likely to become technologically lethargic because of the constant threat of potential competition. A truly contestable telecommunications market, then, will provide consumers with an increasing variety of services produced in an efficient manner and offered at competitive prices.

The City of Tacoma has designed and built a broadband telecommunications system with the express purpose of providing *competitive* telecommunications services to businesses and residents within the City. By creating an open-access architecture (a feat which, until recently, AT&T contended was economically impossible), the City has made it possible for many competing Internet service providers to gain access to the system. It would appear that Tacoma's initiative provides one possible answer to Andy Grove's lament (as expressed earlier) that there appears to be no viable model for building much needed broadband capacity without creating a monopoly position.

### **Creating Competition in the Cable TV Market**

As noted above, the telecommunications system developed by the City also created the capacity to compete with TCI, the local cable TV provider. Though this was not the primary rationale for constructing the system, the possibility of injecting competition into the cable TV market was very attractive to local policy makers because of the poor quality of service then offered by the existing cable TV provider.[13]

The advent of competition did have its intended effect in Tacoma as the incumbent provider (now AT&T/TCI) responded to the City's entry into the market by upgrading its service. By adding fiber to its delivery system and moving to a digital format, the incumbent was able to match (or exceed) the various channel offerings the City's new system delivered. No such upgrades were provided by TCI in nearby Seattle, leaving that city at odds with its only cable TV provider.[13]

### **RECENT DEVELOPMENTS**

Presumably in response to legal challenges from the City of Portland, GTE and the Open NET Coalition, AT&T recently announced that it will open its broadband cable Internet system to ISP providers by 2002 when its contract with @Home, the sole provider currently riding its system, expires.[14] AT&T's general counsel had previously argued, "Regulation [a requirement to provide open access] would undercut the investment needed to expand cable's broadband services. It also would deter the private investment necessary to fund the construction of new broadband facilities, which will damage competition, not spur it." [7] According to AT&T, then, monopoly control of its broadband system was technologically determined. This, in effect, constitutes a natural monopoly argument, which would appear a dangerous position for AT&T to take.

However, the FCC, under William Kennard's leadership, has supported AT&T's position, arguing "At this nascent stage in the development [of broadband], one should not presume to have a regulatory cure for every anticipated marketplace ailment. It would be imprudent to act now. We must allow the marketplace to evolve." [7] The FCC recognizes at least four developing broadband technologies – cable access, DSL access provided by telephone companies, satellite access and wireless access.

Although AT&T's promise to open its system includes a pledge to not penalize customers for choosing a provider not affiliated with AT&T, the question lingers as to whether or not those independent providers of broadband services may be at some competitive disadvantage to AT&T's affiliates. The public ownership model developed by Tacoma represents a viable alternative – an alternative which should provide a more level playing field for ISP competition.

By the end of 1999, with substantial technical assistance from Cisco Systems, Tacoma's public utility had completed the construction of an open architecture, broadband telecommunications system. It was serving over 11,000 homes with cable TV services (exceeding the 25 percent penetration goal) and had contracted with one ISP to begin the provision of residential high-speed Internet services with other ISP providers in the wings. The utility also provides high-speed data transmission services to several major companies in the Tacoma area in competition with the regional Bell telephone company. As one of only three U.S. cities wired with a fiber-optic telecommunications system, Tacoma is attracting a variety of new high-tech businesses.[12] The economic development benefits of a truly competitive, broadband telecommunications system are clear and the public ownership model Tacoma has developed appears viable.

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- [5] Letter from Barbara S. Wyatt, General Manager, TCI Tacoma to Ray Corpuz Jr., July 23, 1996 p. 21.
- [6] Personal interview with Steve Klein, Superintendent of Tacoma Power, September 22, 1999.
- [7] Puget Sound Computer User, Sep. 1999, p. 29.
- [8] Tacoma's citizens voted to purchase Tacoma Water and Light in 1893. By 1912, the power utility had brought its first hydroelectric dam on line. Currently, Tacoma Power owns seven hydroelectric dams on four rivers with a customer base of approximately 250,000 households.
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# Tacoma Decides To Build Its Own Fiber-Optics Network

Mar 17, 1997

Robert T. Nelson

*Seattle Times Staff Reporter*

TACOMA - When Congress and President Clinton deregulated the telecommunications industry a year ago, promising it would open the door to competition, they could not have imagined how the new rules would play out here.

In an era of smaller government, Tacoma has decided to spend \$55 million building a fiber-optics network that would compete head-to-head with the city's cable franchise and the local phone company.

It's a risky venture motivated by public dissatisfaction with cable giant Tele-Communications Inc. (TCI) and fear that Tacoma has fallen behind other cities in building the high-speed communications network modern business demands.

In the 1870s, Seattle and Tacoma competed for Northern Pacific railroad tracks. This time, the competition is for the technology that links businesses to computers and telephone systems throughout the world.

Thanks in large part to private investment, Seattle's downtown already has more fiber-optic cable than it can use. City Light and government agencies met their needs by simply expanding the private cable system as it went in.

Tacoma's system never got built.

About the time Tacoma officials were worrying that communications deregulation would impair the city's ability to compete for new employers, officials at the city-

owned Tacoma Public Utilities were concerned about how future deregulation of the electric industry would affect them. They concluded TPU needed a way to communicate directly with the 140,000 households and businesses it serves.

"As we approach deregulation, our ability to provide ever better service is going to be critical to our success," said Jon Athow, manager of TPU's telecommunications project. "Right now, if a customer loses power, we don't know it until they pick up a phone and tell us their lights are out. We think it would be nice to know when that happens without their having to call."

Nice, yes, but expensive.

The utility estimates it will cost \$55 million to run fiber optics to every neighborhood - and coaxial cable into every household and business - in its 180-square-mile service area, which includes Tacoma and the more populated areas of Pierce County. Recovering that cost through higher electric bills would drive up rates when other utilities will be trying to lure customers away with lower prices.

The investment only pays off, say Tacoma officials, if the cost is spread among customers who use the cable to make Internet connections, transmit computer data, talk on the telephone and receive cable-TV signals.

The new communications utility still needs the approval of the TPU board and the City Council, which has scheduled a vote for April.

But the fact the proposal has gotten this far is a commentary on TCI's standing in the community, Tacoma's moribund downtown and the uncertainties that surround deregulation.

### Dissatisfaction with TCI

TCI's spotty reputation with its customers helped establish a high level of popular support for the project. Tacoma Public Utilities broadened that support by promising to extend the network and provide the necessary electronics - free of charge - to every hospital, school, university, library, firehouse and police station in its service area.

The proposal has enraged officials at TCI, who have spent years trying to get the city to renew the franchise that permits it to route cable over city-owned power poles and public right of way.

"We approached the city in 1992 with a plan to begin rebuilding our facilities," said Barbara J. Wyatt, general manager of TCI of Washington. "Unfortunately, the city has elected to cancel meetings and delay the process. Customers want more channels and it's in our best interest to provide them. Our plan is to provide the best service we possibly can. We need a business license to do that. Unfortunately, to get it, we're having to negotiate with the very people we're competing with. It's a struggle."

Tacoma's response reflects just how strained relations are between the city and its cable franchise.

"TCI is always making claims about what it wants to do in the future," Athow said. "But it's always four or five years away. We've looked at their financials and know they're going to have a hard time doing what they have promised. We didn't create their \$15 million debt. The fact is they treat subscribers as real estate. They've loaded themselves up with so much debt (buying other companies) they can't rebuild."

This is a critical time for both TCI and Tacoma.

Like most of the rest of the cable industry, TCI is heavily in debt from acquiring other systems, many of which are old and under pressure to expand the number of channels they offer. The company faces the dilemma of giving customers the programs they demand, without investing tens of millions of dollars in a fiber-optics system that soon could be obsolete. TCI officials believe the cheapest solution is to expand the system by running digital signals over their existing coaxial cable lines.

Tacoma officials don't believe that is in their city's best interest. And because the city owns the poles along which TCI's cable is strung, it's using the renewal of TCI's contract to try to coerce somebody into building a high-speed, interactive communications system.

The struggle is occurring in a lot of communities afraid of being bypassed by companies suddenly free to service only the most lucrative customers. Electric Lightwave, headquartered in Vancouver, Wash., has a strategy typical in the industry.

"Our focus is on the business market," said Jack Hardy, the company's public-relations manager for Electric Lightwave. "We're not going after the residential side at all. It's quite an investment to go in and put fiber-optic cable into every home. There's just not enough activity in a house to recover that cost."

Tacoma officials contend companies are only interested in providing service to customers who make a lot of long-distance calls and have a need for high-speed data transmission.

"We have five to seven companies that have contacted us, champing at the bit to put fiber in," said Dan Voelpel, head of Tacoma's community-relations division. "The trouble is, they just want to come into town and put fiber in where they can make the most money. None of them are offering anything that's comprehensive."

George Chappell, area manager of communications for US West, agrees.

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### Solution has risks

Tacoma's solution to the problem is a bold business venture with elements of risk it cannot control. If and when TCI renews its business license, it could cut its rates and get into a protracted price war with the city. There also are legal questions about the city competing in an industry it regulates.

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"Down the road they could be sitting on a technology that goes out of date real fast," said Seattle's telecommunications expert, Matt Lampe, who two years ago studied and rejected the idea of building a similar communications utility at City Light.

If Tacoma succeeds, it will have a data transmission network more extensive than Seattle's, stretching beyond downtown and opening the entire region to new development and more competition within the communications industry.

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BY ROBERT T. NELSON  
Seattle Times staff reporter

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*Seattle Times staff reporter*

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# EXHIBIT 71

# Tacoma Public Utilities

## Click! Network Financial Performance Review

April 24, 2000

**PRICEWATERHOUSECOOPERS** 

333 Market Street  
San Francisco, California 94105

EXHIBIT	3
	<i>306(k) Klein</i>
DATE:	<i>9-26-19</i>
Mindi L. Pettit, RPR, CCR #2519	

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Mr. Mark Crisson  
Director  
Tacoma Public Utilities  
3628 South 35<sup>th</sup> Street  
Tacoma, WA 98411-0007

April 24, 2000

**Subject: Click! Network Financial Performance Review**

Dear Mr. Crisson:

PricewaterhouseCoopers has completed its review of the Click! Network as outlined in our agreement of March 7, 2000 and is pleased to present the results of our work in the attached report.

We would like to thank your staff for their complete cooperation and participation throughout the review. All of the staff we worked with demonstrated a professional, enthusiastic approach to their roles in helping Click! attain its goals and serve the greater Tacoma community. Their success is reflected in the supportive articles in trade and general media publications, and in the limited customer contacts we made.

Our review was initiated by collecting and reviewing numerous construction, marketing, accounting, and management reports. We interviewed all of the senior managers in the Click! organization, including working extensively with the new General Manager Dana Toulson. We observed the Network Operations Center (NOC), including the head end and customer care operations, the set-top box inventory, programming and control area, a hub and the broadband interconnection point, one of the two field construction offices which initiates, supervises and inspects the work done on the system, and the engineering department responsible for the design and Multiple Dwelling Unit (MDU) build-out. We also worked with the TPU Finance Department to understand the financial control structure and the

processes for capturing and reporting on revenues, payroll costs, accounts payable costs, journal entries and the preparation of financial statements.

Overall, the Click! Network has been deployed to date within the approved budget, with service levels and quality equalling, and in some cases exceeding, the original plans. The technical quality and redundancy is a model system. Customer service is a hallmark of the operation, particularly your commitment to managing provisioning expectations within an approximate two-week window - then keeping the schedules you set. The extra attention to customer education and support is likely to enhance customer retention. Actual expenditures have been appropriately authorized, inspected and approved. We have identified a number of areas where accounting, reporting and forecasting can be improved, and many of these recommendations have been or are being implemented. After these accounting adjustments, and if the business continues as planned for the remainder of 2000, revenues are forecast to exceed expenses before June of 2001. In total, you have provided the substance to the reality of Tacoma, America's #1 Wired City.

We appreciate this opportunity to have worked with you and the Click! Network staff on this most important project and wish you success in your continued development of Click! Should you have any questions regarding this report, or desire assistance in implementing our recommendations, please contact Rick Van Mell at 415-957-3138.

Very truly yours,

*PriceWaterhouseCoopers LLP*

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## Click! Network Review

April 2000

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## Click! Network Review

April 2000

We were asked to review and provide recommendations on seven specific objectives which can be grouped into five general sections. The specific objectives are provided in italics at the beginning of each section. The five sections are:

- Construction Program
- Marketing Program
- Financial Control, Reporting and Projected Results
- Expansion into University Place
- Click!'s Position in the Telecommunications Evolution

### Construction Program

*"Review actual capital construction costs to date and how they conform to the budget."*

Overall, we found the construction program to be well run and closely coordinated with your marketing and customer service plans. By the end of 1999 your system was operational, and by the end of 2000 all of the initial construction contemplated for the City of Tacoma in the current plan is on track to be complete within the authorized budget of \$91 million. Recommendations for improvement include continuing refinement of the capital budget, as defined in the Work Order system, into discrete tasks associated with specific Click! business lines and cost centers. Each task should identify specific measurable physical milestones and the associated spending by month. Where appropriate, each Work Order should also be linked to specific Marketing and revenue generation plans. In particular, capital spending to support CATV, broadband and ISP customer growth should be directly tied to the Marketing plan. This recommendation is already being implemented for the remainder of this year, the preparation of the 2001-2002 budget, and the longer term financial modelling of Click! Network.

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Marketing Program

*"Compare actual CATV subscriber penetration per activated node and as a system average for all activated nodes in relation to the business plan goal of 25%."*

The marketing program for CATV was developed with a penetration target of 25% of the homes passed within 18 months of node release. As of April 1, 2000, the overall penetration in the City of Tacoma stood just over 23%, even though only 15% of the available nodes have been released for subscribers for a full 18 months. 29 individual nodes have already exceeded 25% penetration, and all of them have been released for one year or more. 16 of the 29 have penetrations between 30% and 47%. 22 nodes are between 20-25% penetration, and 16 of them have been open more than 300 days. 17 of the remaining 26 nodes with less than 20% penetration have been released for less than 6 months. There are 8 nodes completed but not yet fully released to subscribers. At April 1<sup>st</sup>, Click! had approximately 13,000 subscribers, with a projected year end target approximating 19,000. When the subscriber count passes 15,575 the overall penetration for all nodes in the City will exceed 25% and this appears likely before year-end 2000. A hallmark of the marketing program has been to manage the release of nodes such that customers can be given an installation date within about a two week window. This has been accomplished with a structured, coordinated program which calculates the daily estimated installation effort based on the services customers have requested and the number of Service Technicians available. Our primary recommendation for Marketing is the reciprocal of the construction recommendation: the marketing revenue generation plan should be clearly related to the required numbers of installations or circuits and their capital costs. Revenues are currently forecast by separate business line, and should be augmented with a separate summary page of assumptions and construction or installation milestones. Spending in the capital section of the business model should be identified by month, and where considerable capital must be spent before revenue can be generated, the time lag should be clearly defined on the assumptions page. This recommendation has been substantially incorporated into the Click! business model currently maintained by Marketing, and the data aligned with construction and Operations. Only the development of a summary assumptions and milestones page remains to be done. An additional recommendation is that the Click! business model projections be frozen for the remainder of the year 2000 and report actuals against the budget. A rolling forecast may also be desirable to track changes as they occur.

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**Financial Control, Reporting and Projected Results**

*"Assess the management and control of the three Click! Business Lines' actual revenues and expenses.*

*Assess the assumptions for all three Click! Business lines and associated rates of growth and the business plan projections that revenue will exceed expenses by June 2001.*

*Based on the short history for the CATV, Business Advantage and ISP Advantage business lines, evaluate whether there are any obvious area of concern in financial performance, control or reporting."*

As we conducted our review, we found these areas overlapped in many ways, and combined them into this *Financial Control, Reporting and Projected Results* section. For the reader to understand our findings and recommendations in the correct context, we believe it is instructive to describe the reporting and control environment as we found it.

**Control Environment**

First, past practice has been for Finance to provide monthly results to the Director and Superintendent before the division managers. Further, because the City (which provides TPU with its accounting systems) does not have an integrated financial system, the time lag for developing financial statements is considerable, and reports have not been distributed until late in the following month for March through November. This was explained as "waiting until the Board had approved the results" so there would be no distribution of unapproved information. While this may not be a problem for other TPU divisions, in the dynamic start-up environment of Click! Network, the Click! Manager is placed at a considerable disadvantage when asked to explain any given financial result without an effective mechanism to evaluate the supporting details. Another consequence of past practice and system limitations is the routine apparent distortion and delays in the December, January and February reports. For example, during our review which began in March 2000, the December results had just become available. The December Click! Network Operational Summary showed a

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profit of approximately \$145,000 when actual cash operating costs continued to exceed revenues. However this was the result of several journal entries, accruals and deferrals, one exceeding \$1 million. This page appeared in the Financial Statement package provided to the Board and did not contain any supporting explanation. The subsequent January summary showed a loss of approximately \$427,000 which again did not reflect the actual operating results. On April 7th, the Click! Manager had not seen any February results, yet the Director had already seen preliminary *March* results.

#### **Actual Costs and Revenues**

We believe it is important to also note that the actual control of spending for construction and operations appears to be functioning well, despite the limitations of the Work Order, Purchase Order and payroll systems. Reviews of Click! field construction management showed a well-controlled systematic management under unit price contracts and rigorous design and inspection procedures. However, because contractors were assigned to build more than one part of the network when customer demand dictated, their invoices sometimes included work that covered more than one Work Order. The coding by Click! construction staff should have segregated these costs to the appropriate Work Order, and they usually did. Under the Work Order/Purchasing system however, the contractor is working under a single Purchase Order number, and since the control is the maximum amount of the P.O., the Work Order system establishes an encumbrance up to the maximum of the P.O. However, when the invoice distributes work done across multiple Work Orders only the original Work Order encumbrance is reduced. The net effect is to appear to over-run one Work Order while showing a larger than required encumbrance in the original Work Order. Again, this is not a control problem with the actual spending, but is a computer system imposed limitation which limits the ability of Finance to provide a more meaningful oversight role. It also limits the value of Work Order reports in reflecting the true status of open commitments and estimates-to-complete phases of the work. It is the detailed logs and spreadsheets maintained by Click! that provide the best control.

Revenue generation and reporting has not been an issue, and the Click! database was able to provide sufficient data when requested. The billing system is currently being replaced to gain

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even more functionality, and, based on the prior results and the larger issues noted in this report, we did not specifically review this conversion.

We spent considerable time with the Finance Department and the Click! Manager to understand some of the major financial reporting issues, and to develop recommended solutions. Four of the largest issues involved capitalization of General and Administrative expenses, capitalization of connection costs for new subscribers, inter-company issues between Click! and Tacoma Power, and the formatting and presentation of Click! financial reports.

#### **Capitalization of General and Administrative Expenses**

The capitalization of General and Administrative expenses attributable to the construction program for 1999 accounted for over \$1,000,000. The entire sum was shown as a credit to expense in the month of December. The amount was calculated based on a long-standing formula used by Tacoma Power which compared the ratio of capital spending to operating spending, and was historically designed to capitalize a maximum amount of G&A under rate-based rule making. The formula creates a percentage which is then applied to the value of each Work Order for a division, subject to a maximum value which has been increased by 3% per year for about ten years. This same approach was applied by Finance for the first three months of 2000. The percentage factor used was 7.070%, with an individual line item value limited to \$94,000. Finance, as it went through the year end closing, assumed that all of the remaining amount in a Work Order not actually paid in 1999 would be spent in 2000, and added an extra \$2,000,000 for possible new work orders. The net result is another projected charge of approximately \$ 1 million for the year 2000, which was transferred by journal entry out of expense to capital for January, February and March of 2000 in the amount of \$85,000 per month. However, in late January when the amount to be capitalized was determined, the Click! Operations Manager issued Work Order revisions to close five old work order numbers and transfer the necessary remaining spending to five new Work Orders. The revised total spending for Work Orders is \$89 million, without any need for the additional \$2 million estimated by Finance. We re-ran the formula and arrived at a monthly G&A transfer closer to \$59,000, an annual difference of \$312,000. Finance has reviewed this analysis and suggests

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reducing the monthly transfer by \$32,000 which they believe will reflect the current expectations and account for the higher levels in the first quarter. We would like to repeat, this finding is at bottom a manifestation of a culture and pattern of closely held financial practices, reporting and disconnected manual systems, not a reflection of any individual's particular job performance.

Further, the initial Click! capital program established Work Order 17013 in the amount of \$1.9 million to account for capitalized G&A. This was intended to include managers' costs charged to operating expenses. The capitalized G&A however is going directly to construction-in-progress property accounts, and not to Work Orders. The result is that the total of the property accounts will be larger than the sum of the Work Orders. Since both the Capital and Operating Expense budgets are approved, cash control is maintained as long as total spending is less than the sum of the two budgets. However, the potential exists for the capitalization of G&A to cause the sum of the capital accounts to exceed the authorized Capital budget. (We do not expect that to happen based on the current information and projections.) We recommend that future Capital and Expense budgets plan for any expected G&A capitalization and include it only in the Capital budget, even if it flows temporarily through the Expense budget accounts. The Expense budget should be the net spending on operating activities after the capitalized G&A has been transferred to the capital accounts.

A related issue is the capitalization of Tacoma Power expenses. The same formula is used to develop a percentage which reduces Tacoma Power's expenses and charges Click!'s construction account - again by individual Work Order. For 2000 the proposed percentage is 6.16%, totalling just under \$1 million per year and charged at \$80,000 for Jan-Mar. Click! management recognizes there is some level of G&A support from Tacoma Power, but they question if \$80,000 per month is the appropriate level. The overall effect is that Click!'s construction has been charged a 13.23% G&A cost. This remains an open issue.

#### **Capitalization of Connection Costs for New Subscribers**

During our review of the construction program and its controls we learned that connection costs for new subscribers were higher than originally planned for two primary reasons. First,

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subscribers were requesting that more outlets be installed in their homes (approximately 3.5 vs. a planned 1.5). This meant that an individual Click! Service Technician might complete only one or two installations per day vs. a planned three to four. Second, given a high customer demand for service and the unplanned extra demand on Click! Technicians, third party contractors were assigned to make new subscriber connections, primarily in MDUs. These connections were invoiced to Click! at unit rates for the "drop" from the pole to the house and the first outlet, plus an additional charge for each additional outlet. A different rate is used if the connection is made at a pre-wired MDU (Multiple Dwelling Unit). When these contractor costs are invoiced to Click! they are normally coded to the capital Work Orders 17019 or 17027 depending if the connection was at an MDU or single residence.

The cost for all Click! Technicians flows through the payroll system as an operating expense to the 5534 and 5535 accounts. Monthly the Finance Department has been calculating a "new subscribers" count, multiplying it by an originally estimated cost based on a drop line and one outlet, then reducing operating expense and charging the capital Work Order for the resulting amount.

There are four problems with the way the system has worked. First, the "new subscribers" count calculation inadvertently included reconnects - about a 2% error. Second, the count included connections by both Click! Technicians and contractors - this resulted in the Work Orders being charged twice for the same connection. Once by the contractor's invoice and second by the capitalization journal entry. Third, starting in March 2000, this double charging was attempted to be corrected by transferring all of the contractor costs out of the Work Order to operating expense. (Approximate value \$244,000.) However, contractor costs are approximately 50% higher than the rate per connection being used to reduce operating expenses, resulting in overstating operating expense. Fourth, the contractor invoices accounted for all of the outlets installed, but the Click! operating expense reduction only accounted for the first outlet. Thus none of the cost for additional outlets installed by Click! Technicians has been capitalized. Though a specific count has not yet been determined, the estimated value for all additional outlets already installed or planned during the year 2000 approximates \$1.5 - 1.9 million.

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"Revenue". Since these items do not produce any additional net cash and reflect Tacoma Power's use of assets to better deliver electricity, they might better be handled as credits to expense not subject to a Franchise Tax.

#### **Click! Network Financial Reporting**

We have already noted under Control Environment the historical communication and timing problems of financial reporting. The process of reviewing and developing the above recommendations has opened a new line of communication between Finance and Click! that should significantly improve the timing and quality of financial reporting. Some specific steps being implemented include providing access to the Click! Operational Summary spreadsheet on a regular schedule - approximately 2-3 days after the financial close on the 5<sup>th</sup> workday of the month. In addition, as new procedures for journal entries and transfers are developed when implementing these recommendations, there will be a mutual sign-off so all involved will know and understand the ramifications of the process.

The Board currently sees the Click! Network Operational Summary page in the quarterly financial report package. In addition, we understand they receive the Status Summary of Capital Programs. Working with Finance and the Click! General Manager, we recommend a few changes to the Operational Summary. First, the addition of a new line titled "Net Operating Income before Depreciation" to provide a measure for when revenues exceed expenses, and essentially Click! begins to contribute cash. Second, the current Depreciation and Amortization line represents all capital spent, and will be decreased when a Power/Click! segregation is established. Third, the "Summary of Cash" section should be removed because it provides a very incomplete picture of the construction program, and a complete view is provided in the Status Summary of Capital Programs document.

#### **Click! Network Revenues Exceed Expenses Projection**

We were asked to assess "the assumptions for all three Click! Business lines and associated rates of growth and the business plan projections that revenue will exceed expenses by June 2001."

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Click! maintains a robust and complex spreadsheet business model which ties together projected subscriber and customer counts, levels of service for each business line, and operating expenses by account, all by month for 15 years, and a corresponding capital spending page by year broken down by individual Work Order. This is a dynamic model that has been updated as parameters change.

The revenue projections are based on releasing all City of Tacoma nodes this year, and achieving penetration rates consistent with past experience. Thus the CATV revenue is projected to increase steadily throughout the year, and the growth rate will taper off in 2001 as the target penetration is achieved. Broadband revenue is predicted to grow also, with new customer acquisition planned during 2000, which will provide full year revenues in 2001. These assumptions and rates are consistent with current experience, and while not guaranteed, seem reasonable. A requirement for achieving the revenue is that new connections are completed to support the projected addition of new subscribers. Year to date through March, new connections are running approximately 30 days behind original projections. However, new Technicians have been hired, are completing training, and their productivity is expected to be reflected in increased connection rates from April onward. Revenues also include the previously mentioned inter-company SCADA income at the rate of approximately \$1 million per year.

Expense projections are based on payroll figures and program acquisition costs, and are broken down into 19 accounts in four departmental groups. These monthly figures are adjusted periodically for planned salary increases and staff additions. They include the previously discussed credits for the capitalization of work done by Technicians, but only at the level of a drop and one outlet per new connection. They do not include credits for the capitalization of General and Administrative expenses, or depreciation expense. Otherwise, we believe this is a reasonable projection of operating expenses.

As the model currently stands, operating losses steadily decline each month through December 2000, and turn positive and steadily increase starting in January 2001. Without the SCADA income, the breakeven point is not achieved until July 2001. The model currently has two "bottom lines" - one with and one without the SCADA income. We recommend a series of

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changes to the Click! model to better align it and the Operational Summary from Finance. These changes include incorporating a G&A credit line and increasing the credit calculation for new connections to reflect the capitalization of all outlets. The Construction page should be reviewed to be sure the Work Orders reflect the revised G&A and outlet capitalization. As the inter-company charge issues are resolved, any cost for pole attachments and revenues or credits to expense should also be added. Since some of these changes are large, approximating \$1 million per year, the net result will not be known until they are completed. However, on an order-of-magnitude basis, the removal of \$1 million of SCADA income will be approximately offset or exceeded by an increased credit for G&A and outlets. If this is the actual result, the breakeven point will likely occur between January and June of 2001.

An additional word of caution is that the journal entries to make these adjustments for past periods will result in what look like very funny Operational Statement results for the months when they are entered. Further, December 2000 and January 2001 will be impacted by year-end accruals and reversals because of the limitations of the current accounting systems and procedures beyond the control of Click!. We suggest that Finance consider modifying the December and January Operational Summaries to provide footnotes that describe the year-end adjustments and the operating results before the adjustments were made.

Expansion into University Place

*"Assess the financial assumptions and the resulting projections for capital construction costs, O&M expenses and benefits/revenues estimated to accrue as a result of expanding the market for the Click! Network's three primary business lines and meeting Tacoma Power's strategic business and operational needs in the service area of University Place."*

Click! has developed a business model for the proposed expansion into University Place. This model is constructed the same way as their City of Tacoma model, with the same levels of detail. The inputs are based on an actual design down to the node level, and actual walkouts to identify aerial, underground and can-we-serve (CWS) units. The construction cost is based on the current contract costs for the various types of fiber, aerial and underground work done in the City. There is currently no allowance for capitalized G&A from either Click! or Tacoma

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Power, nor a specific contingency amount. The cost per home passed at the end of the second full year of operation in University Place is approximately 95% of the cost per home passed in the City. While it might be expected to be lower because the main fiber loops, head end, hubs and equipment do not have to be duplicated in University place, the underground construction required exceeds 50% of the homes passed compared to 10-15% in the City. A construction period of six months is planned before the release of the first node for customer service. Construction spending has been aligned by year with the rapid acquisition of subscribers in the first two years, and provided for in the model in future years to support a gradual subscriber acquisition program. The initial six month capital program is estimated at \$7.7 million with additional build-out spending of \$ 5 million during the first two years of customer service.

Revenues are based on market penetrations similar to the ramp-up experience in the City of Tacoma, and target penetration by the end of the second full year of operations is 24.8%. The service mix and price per service is also similar to the City. Broadband revenue is limited based on the lower mix of businesses passed. A modest amount of SCADA income is included.

Operating costs have been estimated on an incremental basis above the current City model. Thus additional costs will be incurred for the incremental programming, advertising, taxes, and additional staff in Customer Care and Service Technicians. No additional staff are considered necessary at the Click! Administrative level or for the NOC (Network Operations Center) to support the projected subscriber count. The credit to expense for the capitalization of new connections has been increased to include approximately 1.75 outlets per installation, but may need to be increased further in line with the recommendations above. Depreciation expense is not included in the model.

As currently modelled, revenues exceed expenses after the first six months of customer service - about 12 months from the start of construction in University Place. All full years of customer service have net positive cash flow, even if the SCADA income is not included. While annual cash flows are positive from the first year, the model shows cumulative cash flow becoming positive in year 14 of the project, based on current dollars. If construction were authorized for the second half of 2000, you may benefit from the availability of

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construction crews familiar with your standards, capitalize on the current public momentum Click! has established, and approximately match the declining connection needs for your Service Technicians in the City by the end of 2000 with the opening of new nodes in University Place in approximately January 2001.

Click!'s Position in the Telecommunications Evolution

*"Assess Click!'s current and planned business and marketing model in the context of the evolving telecommunications technology as we understand it to suggest areas of risk/reward and the overall public benefit to the citizens and businesses served by Click!"*

Click! continues to be at the forefront among public and private utility telecommunications efforts. This position has brought considerable national recognition to Tacoma, and also significant tangible benefits. From a review of local press clippings, at least 400 new jobs, five building renovation projects, enhanced University of Washington and UPS academic programs, and several development projects are all linked to the development and presence of Click!. Establishing Click! prompted AT&T (TCI and Excite @home) to upgrade services to Tacoma residents much earlier than otherwise would have happened. Your decision to operate primarily as a wholesaler beyond the CATV service level will stabilize operating and development costs. You remain aware of the developing technologies in digital set-top boxes and the integration of telephony into a variety of services, and are studying ways to cost effectively deploy them to people on the Click! network - without going into head-to-head competition with your own customers.

The success of Click! and its continuing value to the community depends on a team effort among business, civic and education leaders to create a unique region with considerable growth potential. The fiber/coax network is literally and figuratively the thread that ties them together and enables this potential. Working together, this team can leverage the Click! asset to attract major new businesses, create jobs, attract students to programs that provide the skills for those jobs and generally enhance the whole community.

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However, based on our experience serving large, national e-commerce firms, the exceptional benefits of a Wired City, modest real estate prices, available labor, and centers of higher education with technology programs, there is one dimension Tacoma may wish to evaluate in more detail, and that is taxes. When the likes of Webvan established their programs to build twenty-six \$40 million distribution and service centers with 5-600 jobs each, one of their critical site evaluation factors is the tax environment. When it comes to attracting large, sophisticated firms with the greatest benefits for Tacoma, competing sites will be any location within a mile or two of fiber because the cost to make the connection is minor compared to the project size. We understand Tacoma's tax structure has discouraged some businesses in the past, and may play a critical role in attracting new business. Reviewing tax policy options may be one of the more significant ways the City can contribute to the growth momentum you have established, and thus help to maximize returns on the Click! investment for the community.

Summary

Overall, the Click! Network has been deployed to date within the approved budget, with service levels and quality equalling, and in some cases exceeding, the original plans. The technical quality and redundancy is a model system. Customer service is a hallmark of the operation, particularly your commitment to managing provisioning expectations within an approximate two-week window - then keeping the schedules you set. The extra attention to customer education and support is likely to enhance customer retention. Actual expenses have been well managed, inspected and approved. We have identified a number of areas where accounting, reporting and forecasting can be improved, and many of these recommendations have been or are being implemented. After these accounting adjustments and if the business continues as planned for the remainder of 2000, revenues are forecast to exceed expenses before June of 2001. In total, you have provided the substance to the reality of Tacoma, America's #1 Wired City.

\* \* \* \* \*

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We appreciate this opportunity to have worked with you and the Click! Network staff on this most important project and wish you success in your continued development of Click! Should you have any questions regarding this report, or desire assistance in implementing our recommendations, please contact Rick Van Mell at 415-957-3138.

Very truly yours,

*PricewaterhouseCoopers LLP*

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# EXHIBIT 72

## CTC CONTRACT – REQUEST FOR INFORMATION

- TPU Board Resolution No. U-10988 passed January 24, 2018: Directed the City Manager and Interim TPU Director to jointly seek information from interested and knowledgeable entities to determine how the 12 adopted community policy goals can be achieved through a restructuring of Click!.
- First Step (Develop RFI): Request for Information (RFI) will be developed by CTC. The RFI is intended to solicit detailed responses from entities that may have an interest in developing a partnership with the City. The RFI will provide background information (City and Click!) and will include the City’s 12 policy goals. Once released, the RFI will be placed on relevant lists and other distribution channels identified by CTC.

**March 16<sup>th</sup> (Friday):** Completion date of initial draft RFI.

**March 20<sup>th</sup> (Tuesday):** Draft presented to City Council and TPU Board at joint study session.

**March 30<sup>th</sup> (Friday):** RFI finalized.

**April 2<sup>nd</sup> (Monday):** RFI released.

**April 30<sup>th</sup> (Monday):** RFI closed.

- Second Step (Ranking and Recommendations).

Detailed Questions. After initial responses are received, high-level questions will be asked of the respondents to elicit more specific information to develop an understanding of the respondents experience, financial capability and commitment to partnering with the City.

Ranking and Recommendations: CTC will rank responses and follow-up with the viable respondents and provide a recommendation to City Manager and TPU Director.

**May 4<sup>th</sup> (Friday):** Ranking and Recommendation provided to City.

- Third Step (Follow-up): CTC will conduct in-person follow discussions with selected respondents which may include question and answer sessions between City staff and respondents and a tour of Click! facilities.

**May 11 (Friday):** Complete follow-up with selected respondents.

- Fourth Step (Assessment): CTC will analyze the data and prepare an assessment of the potential opportunities and market response. The assessment will include recommendations regarding potential next steps and an evaluation of what was learned, in particular, how the 12 policy goals fit may be accommodated and what the potential outcomes might be.

**May 29<sup>th</sup> (Tuesday):** Present report and recommendation to City Council and TPU Board (*Need to schedule joint study session if possible*)

## PROFESSIONAL SERVICES CONTRACT

THIS CONTRACT, made and entered into effective this **9th** day of **February, 2018**, by and between the **CITY OF TACOMA**, a municipal corporation of the state of Washington (hereinafter the "CITY"), and **CTC TECHNOLOGY & ENERGY**, a Maryland corporation (hereinafter the "CONTRACTOR");

WHEREAS in January 2018, Resolution No. U-10988 of the Tacoma Public Utility Board and Resolution No. 39930 of the Tacoma City Council were adopted establishing a vision and next steps for maximizing the value of Click! Network, and

WHEREAS, these resolutions identified twelve community policy goals and directed that the Interim Director of Tacoma Public Utilities and the City Manager work jointly to prepare requests for information, proposals and qualifications for entities expressing interest in working with the City to determine how the community policy goals can be achieved through collaboration and restructuring of Click!, and

WHEREAS, the resolutions provide that the Utilities Director and City Manager may retain the services of a consultant to assist in this work, and

WHEREAS, the City has the need for consultant services to, prepare a request for information, review and evaluate the responses to the RFI and make recommendations to the Tacoma Public Utilities Board and Tacoma City Council, and

WHEREAS the Contractor has expertise in providing public broadband network business model analysis, strategic planning and business planning and related services;

NOW, THEREFORE, in consideration of the mutual promises and obligations hereinafter set forth, the Parties hereto agree as follows:

### **1. Scope of Services/Work.**

A. The CONTRACTOR agrees to diligently and completely perform the services and/or deliverables described in Exhibit "A" (Scope of Work) attached hereto and incorporated herein.

B. Changes to Scope of Work. The CITY shall have the right to make changes within the general scope of services and/or deliverables upon execution in writing of a change order or amendment hereto. If the changes will result in additional work effort by the CONTRACTOR, the CITY will agree to reasonably compensate the CONTRACTOR for such additional effort up to the maximum amount specified herein or as otherwise provided by City Code.

## EXHIBIT “A”

### SCOPE OF WORK

#### Scope of Work

Building on our previous work with the City, we propose to perform the following tasks:

#### Task 1: Prepare an RFI

We will develop and draft the technical and business components of a request for information (RFI) designed to solicit detailed responses from public and private sector entities that may have an interest in developing a public-public or a public-private partnership with the City. The RFI will also serve to inform the public and private sectors—enabling respondents to understand the potential business opportunity and, just as importantly, to understand the City’s underlying policy goals as reflected in the 12 items adopted by resolution.

The RFI will also describe Tacoma and the region (i.e. Tacoma Power service area) itself—its location, demographics, and attributes—as a way to build a basic picture of market opportunities for potential bidders. The RFI will then describe the infrastructure and operations of Click! in some detail. It will then present the potential partnership opportunity in relatively simple business terms—without discussion of costs or legal structure, for example, because those are items about which we would seek input from the public and private sectors.

After setting the stage, the RFI will then ask respondents to reply to a series of relatively high-level questions, followed by a series of much more specific and pointed questions. The more detailed questions will be designed to solicit useful information from potential partners about their interest in partnering with the City, their existing operations, their experience, their financial stability, and their past experience and commitment to critical City goals such as net neutrality.

The RFI will also be designed to elicit as much practical financial information as possible, including the potential willingness of public and private partners to pay for the use of Click! assets under different scenarios.

As we discussed on the phone, the fact that this process will be public and that neither the RFI responses nor our summary recommendations can be kept private may mean that some of the responses will be less concrete and clear than we would like. We are hopeful that the RFI presents an opportunity to get a sense of the market. It will be designed to do so as effectively as possible, subject to the limitation that RFI respondents are sometimes reluctant to divulge too much information that would be available to their competitors.

Our deliverable in this task will be comprehensive narrative RFI language. (We will require the City’s help in terms of a description of the Click! infrastructure, information

about the technologies used, and so on, so that we can include that material in the sections we prepare.) We will provide the business and technical narrative elements of the RFI and host the publication/release of the RFI, and be the point of delivery and collection of information responsive to the RFI.

Once the RFI is released, we will place the RFI on the relevant lists and in other distribution channels where we know potential partners would be notified about it. We will also make sure it is received by the dozen or so companies that we would hope would be interested in responding.

We will endeavor to complete the draft RFI by March 16th for presentation to the City Council at a joint study session with Public Utility Board on Tuesday, March 20<sup>th</sup> and will endeavor to complete Task 1 by Friday, March 30, 2018.

Our understanding is that the City intends to release the RFI on or around April 2<sup>nd</sup>, 2018 with a due date of April 31<sup>st</sup>, 2018.

### **Task 2: Review RFI Responses and Conduct Follow-up Calls or Meetings with Some or All of the Respondents**

Once responses from the public and private sectors are received we will review and evaluate them on the City's behalf. We will rank the responses, identifying those we feel are most viable and worthy of follow-up. We will verbally advise City staff on our ranking and make recommendations on appropriate follow-up steps. Upon completion of this process, we will confer our ranking and recommendations on follow-up steps with the Public Utility Board and the City Council. We will then be prepared to conduct follow-up phone calls and meetings with the highest-ranked respondents.

We will endeavor to complete this first phase of Task 2 by Friday, May 4th, 2018.

We will then conduct in-person follow-up discussions in Tacoma with the more interesting respondents—potentially giving the respondents the opportunity to ask questions about the Click! infrastructure and tour the City's facilities, while giving the City and CTC the opportunity to ask additional questions and get more input from the respondents about their interest in the opportunity.

We will endeavor to complete this second phase of Task 2 by Friday, May 11, 2018.

### **Task 3: Develop a Summary Memorandum and Make Recommendations in Regard to Next Steps**

Based on the data collected through the RFI (written responses) and follow-up discussions, we will write a summary memorandum and report of our assessment of the City's potential opportunities, how we think the market would react if the City were to issue an RFP, and how the City's interests could be promoted and protected. The memorandum will include a full set of recommendations for next steps, as well as

an evaluation of what we have learned about the potential trade-offs among policy goals and an analysis of potential outcomes.

We will endeavor to complete Task 3 by Tuesday, May 29<sup>th</sup>, 2018. Joanne Hovis will then be available to present the memo and recommendations, and to respond to questions, before the Public Utility Board and the City Council as requested.

### **Project Fees**

CTC proposes to perform the tasks identified in the scope of work above for a not-to-exceed cost of \$37,000. Travel costs for Joanne’s trips to assist in interviews and to present recommendations will be billed separately in addition to this budget.

We will bill this work at the following hourly rates:

<b>Labor Category</b>	<b>Rate</b>
Director of Business Consulting /	\$170
Principal Analyst / Engineer	\$160
Senior Project Analyst / Engineer	\$150
Senior Analyst / Engineer	\$140
Staff Analyst / Engineer	\$130
Communications Aide / Engineer Aide	\$75

CTC’s billing rates are inclusive of all routine expenses including administrative, accounting, and computer support, telephone calls, and photocopying. Local travel is billed at current standard mileage rates. Non-routine expenses and long-distance travel are recovered at direct cost with no mark-up.



**City of Tacoma, Washington, and Tacoma Public Utilities**

**Request for Information and Qualifications**

**for**

**Partnership Arrangements for Tacoma Power's Click! Network**

**March 23, 2018**

definition (HD) channels, and 11,000 hours of on-demand content. Click! also offers a multi-room DVR system, as well as TV Everywhere, allowing customers to watch TV from any device.

At the end of 2017, Click! had 21,303 wholesale residential internet subscribers and 1,310 wholesale commercial internet subscribers. Rainer Connect and Advanced Stream are the two companies that currently provide retail cable modem internet service over Click!'s open access network. They provide speeds ranging from 6 Mbps to 100 Mbps downstream, and from 1 Mbps to 10 Mbps upstream with prices ranging from \$31.95 per month to \$149.95 per month. These companies are on a month-to-month contract with Click!.

Rainer Connect, Optic Fusion, Zayo, Level 3, CenturyLink, Noel, and Wave have entered into agreements with Click! to provide a range of business services over the Metro Ethernet Forum (MEF) 2.0 certified network, including Ethernet Private Line, Ethernet Virtual Private Line, Ethernet Local Area Network, Voice, Colocation, Dark Fiber, Virtual Cross Connect, Cellular Backhaul, and Wavelength. A map of existing lit buildings is [located online](#). These retail business service providers typically have a five-year contract with Click! with an automatic one-year extension. Any Provider that is selected through this process to partner with the City will be obligated to honor Click!'s contracts with these companies until their expiration.

As a wholesale internet provider, Click! staff maintains, repairs, monitors, and upgrades the network as needed. The staff members install data service drops, provision cable modems, and provide marketing support. Click! charges its ISP partners 60 percent of the retail price as the wholesale rate.

Current rate cards are included in Attachment A; a rate history is included in Attachment B.

### **Market Overview**

While the Click! network offers service in Tacoma, Fircrest, University Place, Pierce County, Lakewood, and Fife, it does not pass every location that TPU's electric network passes. Click! passes roughly two-thirds of homes in TPU's electric service area. While Click! service is available to 90 percent of TPU electric customers in the City of Tacoma itself, it is only available to 59 percent of TPU customers in Fircrest, 55 percent of TPU customers in University Place, 58 percent of TPU customers in unincorporated Pierce County, 53 percent of TPU customers in Lakewood, and 42 percent of TPU customers in Fife. Approximately 24,500 homes passed (21.5 percent) subscribe to at least one service from Click! or its retail ISP partners.

The City and TPU seek to ensure that the network can be expanded to more of TPU's electric service territory through the collaboration contemplated here.

Click! competes with Comcast, DirecTV, and DISH Network for cable TV subscribers. As of May 2015, Click! had a 13 percent share of the video market.

Click!'s retail ISP partners compete with Comcast and CenturyLink. As of May 2015, Click!'s retail ISP partners had a combined 15 percent share of the internet market.

### **Operations and Staffing**

Click! is an operating section of Tacoma Power, the electrical division of TPU. It has 92 budgeted full-time employees. An organizational chart is included in Attachment D.

### **Financial Summary**

In 2017, the Click! network's total operating revenue was approximately \$2.2 million; of that, 67 percent came from cable television customers, 28 percent came from retail ISP partners providing broadband, 4 percent came from partner ISPs providing Ethernet and SONET services, and 1 percent came from interdepartmental sources. In the same year, Click! spent about \$1.8 million on administration and sales expenses and about \$900,000 on operations and maintenance expenses. Total expenses in 2017 came to \$2.7 million, for a net loss of just more than \$500,000.

An operational summary containing a breakdown of revenue and expenses for FY2016 and FY2017 is included in Attachment F. A detailed financial statement for FY2017 is included in Attachment G.

## **V. The Evaluation Process**

The City will use a variety of mechanisms to evaluate responses, and will review submissions based on:

- Respondents' expertise, experience, and technical and financial qualifications, per the instructions in Section VI
- How well the proposed business arrangement furthers the City's 12 community policy goals, as detailed in Section II
- How the proposed arrangement brings value and the benefits of next-generation broadband to the Tacoma community
- How the proposed business model provides a predictable revenue stream to TPU
- The potential of the proposed business model to enable expansion to areas of TPU's electric service territory that Click! does not yet reach
- Additional factors that may be determined in the course of this RFI/Q process

The City may provide more detailed information regarding available assets to one or more respondents, and ask those respondents to refine their responses.



**A Successful Future for Click! Network**  
*The Next 20 Years! Green and Growing*



**Advanced Stream’s Solution: A Response to City of Tacoma  
“RFI/Q For Click Partnership Arrangement” April 27, 2018  
By: Mitchell Shook, CEO Advanced Stream**

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## 1. Cover Letter

To: Jeff Lueders  
 Cable Communications & Franchise Services Manager Media & Communications Office City of Tacoma  
 1224 Martin Luther King Jr. Way  
 Tacoma, WA 98405

### The Way Forward for Click! Network

Dear City of Tacoma Policy Makers,

As 20th anniversary celebrations are being planned for July, Click! is at a crossroads. Policymakers face serious alternatives, in a sea of uncertainty, with little undisputed information to rely on.

On one hand it's alleged that Click! is losing millions of dollars; and, therefore being illegally subsidized by Tacoma Power rate payers. On the other hand that allegation is vigorously opposed and disputed - even by the City of Tacoma's own attorneys<sup>1</sup>.

If the plaintiffs are correct, and the courts find Click! is an illegal activity and order it to be shut down<sup>2</sup>, then drastic measures would be required to save Click!. Our proposal provides a nimble strategy, that preserves Click!, while offering a way forward in the event of an unlikely, adverse, outcome to the lawsuit. We call this the "Pivot Plan".

However, if Click! is actually a legally operating endeavor, serving its intended purpose as an economic engine of growth and prosperity for our community, while bringing unseen benefits and savings to ratepayers, public education institutions and government stakeholders, then drastic changes are not needed at this time.

In this case, policymakers are free to support and improve Click!; and, to build upon the first 20 years of success -while leveraging Click! for digital equality in Tacoma. Perhaps the old saying applies, "If it ain't broke, don't fix it". Advanced Stream's proposal offers a simple solution. We present a prudent

<sup>1</sup> See page 3, line 14: <http://stickwithclick.com/images/Declaration-of-Kari-L-Vander-Stoep-In-Support-of-A-Stay.pdf>

<sup>2</sup> Candice Ruud March 2018 "Power revenues can't be used to pay for Click network's commercial expenses, judge says" <http://www.thenewtribune.com/news/local/article203633679.html>

and proven path forward. A way to redouble efforts and build upon the past 20 years - while preserving options.

Here we carefully consider and address the twelve policy goals outlined in the RFI/Q.

### **Alternatives For Click! - Achieving The 12 Policy Goals!**

The current situation is reminiscent of January 2012, when TPU management first announced that Click! was losing money and proposed a “Retail Compete” strategy that would have expanded Click!’s role, from a wholesale provider of ISP services, into a retail ISP and phone company. If implemented, that proposal - known as “All In” - would have put Click! into direct competition with its private ISP partners.

That “All In” proposal, which would have greatly expanded the role of government, was unanimously rejected by the TPU Board in 2012. Instead, the Board approved “Plan B”, requiring the ISPs to add 6,000 more Internet customers over a 4-year period.

With close collaboration, between Click! staff and the private ISP partners, “Plan B” was a tremendous success - delivering the promised 6,000 new customers ahead of schedule. Click! become profitable in 2014 and was also paying down all the sunk depreciation and amortization costs.<sup>3</sup> The 2012 “Plan B” example showed what can be accomplished through a prudent Public-Private Partnership.

Advanced Stream’s proposal clearly shows how Click! can, once again, expand and build upon the current public-private business model to become profitable and achieve all 12 public policy goals.

The Advanced Stream solution offers two clear alternatives for Click! going forward.

First, our “Plan B 2.0” option, which sees, in the next 20 years, a bright future and builds upon Click!’s substantial achievements to obtain a successful outcome of all 12 policy goals. The “Plan B 2.0” outlines cost savings and offers private ISP funding for Click! to achieve Gigabit speeds. We present marketing strategies to achieve maximum profitability and take into consideration some amazing opportunities for increasing revenue.

Secondly, we outline our “Pivot Plan” -which dramatically lowers sales, marketing and operating costs for Click! by having the ISPs function as payment and service centers - for their respective CATV customers - in support of the Click! CATV products. The ISP partners would also expand their current role of assisting with CATV sales<sup>4</sup>. This “Pivot Plan” provides policymakers a contingency alternative, way to “Pivot”, while remaining on the more desirable “Plan B 2.0” path. This strategy preserves Click!’s private-public partnership model and would only be required in the event of an adverse outcome in the pending legal case.

Advanced Stream’s proposal saves the living wage jobs of Click! Staff and provides a logical, flexible, way forward - even if unlikely legal, political, or market circumstances, one day, force drastic changes.



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<sup>3</sup> <http://stickwithclick.com/images/Final-Click-Operating-Income-March-2015.jpg>

<sup>4</sup> Since the ISPs and Click!, in most cases, have a shared a relationship with these common customers, any transfer of the CATV customers must be sensitive to the current non-disclosure elements in the ISP contracts, in particular the private ISP customer lists and details of those valuable relationships. The ISPs have worked for many years to acquire these mutual customers and it would be unfair for Click! to hand over their CATV customers to just one of the ISPs - thereby harming the other ISP.

Mitchell Shook  
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Advanced Stream Broadband  
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Tacoma, WA 98406  
253-627-8000  
mitch@advancedstream.com

## **2. Business Model Summary - Plan B 2.0! Building On The Open Access Model.**

Click! holds amazing potential for growth in the next 20 years. With less than 50% name recognition and only a 15% “take rate”, or market share, Click! has tremendous opportunity for growth.

Our proposal details surprising cost savings that will allow Click! to quickly and inexpensively implement Gigabit speeds.<sup>5</sup> We identify marketing strategies to achieve full profitability and highlight some of the amazing opportunities Click! has now to expand and increased revenue.

Now is not the time to abandon Click! Network’s successful business model. Results of the current lawsuit are not in; and, those findings may reveal that Click! is, in fact, a successful, legal and profitable undertaking.

It can be useful, however, to consider an alternative - contingency - path - a way for policy makers to change direction and “pivot” from our proposed “Plan B 2.0” path if Click! is declared to be an illegal activity and forced to exit or liquidate its business by a court.

Advanced Stream’s proposed business strategy provides a way for policy makers to respond, in the event a “Pivot Plan” is required. In section 8, below, we detail the “Pivot Plan” and the proposed establishment of a new 501 (c) non-profit entity to manage the wholesale broadband and Internet activities, perform installations, provide high level network administration, engineering and perform some CATV customer service functions.

### **2.1 Preserving The Current Public-private Partnership Model.**

“Plan B 2.0” preserves and expands Tacoma’s open access network, and the public-private partnership formula that has been the foundation of Click!’s success since its inception. Customers benefit from the increased competition and better service that open access brings to our local market.

Customers always talk about how much they love Click! and the local ISPs customer service. This is possible because of the dedicated, local, staff who focus on the customers’ needs.

When customers have computer issues and need technical assistance, for whatever reason, they will usually call their ISP. The ISP assists and retains these customers. Whether it’s computer viruses, WiFi router or networking issues, forgotten passwords, expired credit cards etc., the ISP takes that call and helps those customers.

When there are issues with CATV, Click! is there with world class, local support, taking calls almost instantaneously. The Click! customer service center is located just inside the lobby at TPU - a perfect location for attracting new customers and reinforcing the brand’s marketing message.

The ISPs are well suited for bringing in customers. They have tremendous entrepreneurial and marketing skills. They are a proven resource for capturing market share.

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<sup>5</sup> Advanced Stream’s proposal provides Click! with funding, if needed, to implement DOCSIS 3.1 and SIPV.

One reason the wholesale partnership model has worked well for Click! is that the private sector ISP partners are nimble and free to practice marketing tactics that a government entity, such as Click!, are not be allowed to deploy. Price discrimination is one such example. In the competitive broadband market, it's very common for competitors to "wheel and deal" to win a customer. "What will it take" is one of Advanced Stream's most successful closing tactics for winning new customers. A bureaucratic, governmental, institution is not allowed to practice such "guerilla marketing" tactics. Do so would be considered a "gift of public funds" - an illegal act for public officials.

## 2.2 Low Hanging Fruit - Name Recognition and Take Rate

Click! has extremely low name recognition and market share rates for a municipal network. Given the communities' civic pride in Click!, combined with growing public support for municipal broadband networks generally, there is no reason that Click! cannot at least double its current 15% take rate - to achieve a 30% take rate.

With a gigabit offering, Click! might even achieve the amazing 60% take rate Chattanooga Tennessee's EPB<sup>6</sup> has accomplished. With a 30% take rate, Click! would show \$10 million a year profit. If Click! achieved a 60% take rate, it would be earning \$14 million a year - all after depreciation and amortization. Such take rates are not uncommon. A project in San Francisco has an estimated 48% take rate. Certainly Click can improve dramatically over its current 15% rate<sup>7</sup>.

## 2.3 The More The Merrier! Opening up our Open Access Network

"Plan B 2.0" preserves, even increases, existing competition in the market. Click! can build on this successful open access formula by allowing additional qualified ISPs to join the network. These new ISP partners can bring additional resources to bear, unencumbered by the government regulation and bureaucracy, in support of the marketing efforts needed to take market share and expand Click!'s wholesale ISP and Cable TV customer base<sup>8</sup>. It is a win-win for Click!, when the ISP partner signs up a customer - since nearly 50% of ISP customers also subscribe to CATV services<sup>9</sup>.

Why limit the network to just 2 or 3 ISP providers? With more ISPs promoting the Internet service to potential customers, more marketing resources can be deployed in acquiring customers. We believe this will allow Click! to grow its wholesale Internet customer base even faster. The profits from these activities can further support network expansion and our community's important digital equity initiatives.

This open access model is a proven strategy for winning new customers. The ISPs have demonstrated their ability to bring additional customers when called upon.

## 2.4 "Plan B 2.0" -The Clear Path Forward

Beginning in 2012, the current ISP partners<sup>10</sup> agreed to add 6,000 new Internet customers to Click! Network. They succeeded in achieving that goal, with an effort known as "Plan B" - the plan was

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<sup>6</sup> Interview with Colman Keane, the Director of Fiber Technology for EPB Chattanooga 6/12/2017

<https://muninetworks.org/content/transcript-community-broadband-bits-episode-257>

<sup>7</sup> <https://sfbos.org/sites/default/files/CTC-Deliverable22-final-20171017.pdf>

<sup>8</sup> There were 22,650 ISP customers and 15,787 CATV customer, on March 1, 2018 -from RFI/Q Appendix

<sup>9</sup> From Click! 2018 RFI/Q Attachment -ISP w/CATV Penetration based on total ISP Subs

<sup>10</sup> Advanced Stream, Net Venture and Rainier Connect.

named as an alternative to the “All In” or “Retail Compete” model that Click! management proposed at the time. The goal was accomplished over a 4-year period.

Click! could, once again, enlist the support of its ISP partners, by leveraging their marketing skills and resources, to lead a membership drive designed to acquire an additional 8,400 Internet customers over the next 3 years.

This would generate an additional \$3 million a year in wholesale ISP profits for Click! -covering all of Click!’s operational losses<sup>11</sup>. The original Plan B was accomplished in under 4 years. We believe that Plan B 2.0 can be accomplished in 3 years -as our spreadsheet in Exhibit B shows.<sup>12</sup> The ISPs bear all the marketing expenses and promotional costs for acquiring these customers, while Click! benefits from the additional wholesale revenue<sup>13</sup>.

Such expanded usage of Click! Network, and the additional revenue it brings, ultimately supports the very important digital inclusion goals.

## 2.5 Preserving Competition –While rolling out Gigabit Speeds

The implementation of Gigabit speed is one of the most important goals for Click! Staying current with the latest technological developments is imperative. Historically, Every increase in speeds, over the history of Click!, has resulted in a surge in customer sign-ups. Once Gigabit services are offered, Click! market share will once again dramatically increase.

With the open access model intact, Click! staff can dedicate their time and resources to implementation of DOCSIS 3.1 Gigabit speeds, while avoiding complicated structural changes to the system at a critical time -when Click needs to be focused on expanding its commercial offerings, addressing digital equity and focusing resources on the deployment of symmetrical Gigabit speeds<sup>14</sup> via DOCSIS 3.1 and FTTH<sup>15</sup> deployments.

## 2.6 Switched IPTV and Gigabit Now!

Fortunately Click! is in the right place at the right time with its state of the art DOCSIS 3.1 capable platform. Moving Click! to IPTV and delivering Gigabit service to Tacoma is not difficult and will lead to a dramatic addition of customers.

Click! has issued an RFP for Software Based CMTS. The respondents have shown that new technology now allows a surprisingly inexpensive way to add symmetrical Gigabit speeds to Click! Network<sup>16</sup>.

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<sup>11</sup> Click! showed an operating loss, of \$4.8 million, for 2017 -after depreciation and amortization. With 8,400 additional ISP customers, Click would be generating \$2 million a year in net profit -after paying down all depreciation and amortization costs -including costs for the DOCSIS 3.1 upgrade. ISP revenue is 100% marginal profit, since there are no variable costs. The cost for the gateway is a fixed cost.

<sup>12</sup> The author of this paper, Mitchell Shook, led the membership drive for Advanced Stream under Plan B

<sup>13</sup> The average revenue per ISP user on Click! is currently \$25. Our proposal increases this ARPU to \$30. Important to note that over 50% of ISP customers take CATV also. Since CATV has a 20% gross margin, the additional CATV customers could contribute an additional \$1.1 million a year in gross profit; but, to be conservative our projections do not assume any CATV customer growth.

<sup>14</sup>JEFF BAUMGARTNER, MultiChannel News, JAN 30,2018 "CableLabs adds MAC Layer support to extension to DOCSIS 3.1 that will deliver symmetrical multi-gigabit speeds"

<https://www.multichannel.com/news/full-duplex-docsis-takes-another-step-forward-417820>

<sup>15</sup> New plant extension are being done with fiber-to-the-home (FTTH) technology.

<sup>16</sup> Both the Cisco solution and Harmonic solution estimate DOCSIS 3.1 solutions, that deliver Gigabit, can be fully enabled for less than\$1.5 million.

Thanks to recent technological developments in the DOCSIS standards, distributed architecture, and specifically Remote PHY (R-PHY)<sup>17</sup>, proposals from vendors such as Cisco and Harmonic<sup>18</sup>, now show that fully deploying Gigabit over Click! will cost under \$1.2 million<sup>19</sup>.

Upgrading Click! to a switched IPTV (SWIP) platform - with a hosted and managed video control plane solution<sup>20</sup> is an inexpensive and prudent step in supporting Gigabit speeds and the need for future bandwidth growth.

## 2.7 A Realistic View Of Click's Financial Situation

There are many ways to improve Click! and build upon its success; but, measuring that success and progress is also important. Before looking further at the many opportunities for future growth and increased revenue, it is important to understand why many believe Click! is already very viable and can certainly be a profitable, financially stable, business with many amazing opportunities for our community.

### 2.7.1 Achieving Profitability – Easily Done!

More than anything, long term financial stability for Click! Network requires increasing revenues and controlling costs. Finding more users, commercial and non-commercial, increases profits. Profits that can support digital inclusion and be used to expand and maintain the network. Click! showed an operating loss of \$2.4 million in 2017<sup>21</sup>. That loss can easily be covered, by cutting one full time management position, that is no longer essential to Click! Operations, and introducing a \$5 price increase per ISP and CATV customer<sup>22</sup>. See Exhibit B.

### 2.7.2 Cutting Management Costs

Under our proposal the “All In” retail compete model would be shelved and the ISP contracts would be renewed. This would eliminate the need for the current General Manager of Click! - who was hired specifically for the Retail Compete (Plan A) program. This position can easily be filled from within, by current Click! Management<sup>23</sup>. Eliminating this position saves approximately \$17,645, per month. Other savings could be achieved by reducing management costs for CATV sales and marketing. This cost center, 552200, which is “Click Marketing and Administration” ran over \$1 million in 2017. There is no need for Click! to emphasize CATV sales under “Plan B 2.0” - since the ISP partners bear all the expense for bringing in new customers.

### 2.7.3 Adding Revenue - Creating Incentive for Investment

Renewing the 3 year contracts with the ISPs allows them certainty -which affords them the ability to invest the significant resources required in fulfilling the goals of Plan B 2.0.

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<sup>17</sup> RPHY takes the QAM modulation/demodulation portion of the CMTS and separates it to a location outside of the CMTS. This function will now be handled directly in an HFC node in the field or a “shelf” type unit located in a hub or cabinet. The connection between the CMTS and the Remote PHY Device (RPD) is traditional Ethernet.

<sup>18</sup> Harmonic's CableOS CCAP solution, Submitted by MegaHertz LLC has no licensing cost; but, is not “standards based”. It provides a software-based CMTS running on off-the shelf 1-RU servers. It is an end-to-end Remote PHY system with high RF port density, CableOS easily enables the migration to multi-gigabit broadband with DOCSIS 3.1

<sup>19</sup> Much less than the \$5 to \$ 10 million estimates that were presented by Click! Staff to City Council two years ago.

<sup>20</sup> High Speed Internet is becoming Click!'s most important service and RF spectrum must be managed efficiently.

<sup>21</sup> Not including the sunk cost of depreciation and amortization -which were \$2,455,130. With depreciation and amortization included, Click! shows a \$4.9 million loss.

<sup>22</sup> Given 38,437 total wholesale ISP and CATV customers, an increase of \$5 per month covers the losses.

<sup>23</sup> Either the current Business Operations (cost center 552100) or Technical Operation ( 552300) managers could do this.

Advanced Stream's proposed membership drive anticipates an increase in speeds, a small price increase and the addition of 8,400 more Internet customers<sup>24</sup> - all of which generates an additional \$5 million a year in wholesale ISP profits for Click! in under 3 years - thereby covering all of Click!'s losses. By the end of year 3, the plan generates \$6.2 million of additional revenue. See Exhibit B.

### 3. Affirmations - Addressing The Core Project Goals

This section shows how the 12 strategic goals are impacted by Advanced Stream's proposed strategy of "Plan B 2.0" with an option to "pivot" if needed.

#### 3.1 Public Ownership and Use of the Telecommunications Assets

"Plan B 2.0", by building upon the current public/private open access arrangement with the ISP and MSA retail service partners<sup>25</sup>, insures the continued public ownership of the telecommunications assets. This option provides the best security for the network and assets necessary for TPU operations and the least disruption for current Click! employees, while securing future access to the network for public purposes.

#### 3.2 Equitable Access to Services - Digital Equity Action Committee

With "Plan B 2.0", TPU and Click! staff remain fully in charge of future expansion decisions. Residential and commercial ratepayers continue to benefit from the impartial, equitable, strategy Click! has historically followed for building out the network.

#### 3.3 Affordability -Expanding Commercial Activity to Support Public Policy

Under the current model, Click! offers discounted residential Cable TV services to low income customers.<sup>26</sup> Advanced Stream has its \$14.95 Digital Inclusion package for qualified low-income customers. Click! can easily support such programs, in conjunction with the ISP partners, by simply providing a wholesale "Digital Inclusion" package to the ISPs. The ISPs would be contractually bound to deliver these services to the end users at the wholesale cost<sup>27</sup> - without making any profit on these customers.

Click! could update the agreements, when renewing the contracts with the wholesale ISP partners, and require them to provide some WiFi and cable modem services for free, or at low cost, to prioritized areas, or "inclusion zones", as part of their contracts.

#### 3.4 Net Neutrality For All Customers

This "Plan B 2.0" option makes no change with respect to Click's ability to set and adhere to net neutrality principles. This strategy supports Tacoma's strong belief in Net Neutrality – that all lawful internet content is equally accessible, regardless of its subject matter or viewpoint. With Click! in control of the DNS servers, the Internet gateway routers, and IP address block, a retail ISP over

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<sup>24</sup> Like the ISP did in 2012 under Plan-B, when they added 6,000 new customers.

<sup>25</sup> The retail service providers, Advanced Stream, Rainier Connect, Net Venture, Optic Fusion, Zayo, Level 3, Centurylink, Noel, and Wave Broadband currently provide a range of services over Click! network

<sup>26</sup> Customers that qualify for TPU's Energy Assistance Program also receive discounted CATV services.

<sup>27</sup> The ISPs should not be profiting from customers on this program. It's their turn to "give back" to society -for the 20 years of success that they have enjoyed while operating over Click! Network.

Click! cannot speed, slow, or block internet content based upon political views, paid prioritization or other businesses interests.

Since President Trump has overturned the FCC internet privacy rules, private telecom companies can now collect and sell their customers' private online usage information. Given federal rollbacks of net neutrality and internet privacy protections, municipal ownership and operation of Internet services is one sure way to protect customers' constitutional rights to free speech and privacy.

The ACLU has recently called on local governments to pursue providing broadband to residents to help counteract federal rollbacks of net neutrality and internet privacy protections<sup>28</sup>. With Advanced Stream's plan no drastic changes are made to this part of Click! Network's proven business model.

### 3.5 Open Access - Preserving A Proven Strategy for Success

"Plan B 2.0" preserves Tacoma's open access network, and the public-private partnerships that have been the foundation of Click! success since its inception. Customers benefit from the competition and better service that open access brings to our local market.

This open access model is a proven strategy for winning new customers. The ISPs have demonstrated their ability to bring additional customers when called upon.

### 3.6 Preserving Competition –While rolling out Gigabit Speeds

"Plan B 2.0" preserves, even increases, existing competition in the market. With Advanced Stream's plan, more retail ISP partners are added to Click!

### 3.7 Safeguarding Municipal Use By Tacoma Power, The City, And Other Local Governments

Under the "Plan B 2.0" alternative, Click! would continue maintaining and supporting the City's Institutional Network (I-NET) and the 130 public institutions that currently benefit from it. Additional institutions that aren't currently using it can even be added, further benefiting the community.

Click! positively impacts our community, furthering education, job and civic engagement opportunities. This strategy safeguards continued municipal use. Clearly now is not the time to give up on Click!

### 3.8 Financial Stability For Click! - Switched IPTV and Gigabit Now!

The implementation of Gigabit speed is one of the most important goals for Click! Staying current with the latest technological developments is imperative.

Moving Click! to IPTV and delivering Gigabit service to Tacoma will lead to a dramatic addition of customers. Click! has always experienced growth in customers as new, higher speed, packages are introduced. The last major upgrade, from DOCSIS 2.0 to DOCSIS 3.0, occurred in 2012 and, in conjunction with Plan-B, resulted in an additional 6,000 ISP customers.

Fortunately Click! is in the right place at the right time with its state of the art DOCSIS 3.1 capable platform. Click! has issued an [RFP for Software Based CMTS](#). The respondents have shown that new technology now allows a surprisingly inexpensive way to add symmetrical Gigabit speeds to Click!

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<sup>28</sup> Jay Stanley, Senior Policy Analyst, ACLU MARCH 30, 2018: [Public Broadband Can Help Protect the Open Internet and Close the Digital Divide](https://www.aclu.org/blog/free-speech/internet-speech/public-broadband-can-help-protect-open-internet-and-close-digital)  
<https://www.aclu.org/blog/free-speech/internet-speech/public-broadband-can-help-protect-open-internet-and-close-digital>

Network. Respondents have provided bids that will enable Click! to roll out Gigabit service for under \$1.2 million<sup>29</sup>.

Thanks to recent technological developments in the DOCSIS standards, distributed architecture, and specifically Remote PHY (R-PHY), proposals from vendors such as Cisco and Harmonic<sup>30</sup>, now show that fully deploying Gigabit over Click! will cost between \$1 and \$1.2 million<sup>31</sup>.

To meet the soaring demand for bandwidth, R-PHY<sup>32</sup> removes the physical layer (PHY) of a traditional cable headend CMTS or CCAP and pushes it to the network's fiber nodes that connect to the cable modem at the customer's site<sup>33</sup>.

For the Harmonic solution<sup>34</sup> the net price is just \$1.1 million - after a \$268,965 buy back discount for Click!'s CBR8 Cisco router<sup>35</sup>, while the Cisco solution would cost just \$1 million<sup>36</sup>, after a \$200K buyback credit. There is a licensing cost going forward, under Cisco's Infinite Broadband Unlocked (IBU) Licensing Program that allows the operator to deploy as much DOCSIS 3.0 / 3.1 downstream and upstream spectrum as they choose, but only pay a \$1.10 monthly fee based on the number of subscribers that the operator has on their system<sup>37</sup>.

Significant deployments of this new technology, with distributed architecture and specifically Remote PHY (R-PHY), are now happening around the world<sup>38</sup> and the current ISP partners are willing to support this effort with time and resources<sup>39</sup>.

A SIPV solution allows a full range of advanced digital video services – all without significant CAPEX, OPEX. This upgrade is estimated to cost \$415,568<sup>40</sup> and is essential for freeing up the channels needed for future broadband growth.<sup>41</sup> The move to SIPV will be seamless, from a customer perspective, since the new system is compatible with the current set top boxes and TiVo equipment.

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<sup>29</sup> Both the Cisco solution and Harmonic solution estimate DOCSIS 3.1 solutions, that deliver Gigabit, can be fully enabled for less than \$1.5 million. Details of these RFQs are under non disclosure, but are in the possession of Click! Staff and available if needed.

<sup>30</sup> Harmonic's CableOS CCAP solution, Submitted by Mega Hertz LLC has no licensing cost; but, is not "standards based". It provides a software-based CMTS running on off-the shelf 1-RU servers. It is an end-to-end Remote PHY system with high RF port density, CableOS easily enables the migration to multi-gigabit broadband with DOCSIS 3.1

<sup>31</sup> Much less than the \$5 to \$ 10 million estimates that were presented two years ago.

<sup>32</sup> RPHY takes the QAM modulation/demodulation portion of the CMTS and separates it to a location outside of the CMTS. This function will now be handled directly in an HFC node in the field or a "shelf" type unit located in a hub or cabinet. The connection between the CMTS and the Remote PHY Device (RPD) is traditional Ethernet.

<sup>33</sup> <https://blogs.cisco.com/sp/putting-the-why-in-remote-phy>

<sup>34</sup> The Harmonic solution is not "standards based" -according to CCI (a competitive bidder on this RFP for Software Based CMTS Specification No. PC17-0454F <https://www.harmonicinc.com/solutions/software-based-ccap/>

<sup>35</sup> From Harmonic's Jan 2018 Proposal: "Harmonic will buy back the CBR8 -The buyback will be issued as a discount from total price, in an amount of \$268,965.52.

<sup>36</sup> Click!'s CMTS is Cisco based. CCI Systems, Inc is proposing the configuration and activation of Remote PHY CMTS Network for Click! Cisco has recently demonstrated full duplex DOCSIS 3.1 architecture. They are proposing a gigabit solution for \$1 million with a \$1.10 monthly subscription fee for licensing.

<sup>37</sup> The \$1.10 per user monthly subscription fee is billed quarterly.

<sup>38</sup> MultiChannel News FEB 14, 2018 "Com Hem, a Sweden-based operator that serves about 1.5 million customers, is deploying CableOS - the operator's lab unit is testing symmetrical speeds of 1.2 Gbps in Stockholm using DOCSIS 3.1" <https://www.multichannel.com/news/harmonic-ids-real-deployment-its-virtual-ccap-418128>

<sup>39</sup> Additional staffing is often required, to manage customer notifications, for planned outages that occur during upgrades. The ISPs have traditionally performed this important function. The ISPs can cover the costs for the ongoing licensing, if the Cisco solution is selected (estimated to be \$290K per year).

<sup>40</sup> Turn key cost as proposed to Click! by Adara. Includes the Digital content manager SIPV headend equipment, RF gateway, Motorola NE 2500 Bulk Encryptor, with MPTS licence, Virtual Services Resource Manager, and all configuration and setup

<sup>41</sup> Description of SIPV by Adara Technologies : <http://www.adara-tech.com>  
[http://www.adara-tech.com/sites/default/files/docs/resources/adara\\_sipv\\_white\\_paper\\_final\\_june24\\_2017.pdf](http://www.adara-tech.com/sites/default/files/docs/resources/adara_sipv_white_paper_final_june24_2017.pdf)

SIPV will enable Click! to quickly and inexpensively free up as many as 50 or more video QAM (or EIA) channels, making them immediately available for DOCSIS 3.0, 3.1 and FULL DUPLEX expansion.

### 3.8.1 Cable Television And Increasing Revenues

Click! Network's provision of retail cable television service supports the retention of the profitable wholesale ISP partners. Having a CATV product reduces customer churn. These products go hand in hand.

At the beginning of 2018 there were 22,600 ISP and 16,010 CATV<sup>42</sup> accounts. Of these ISP customers, 10,562 (nearly 50%) of them subscribe to CATV also.

If Click! took the drastic step of shutting down, or exiting the CATV business, those valuable ISP customers would be pushed into the hands of Comcast.

Generally, when a customer moves their CATV service to another provider they also bundle the Internet service; so, by exiting the CATV business Click! would lose both the Cable TV customer and the lucrative wholesale ISP customer.

These wholesale ISP customers are very profitable for Click!<sup>43</sup> - currently contributing about \$6.5 million in net profit per year<sup>44</sup>. Exiting the CATV business and losing these customers would be a very damaging financial mistake for Click!.

In Section 8, on Business Structure, we offer a contingency path for Click! - a way for policy makers to pivot under this "Plan B 2.0" path and shift Click! away from what is alleged to be an illegal operating structure under TPU (should circumstances require such a drastic change)

### 3.8.2 Aggressively Lowering Costs - Reducing Sales & Marketing Costs

The ISPs are capable and willing to take on management and administrative functions currently performed by senior Click! leadership; specifically, those tasks performed by the non-union general manager and the sales and marketing personnel. It does not make sense to continue investing significant resources in growing the CATV business, as this is a declining market opportunity. Reducing the non-union labor associated with these Sales & Marketing efforts would save more than \$500,000/year. Simply issuing contracts to the ISPs will provide the incentive necessary to allow the private sector partners to perform these sales and marketing functions currently performed but these Click FTEs. Renewing the ISP contracts will give the ISP partners the confidence they need to hire the people to replicate these efforts.

Although not part of our current proposal, it could also be possible to reduce Click! labor costs in the customer service area, if deemed essential<sup>45</sup>.

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<sup>42</sup> As of Jan 2018, there were 16,010 total Cable TV Customers -with 15,455 Residential and 555 Commercial - source RFI/Q

<sup>43</sup> The total marginal cost for an ISP customer is approximately \$1.40 and the ARPU (average revenue per user) revenue is \$25, so the wholesale ISP customer has a monthly marginal contribution of \$23.60. This is a 94% profit margin. It should be noted that the cost for the gateway is essentially a fixed cost, so additional ISP revenue has a 100% profit margin.

<sup>44</sup> That is gross wholesale ISP revenue minus the fixed costs for the gateway.

<sup>45</sup> Job code 552500 could be reduced by 5 FTE, with those personnel being absorbed by the private sector ISP partners.

### 3.8.3 Revenue Increase and Ultimate Profitability

Financial stability of Click! is ultimately a function of profitability. Advanced Stream's proposed membership drive generates an additional \$5 million a year in wholesale ISP profits for Click! in under 3 years - covering all of Click!'s losses. By the end of year 3, the plan generates \$6.2 million of additional revenue.

For a detailed analysis of Plan B 2.0's path to profitability please see Exhibit B.

### 3.9 Promoting Economic Development And Educational Opportunities

"Plan B 2.0" is the best alternative for supporting Tacoma's economic development and educational opportunity. So much of Tacoma's amazing progress in this area is closely tied to the creation and growth of Click! Network.

Beginning in 1997, Tacoma was promoted as "America's most wired city". It was during this period that the University of Washington decided to locate its campus in Tacoma. Many companies located their businesses in Tacoma, to take advantage of the broadband speeds that were unavailable in other communities.

Similarly, by upgrading Click! now, to offer gigabit internet service, Tacoma can bring economic development and educational opportunities to our community for years to come.

#### 3.9.1 Gigabit Speeds Bring Economic Growth

Click! Management has partially implemented plans for delivering symmetrical Gigabit speeds -both over the current DOCSIS platform<sup>46</sup> and over the FTTP roll out<sup>47</sup>. The cost estimates for deploying Gigabit service over Click! have recently been drastically reduced. Deploying Gigabit will result in tremendous economic growth.

#### 3.9.2 Switched IP Video

Gigabit speeds and the ever increasing need for more bandwidth will require moving to IPTV technology to free up RF spectrum. This will require moving to Switched IP Video, or SIPV. Unlike all other technologies employed for DOCSIS 3.1 expansion, SIPV enables operators to quickly and inexpensively free up as many as 50 or more video QAM (or EIA) channels, making them immediately available, in as little as 90 days, for DOCSIS 3.1 and FULL DUPLEX expansion. In addition, using only 12 - 24 QAMs or fewer, SIPV delivers an unlimited video channel offering of SD, HD and UHD/4K programming.

### 3.10 Job Options and Security For Click! Staff And Protecting The Intellectual Capital Of The System

By following a "Plan B 2.0" strategy, Click! preserves living wage job security and the intellectual capital of the the system.

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<sup>46</sup> Breakthroughs in [DOCSIS 3.1 now allow for symmetrical gigabit speeds](#).

<sup>47</sup> Click! has rolled out FTTH in greenfield areas and future expansion will utilize this technology.

### 3.11 Protecting Customer Privacy

Under the current model, the City, TPU and Click!'s well established policies for protecting customer privacy would continue. The Tacoma City Council passed Res. NO. 39702 in 2017 that protects customer privacy in Tacoma<sup>48</sup>

TPU employees are always careful when gathering information to provide needed services and in protecting the public's privacy. Click! carefully follows the requirements of Section 631 of the Cable Communications Policy Act of 1984<sup>49</sup>. Preserving the current business model insures these practices continues.

### 3.12 Preserving Click!'s Goodwill, Including Its Market-leading Customer Service

By following a "Plan B 2.0" strategy, Click! fully preserves its goodwill and world class customer service.

## 4. Structure, Financial Qualifications, and Experience.

Advanced Stream is an LLC, wholly owned by our founder, Mitchell Shook. With no debt, and 20 years of successful experience operating as an ISP partner in good standing over Click! Network, Advanced Stream is on solid footing to serve customers, partners, employees and the community for the long run.

Over these many years, Advanced Stream has collaborated with Click! staff on finding ways to reduce costs and streamline our operations. Those efforts would naturally continue under the current business model.

Advanced Stream has no debt and sufficient capital on hand to carry out its obligations and commitments under this proposal.

Advanced Stream has demonstrated its ability to implement and successfully complete aggressive customer acquisition strategies before. The example of the Plan-B, the last membership drive that Advanced Stream (and the other ISPs) participated in, from 2012, demonstrated this most clearly.

## 5. Technical and Transitional Capabilities

By "Plan B 2.0", Click! staff continues their capable management of all aspects of the HFC and FTTP network. Advanced Stream and the other ISP continue operating under the terms of their current ISP partnership agreements. In the event the "Drastic Change" pivot course is implemented by policy makers, the current Click! staff would transition to the proposed new non-profit entity, as described in Section 8.1, so there is a continuity of staff and technical capabilities under the Advanced Stream proposal.

## 6. Operational Capabilities

Advanced Stream, under its partnership with Click!, currently supports over 9,000 ISP customers, providing cable modem, Email and VoIP services. With 15 employees located in Tacoma, Advanced

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<sup>48</sup> CANDICE RUUD <http://www.thenewstribune.com/news/politics-government/article145363804.html>

<sup>49</sup> Click! Customer Privacy Notice <https://www.clickcabletv.com/about/legal-notice/catv-subscriber-agreement/>

Stream is prepared to hire the additional staff needed for its proposed 9,000 new ISP customer membership drive.

## 7. Sales and Marketing - 20th Anniversary Membership Drive and Plan B 2.0

Under the current model, Click! Has a unique opportunity to take advantage of a key anniversary by announcing a membership drive. In July 2018, Click! will celebrate the 20th anniversary of installing its first customer. That customer is still with Click! today. By organizing media and promotional efforts, in conjunction with the ISP partners, Click! could use this opportunity to kick off a membership drive for adding more customers.

With cooperation and coordinated efforts between Click! staff and the ISP partners, amazing growth can occur. One example, of how successful such a program can be, happened in 2012, when the current ISP partners<sup>50</sup> agreed to add 6,000 new Internet customers to Click! Network over a four year period.

The ISPs succeeded in achieving that goal, with an effort that was known as “Plan B”<sup>51</sup> - the plan was named as an alternative to an “All In Compete” model that Click! management proposed at the time. The customer acquisition goals for Plan B were tracked on a monthly basis accomplished over that 4-year period<sup>52</sup>.

Click! could, once again, enlist the support its ISP partners, by leveraging their marketing skills and resources, to lead a membership drive designed to acquire the additional 8,400 Internet customers.

Under Advanced Stream’s plan these additional customers would generate an additional \$3 million a year in wholesale ISP profits for Click! - thereby covering all of Click!’s operational losses<sup>53</sup>.

This membership drive could be accomplished in a 3-year time frame<sup>54</sup> - with the ISPs bearing all the marketing expenses and promotional costs for acquiring these customers, while Click! benefits from the additional wholesale revenue<sup>55</sup>. The program could be tracked, on a monthly basis, with the ISPs adding 234 new customers per month.

Such increased usage of Click! Network, and the additional profits it brings, ultimately supports the roll out of gigabit services and the important digital inclusion efforts.

### 7.1 New Commercial Opportunities - Wireless 5G Technology

Recent breakthroughs in wireless 5G technology hold great potential as an additional revenue source for Click! and TPU’s telecommunications fiber plant. To support consumers’ ever-growing needs for bandwidth, with the Internet of Things (IOT) and smart homes, next-generation wireless platforms will soon require backhaul services for an increasing number of cellular antenna sites in public places<sup>56</sup>.

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<sup>50</sup> Advanced Stream, Net Venture and Rainier Connect.

<sup>51</sup> [Click’s slide talking about Plan B](#)

<http://stickwithclick.com/images/Description-of-Plan-B-from-Tenzins-presentation-to-the-TPU-Board-6-2012.jpg>

<sup>52</sup> Against a backdrop of sensationally damaging media reports about the imminent demise of Click! and a proposal by TPU management to offload Click! in a firesale to Wave Broadband at one point in 2015.

<sup>53</sup> In 2017 Click! showed a small operating loss, before depreciation and amortization, of \$2.4 million. With 8,400 additional ISP customers, Click will generate \$3 million a year in additional ISP revenue - which is nearly 100% marginal profit, since there are no variable costs and the gateway is a fixed cost.

<sup>54</sup> Mitchell Shook, the author of this paper, led the membership drive for Advanced Stream under Plan-B.

<sup>55</sup> The average revenue per ISP user on Click! is \$24 and most ISP customers take CATV also. Since CATV has a 20% gross margin, the addition CATV customers would contribute be an additional \$1.1 million a year in gross profit.

<sup>56</sup> Sean Kinney RCR Wireless, “operators to deploy 100-350 small cells per square kilometer by 2020”

<https://www.rcrwireless.com/20171212/network-infrastructure/report-finds-major-increase-in-small-cell-deployments-tag17>

Click! Network, with its wireless-enabling infrastructure of fiber and pole attachments, is in the right place at the right time -perfectly situated to provide this backhaul functionality.

City and TPU staff must develop a comprehensive city-wide policy for streamlining the coming flood of requests for microcells on publicly owned assets. As wireless companies seek access and usage of public assets for their wireless deployments, the City should have requirements in place that allow for free or low-cost services to digitally disadvantaged Tacoma residents.

## 7.2 Expanded Utility Opportunities - Smart Meters and Water Heaters

Finding ways for TPU to expand its utilization of the telecommunication network ultimately supports the Click! business model.

We are surprised every day by the amazing potential Click! holds. One very recent example of a completely new usage for Click! is the "smart" water heater pilot project in the Salishan housing complex in East Tacoma.

This Salishan program is a partnership with Tacoma Power, the Tacoma Housing Authority and the Bonneville Power Administration for new "smart" residential water heaters that have Demand Response (DR) ability. Thru this program the old water heaters in 87 duplex and triplex units in Salishan were replaced with new, more efficient, "smart" water heaters that have a modular communications port. This program will allow utility customers an opportunity to play a significant role in the operation of the electric grid by reducing or shifting their electricity usage during periods of peak electric usage in response to specific time of day rates or other forms of financial incentives.

The imminent, \$80 million, AMI project represents a significant opportunity for leveraging the investment in Click!. As this project begins to unfold<sup>57</sup>, the successful bidder should be encouraged to study Click! and the telecommunications plant for ways these assets can play a role in supporting the AMI project's communication needs<sup>58</sup>.

One AMI meter manufacturer points to projects such as those by EPB Chattanooga<sup>59</sup>, Morristown Utilities and Jackson Energy Authority -where the fiber plant uses more AMI take out points closer to the home -rather than the typical AMI architecture.

As one AMI bid holder puts it, *"We have found that this architecture provides the utility as well as the telecom entity with maximum capability within the AMI network as well as maximum flexibility in how they choose to account for costs between the entities, which can be key to any cash flow analysis."*<sup>60</sup>

The city-owned electric utility in Chattanooga, Tennessee, offers Gigabit Internet access and the network also serves as the backbone for their smart meters and smart grid. The same box "that powers the Internet, TV and Phone also powers the smart meter."<sup>61</sup>

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<sup>57</sup> The AMI RFP was released in April of 2018. Link: <http://cms.cityoftacoma.org/Purchasing/FormalBids/PS18-0015F.pdf>

<sup>58</sup> With Click! supporting the backhaul functions of the AMI project -it eliminates the need to install numerous 900Mh radios throughout the project footprint.

<sup>59</sup> The city-owned electric utility in Chattanooga, Tennessee, became the first U.S. company to offer Internet access speeds of 1 gigabit per second to customers. The [fiber also serves as the backbone for a sophisticated smart grid.](http://stickwithclick.com/images/Smart-Grid-Paybacks-The-Chattanooga-Example.pdf) <http://stickwithclick.com/images/Smart-Grid-Paybacks-The-Chattanooga-Example.pdf>

<sup>60</sup> Email 4/24/2018 from AMI vendor to Mitchel Shook, CEO Advanced Stream

<sup>61</sup> WTVC NewsChannel 9 "EPB Makes Lightning Fast Internet in Chattanooga" <https://youtu.be/L8sBp5tb3oA>

Their smart grid includes 180,000 smart meters that provide two-way communication; 1,400 smart switches that allow the utility to isolate power outages; and sensors that allow for precise voltage management to reduce waste.

## 8. Business Structure - “Plan B 2.0” and Contingency “Pivot Plan”

As we have shown in Section 3, with Advanced Stream’s “Plan B 2.0” proposal, the current public-private ISP partnership arrangement is leveraged and all 12 important policy goals are met. Click! remains operating as a part of TPU, while the private ISP partners stand ready to step in and help with a “Pivot Plan” - by taking over the marketing and customer service functions for much of the CATV business, if need be.

This strategy provides policymakers a successful path forward for Click! - with an option for lowering operating costs that can be implemented if ever needed.

Given existing uncertainty<sup>62</sup> over Click!’s status, it is not prudent to make drastic changes without all the facts. Click! is a valuable and prized asset of our community. One might ask, *“If Click! is such a troubled, unprofitable, enterprise, why are bidders lining up to take it off the community’s hands?”*

What is the actual legal status of Click!? Who is right, in the Coates v. City of Tacoma case? Perhaps the attorneys representing the City in this case are correct -in their insistence that Click! is a legally authorized endeavor and that financial losses are a “disputed issue”. On April 23rd, the City’s attorneys filed a compelling Motion for Discretionary Review, arguing that Click!’s operations are lawful and proper<sup>63</sup> .

On June 14th, 2018 the City’s Motion for Discretionary Review<sup>64</sup> was granted by the Washington State Court of Appeals. Now we have about 18 months to wait for a final decision on that matter; but, this sort of review is not granted lightly. So this is a very positive development!

Making drastic policy changes in such an uncertain environment is unwise; however, it is prudent to plan for all potential contingencies -which is why we are proposing the [emhttp://stickwithclick.com/images/Appeals-Court-Grants-City-of-Tacomas-motion-for-Discretionary-Review-on-Click.pdf](http://stickwithclick.com/images/Appeals-Court-Grants-City-of-Tacomas-motion-for-Discretionary-Review-on-Click.pdf)ergency “Pivot Plan”.

There are few, if any, risks associated with Advanced Stream’s proposed Plan B 2.0. This plan offers a path forward while the legal and accounting issues are resolved. We can immediately implement Advanced Stream’s proposals, by simply renewing the ISP contracts and set about bringing equitable access to Tacoma.

Since the Appellate Court has granted the City’s motion for discretionary review, there will now begin an estimated 18 month wait for a decision on the partial summary judgement issue.

In the meantime, there is great risk in following a path toward privatization. We risk turning over 20 years of hard work and community investment in our precious municipal asset to an outside entity.

In the time it will likely take to resolve the current legal issues at Court, Plan B 2.0 could be completed -thereby clearly establishing Click!’s profitability and long term solvency.

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<sup>62</sup> The City of Tacoma’s Motion for Discretionary appeal was granted on June 14th, 2018. We feel certain Click! and the City will prevail in the [Coates v City of Tacoma case](http://stickwithclick.com/images/City-of-Tacomas-Response-to-Plaintiffs-Mo-for-Partial-SJ-50739118.pdf)

<http://stickwithclick.com/images/City-of-Tacomas-Response-to-Plaintiffs-Mo-for-Partial-SJ-50739118.pdf>

<sup>63</sup> City of Tacoma April 23, 2018 -[Motion for Discretionary Review](http://stickwithclick.com/images/City-of-Tacoma-Motion-for-Discretionary-Review-4-23-18.pdf) - Granted

<http://stickwithclick.com/images/City-of-Tacoma-Motion-for-Discretionary-Review-4-23-18.pdf>

<sup>64</sup> <http://stickwithclick.com/images/Appeals-Court-Grants-City-of-Tacomas-motion-for-Discretionary-Review-on-Click.pdf>

Perhaps “If it ain’t broke, don’t fix it” is the appropriate policy at this moment; and, redoubling efforts to improve Click!, while providing a last resort contingency plan, for unlikely and unexpected events, as Advanced Stream proposes, is the proper path forward.

### 8.1 The “Pivot Plan” - Covering All Bases

Advanced Stream’s proposal offers a two step solution - a safety net for an unlikely event, or a worst case emergency scenario. An example of an “unlikely event” might be if Click! is declared by the Courts to be an illegal activity and forced to exit or liquidate its business. Advanced Stream’s proposal offers a way for policy makers to then dramatically lower cost by “pivoting”, from our “Plan B 2.0” strategy, to the “Pivot Plan” strategy.

Under this contingency alternative, Advanced Stream proposes that some Click! engineering and operations staff would continue to operate the telecommunications plant, as employees of TPU, while the private sector ISP partners would expand their current role, of assisting with CATV sales, customer support and to begin accepting monthly payments for Click! CATV products - essentially like a payment center.

### 8.2 Establishment Of A New 501 (C) Non-profit Entity

The biggest change to Click! with the implementation of the “Pivot Plan” would be the establishment of a new 501 (c) non-profit entity to continue managing the wholesale broadband and Internet activities, perform installations, provide high level network administration, engineering and some CATV customer service functions. This entity would operate under an agreement with TPU - similar to the current ISP contracts.

In addition to allowing the ISPs to function as payment and service centers, for their respective CATV customers,<sup>65</sup> another significant change would be expanding the ISPs responsibility for CATV support. Customers that do not subscribe to Internet service and have no ISP relationship would continue to receive direct support from the new non-profit entity; additionally, the Click! customer service center would remain in the TPU lobby. This is an amazing location for marketing the Click! products to the ratepayers. Most of them are Comcast customers and have never heard of Click!. The lobby presence is essential for Click! and that cannot change.

Since the ISPs and Click!, in most cases, have a mutual relationship with their shared Internet-CATV customers, any strategy to transfer away the CATV business and customers from TPU must be sensitive to the current non-disclosure agreements in the ISP contracts - in particular the private ISPs’ customer lists and the details of those valuable relationships. The ISPs have worked for many years to acquire these mutual customers and it would be unfair, illegal and harmful for Click! to hand over one ISP’s CATV customers to another, a competitor, ISP.

Advanced Stream, for example, has spent 20 years building up its customer base - a mutual customers base - with Click! as a partner. Those shared customers are valuable assets that belong, partially, to Advanced Stream and the other respective ISPs. Putting one ISP’s customers in the hands of a competitor would be unfair; therefore, our solution places them into a non-profit entity that would protect the privacy and confidentiality of these customer relationships.

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<sup>65</sup> Essentially a franchise, licensing or joint venture type arrangement in support of the Click! brand.

As future ISPs join the network, the newly created Click! non-profit entity would continue managing services on the network - much as Click! does now. This ensures the continued confidentiality of the mutual customer information - thereby protecting the ISPs valuable customer lists.<sup>66</sup>

Nevertheless, Since the ISPs have had a good run, with 20 years of success, operating on Click! Network, it seems reasonable to seek their support in event such a “worst case” transition is required.

Advanced Stream feels this “Pivot Plan” would be a way for the ISPs to “give back” to the community -by stepping in to “save the day” in the event of an emergency.

In this spirit, of “giving back”, the ISPs would agree to fund the creation of this 501 (c) non-profit entity - which would license the Click! CATV brand and purchase the existing CATV assets from TPU at book value<sup>67</sup> and enter into a operating agreement with TPU for the plant and network. This agreement could be similar to that by which the ISP partners currently operate under. We have provided a flowchart in Exhibit A that depicts the arrangement.

This new non-profit entity would hire most of the current Click! Staff - with current pay rates, contracts and accrued benefits intact. This would include all staff associated with Technical Operations, Service Installations, Network Operations, HFC construction and Engineering, Network Service Assurance would be mostly unaffected.

Some reduction in management, sales and marketing personnel would be certainly possible.

Since the "All In" proposal would no longer be on the table, and promoting the CATV product should no longer be a priority<sup>68</sup>, personnel assigned to those efforts could be reassigned to other areas of the utility. The jobs affected would include the current General Manager position (job code 551100) and most of the Sales and Marketing roles (job codes 552200).

Advanced Stream is willing to carry out, alone if necessary, the facilitation of this type of transition; hopefully, the other ISP, Rainier Connect, would similarly support our proposal for a shared solution - after all, the ISPs have collaborated successfully in the past -to deliver solutions at key moments in Click!’s evolution. A notable example is the original “Plan B”, where the ISPs invested their resources to capture 6,000 new customers by agreement.

### 8.3 Honoring The Terms Of The Contract With IBEW Local 483

Advanced Stream’s “Pivot Plan” proposal would include honoring the terms of the contract with IBEW Local 483, thereby insuring Click! staff’s benefits and contracts are kept intact. Advanced Stream would also work with TPU on a transition path to make sure that all the personnel’s benefits and contract terms are accurately transferred and that a seamless relocation plan is created for all of affected Click! employees.

Finally, Advanced Stream, or the ISPs jointly,<sup>69</sup> would agree to provide immediate funding for the costs associated with needed CATV upgrades - such as implementing a switched IPTV platform. Any

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<sup>66</sup> Since the ISPs and Click!, in most cases, have a shared a relationship with these common customers, any transfer of the CATV customers must be sensitive to the current non-disclosure elements in the ISP contracts, in particular the private ISP customer lists and details of those valuable relationships. The ISPs have worked for many years to acquire these mutual customers and it would be unfair for Click! to hand over their CATV customers to just one of the ISPs - thereby harming the other ISP.

<sup>67</sup> Including the set top boxes and other CPE assets.

<sup>68</sup> CATV is no longer a growth market and it makes less sense to continue investing in expanding and marketing this product.

<sup>69</sup> We would propose sharing the costs, on a prorata basis.

profits that accumulate from CATV operations would remain in the non-profit entity and be used for future network expansion, upgrades, maintenance and funding employee benefits.

This alternative preserves the benefits Click! has brought to our community while maximizing TPU ratepayer's investment in this \$200 million asset.

#### 8.4 The City Can Help Reduce Risks

One way that the City policymakers can reduce risk, and protect the Click! brand, is by being proactive and strongly supporting the existing public-private partnership model. This is accomplished by renewing the ISPs' contracts. At this important moment in Click!'s history, such support and certainty is essential. It will give confidence to our customers, prospective clients, and the employees of both Click! and the ISP partners.

Policymakers can also provide certainty, by strongly supporting Advanced Stream's strategy of "Plan B 2.0". Doing otherwise risks delaying implementation of Click!'s roll out of gigabit service -resulting in a huge lost opportunity of winning customers that could easily be acquired with a first mover advantage. Even worse, if Comcast offers gigabit first, then Click! could suffer an exodus of customers.

#### 9. Schedule - Gigabit in 90 days.

Once a "Plan B 2.0" strategy is approved, and the ISP contracts are renewed, the ISPs can get to work immediately and begin adding the proposed 234 customer per month.<sup>70</sup> We can kick off the program with a "20th Anniversary" celebration and grass roots membership drive.

Rolling out SIPV will take an additional 90 days. Once completed, this frees up the bandwidth that allows Click! to bond channels needed for achieving Gigabit speeds under the current DOCSIS 3.0 plant.<sup>71</sup>

#### 10. Maintenance

Under our "Plan B 2.0" proposal, Click! would continue to maintain the network and the CATV system, while the ISPs would continue to maintain the cable modems and other Internet related customer premise equipment.

#### 11. Financing, Funding, and Payments

Under "Plan B 2.0" there are no drastic changes, the ISPs and MSAs will continue making their monthly payments, which currently total \$810,000 a month, to Click! for wholesale Internet and broadband services. The payments are based on the number of subscribers - according to the service level pricing provided by the ISP and MSA contracts. These payments would increase under the "Plan B 2.0" proposal, given the proposed price increase and added customer counts. The amounts are also subject to increases and adjustments, under the terms of the ISP and MSA contracts.

Since these contracts are already in place, they would just need to be renewed for the usual 3 year term that has historically served us well. There would be no delay in implementing this strategy.<sup>72</sup>

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<sup>70</sup> This strategy is similar to the Plan-B from 2012 and will add 9,000 customers over the next 4 years.

<sup>71</sup> DOCSIS 3.1 requires the Harmonic or Cisco upgrade. We can still get Gig service by bonding more channels under 3.0

<sup>72</sup> The Contracts have always automatically renewed for 3 years

To assist with the implementation of DOCSIS 3.1 and SIPV, Advanced Stream is willing to provide an Interest free loan, if needed, to fund these improvements. This loan would be retired in exchange for future services billed under the ISP contract.

In the event of a worst case scenario and the "Pivot Plan" is required, Advanced Stream would provide funds for the formation of the non-profit entity to continue running the CATV, broadband and wholesale Internet business. These funds would be used to purchase, from TPU, the assets associated with Click! -such as the CPE equipment, and other assets, required to carry on the business.

Advanced Stream requires no outside financing, or other sources of capital, to facilitate the expansion of the partnership or implementation of our proposal.

Advanced Stream has outlined, in section 8.1, its proposal for funding network expansion, equipment refreshes and customer expansion. No financing will be required and no service payments from the City are needed.

Our proposal would continue Advanced Stream's "low price guarantee" strategy - with current subscriber pricing, or lower, to be maintained. Current pricing is available on our website.<sup>73</sup> When Gigabit speeds become available, we propose offering that service at \$75 a month.

Advanced Stream has demonstrated its ability to execute grass roots, social media charged, highly effective customer acquisition strategies. From knocking on doors to shaking signs, Advanced Stream is highly visible in the community during customer acquisition campaigns. Advanced Stream also employs direct marketing, via postal mailers and inserts in the Tacoma Public Utility billing statements. We leverage our existing customer base, by offering them financial incentives (finder fees) for referring new customers. These practices, and others would form the basis of our marketing strategy.

Click! has approximately a 15% market share of Internet subscribers. Our sales objectives for Internet customers would be to add net 2,808 new customers per year. So the first year we would increase the customer base by 2,808 and 5,616 by the second year and 8,424 by year three.

If we begin now, Click!'s market share would be 16.5%<sup>74</sup> in June of 2019, 18% by June of 2020 and 19.5% by June 2021.

Past performance has demonstrated Advanced Stream's ability to aggressively acquire customers and achieve the proposed increases in market share and take rate.

We have provided a flowchart, in Exhibit A, that depicts the flow of funds.

## **12. Services - Switched IPTV and Gigabit Now!**

Plan B 2.0 will allow the retail ISP partners to continue providing Internet, phone, hosting and email services, while Click! staff can continue to serve their MSA customers while completing their well organized, and partially implemented, roll out of Gigabit speed services - one of the most important goals for Click!

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<sup>73</sup> Residential pricing is available: <http://www.advancedstream.com/content/residential>

Commercial pricing is available: <http://www.advancedstream.com/content/commercial>

<sup>74</sup> As of May 2015 Click! Had a 15% market share of Internet.

Staying current with the latest technological developments is imperative. Moving Click! to IPTV and delivering Gigabit service to Tacoma will lead to a dramatic addition of customers.<sup>75</sup>

Thanks to recent developments in the DOCSIS standards, distributed architecture, and specifically Remote PHY (R-PHY), proposals from vendors such as Cisco and Harmonic<sup>76</sup>, now show that fully deploying Gigabit over Click! will cost under \$1.2 million<sup>77</sup>.

With a state of the art DOCSIS 3.1 capable platform, Click! is in the right place at the right time.

Through Click!'s recent RFP for Software Based CMTS, respondents have shown new technology allows a surprisingly inexpensive path to symmetrical Gigabit speeds for Click! Click! Can roll out Gigabit service for under \$1.5 million<sup>78</sup>.

To meet the soaring demand for bandwidth, R-PHY<sup>79</sup> removes the physical layer (PHY) of a traditional cable headend CMTS or CCAP and pushes it to the network's fiber nodes that connect to the cable modem at the customer's site<sup>80</sup>.

For the Harmonic solution<sup>81</sup> the net price is just \$1.1 million - after a \$268,965 buy back discount for Click!'s CBR8 Cisco router<sup>82</sup>. While the Cisco solution would cost just \$1 million,<sup>83</sup> after a \$200K buyback credit. There is a licensing cost going forward, under Cisco's Infinite Broadband Unlocked (IBU) Licensing Program that allows the operator to deploy as much DOCSIS 3.0 / 3.1 downstream and upstream spectrum as they choose, but only pay a \$1.10 monthly fee based on the number of subscribers that the operator has on their system<sup>84</sup>.

Significant deployments of this new technology, with distributed architecture and specifically Remote PHY (R-PHY), are now happening around the world<sup>85</sup> and the current ISP partners are willing to support this effort with time and resources<sup>86</sup>.

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<sup>75</sup> Click! has always experienced growth in customers as new, higher speed, packages are introduced.

<sup>76</sup> Harmonic's CableOS CCAP solution, Submitted by Mega Hertz LLC has no licensing cost; but, is not "standards based". It provides a software-based CMTS running on off-the shelf 1-RU servers. It is an end-to-end Remote PHY system with high RF port density, CableOS easily enables the migration to multi-gigabit broadband with DOCSIS 3.1

<sup>77</sup> Much less than the \$5 to \$ 10 million estimates that were presented two years ago.

<sup>78</sup> Both the Cisco solution and Harmonic solution estimate DOCSIS 3.1 solutions, that deliver Gigabit, can be fully enabled for less the \$1.5 million.

<sup>79</sup> RPHY takes the QAM modulation/demodulation portion of the CMTS and separates it to a location outside of the CMTS. This function will now be handled directly in an HFC node in the field or a "shelf" type unit located in a hub or cabinet. The connection between the CMTS and the Remote PHY Device (RPD) is traditional Ethernet.

<sup>80</sup> <https://blogs.cisco.com/sp/putting-the-why-in-remote-phy>

<sup>81</sup> The Harmonic solution is not "standards based" -according to CCI (a competitive bidder on this RFP for Software Based CMTS Specification No. PC17-0454F <https://www.harmonicinc.com/solutions/software-based-ccap/>)

<sup>82</sup> From Harmonic's Jan 2018 Proposal: "Harmonic will buy back the CBR8 -The buyback will be issued as a discount from total price, in an amount of \$268,965.52.

<sup>83</sup> Click!'s CMTS is a Cisco based. CCI Systems, Inc is proposing the configuration and activation of Remote PHY CMTS Network for Click! Cisco has recently demonstrated full duplex DOCSIS 3.1 architecture. They are proposing a gigabit solution for \$1 million with a \$1.10 monthly subscription fee for licensing.

<sup>84</sup> The \$1.10 per user monthly subscription fee is billed quarterly.

<sup>85</sup> MultiChannel News FEB 14, 2018 "Com Hem, a Sweden-based operator that serves about 1.5 million customers, is deploying CableOS - the operator's lab unit is testing symmetrical speeds of 1.2 Gbps in Stockholm using DOCSIS 3.1" <https://www.multichannel.com/news/harmonic-ids-real-deployment-its-virtual-ccap-418128>

<sup>86</sup> Additional staffing is often required, to manage customer notifications, for planned outages that occur during upgrades. The ISPs have traditionally performed this important function. The ISPs can cover the costs for the ongoing licensing, if the Cisco solution is selected (estimated to be \$290K per year).

A switched IPTV solution allows a full range of advanced digital video services – all without significant CAPEX, OPEX. This upgrade is estimated to cost \$415,568<sup>87</sup> and is essential for freeing up the channels needed for future broadband growth.<sup>88</sup> The move to SWIP will be seamless, from a customer perspective, since the new system is compatible with the current set top boxes and TiVo equipment.

Switched IP Video (SIPV) will enable Click! to quickly and inexpensively free up as many as 50 or more video QAM (or EIA) channels, making them immediately available for DOCSIS 3.0, 3.1 and FULL DUPLEX expansion.

## 12.1 FTTH program

Staying relevant, with cutting edge technology, is essential for Click!'s long term success. Click! has always been updated and remained a competitive force in the market. Currently, Click! is rolling out cutting edge technology with a recent, successfully completed, FTTH pilot project in a new subdivision (The Knolls) consisting of 165 homes in University Place.

Click! is currently in the process of completing the integration of the Calix AXOS platform with existing back office systems, conducting staff training, and developing sales and marketing plans. Marketing of FTTH service will begin once these activities have been completed.

## 12.2 Cable Television And Increasing Revenues

Providing a retail CATV product makes the platform “sticky” - supporting retention of very profitable wholesale ISP customer. Since the CATV product reduces customer churn, these products go hand in hand.

With 22,600 ISP and 16,010 CATV accounts, more than 70% are Cable TV customers<sup>89</sup>. If Click! were to take the drastic step of shutting down, or exiting the CATV business, those customers would be pushed into the hands of Comcast.

Generally, when a customer moves their CATV service to another provider they also bundle the Internet service; so, by exiting the CATV business Click! would lose both the Cable TV customer and the lucrative wholesale ISP customer.

These wholesale ISP customers are very profitable for Click!<sup>90</sup> -contributing about \$6.5 million in net profit<sup>91</sup> -per year. Exiting the CATV business and losing these customers would be a very damaging financial mistake for Click!.

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<sup>87</sup> Turn key cost as proposed to Click! by Adara. Includes the Digital content manager SIPV headend equipment, RF gateway, Motorola NE 2500 Bulk Encryptor, with MPTS licence, Virtual Services Resource Manager, and all configuration and setup

<sup>88</sup> Description of SIPV by Adara Technologies : <http://www.adara-tech.com>  
[http://www.adara-tech.com/sites/default/files/docs/resources/adara\\_sipv\\_white\\_paper\\_final\\_june24\\_2017.pdf](http://www.adara-tech.com/sites/default/files/docs/resources/adara_sipv_white_paper_final_june24_2017.pdf)

<sup>89</sup> As of Jan 2018, there were 16,010 total Cable TV Customers -with 15,455 Residential and 555 Commercial

<sup>90</sup> The total marginal cost for an ISP customer is approximately \$1.40 and the ARPU (average revenue per user) revenue is \$24, so the wholesale ISP customer has a monthly marginal contribution of \$22.60. This is a 94% profit margin. It should be noted that the cost for the gateway is essentially a fixed cost, so additional ISP revenue has a 100% profit margin.

<sup>91</sup> That is gross wholesale ISP revenue minus the fixed costs for the gateway.

## 12.3 Switched IP Video

The need for more bandwidth will require moving Click! CATV to a switched IPTV technology and Advanced Stream is willing to provide the capital, as an interest free loan, for this upgrade<sup>92</sup>.

Switched IP Video, or SIPV, will allow Click! to inexpensively free up as many as 50 or more video QAM channels for DOCSIS 3.1 and FULL DUPLEX expansion. With just 12 to 24 QAMs, SIPV delivers unlimited video channels offering of SD, HD and UHD/4K programming.

## 13. Pricing

Advanced Stream has always provided transparency and a “low price guarantee”. What you see is what you get. There are no confusing taxes or misleading “surcharges” on our billing. No hidden charges or other shenanigans typically found in the billing practices of the big ISPs.

Advanced Stream does provide lower, introductory, prices to new customers; but, unlike the large ISPs, there is no contract or “early termination” penalty for cancelling the service.

Advanced Stream is committed to bringing the lowest prices for Internet access to our community and to bridging the digital divide for low-income individuals. Under a “Plan B 2.0” strategy, Advanced Stream will donate at least 200 computers per year to qualifying families, while expanding its \$14.95 “Digital Inclusion” program<sup>93</sup>.

Advanced Stream will also support Click! efforts to make Tacoma a Gig City - delivering a Gigabit product for \$75.95 a month.

## 14. Equitable Access to Services - Digital Equity Action Committee

Click! serves the entire community. Over the past 20 years, Click! has taken an equitable approach to constructing the Network. It has been built in a way that makes it available to residents of Tacoma without consideration of geographic, demographic, or socioeconomic status.

The key to equitable access is ensuring the financial sustainability of Click!’s business model. Achieving financial sustainability requires a business plan that incorporates strategies to expand the usage of Click!.

This can be accomplished by redoubling efforts to acquire customers under the current open access business model; and, by collaborating with local governments and public stakeholders.

Tacoma could benefit by following Seattle’s lead in the formation of a Digital Equity Action Committee<sup>94</sup>. This committee would provide guidance and craft community policies for sustainable equitable access.

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<sup>92</sup> Loan to be retired from amounts due under the ISP contracts

<sup>93</sup> [Advanced Stream’s Digital Inclusion Package](https://www.advancedstream.com/digital-inclusion) <https://www.advancedstream.com/digital-inclusion>

<sup>94</sup> Statement from City of Seattle: “Digital equity seeks to ensure all residents and neighborhoods have the information technology capacity needed for civic and cultural participation, employment, lifelong learning, and access to essential services. Working toward digital equity involves intentional strategies and investments to reduce and eliminate historical barriers to access and use technology”  
<https://www.seattle.gov/tech/initiatives/digital-equity>

## 14.1 Digital Equity Action Committee -Community Broadband Roadmap

Click! has made significant accomplishments, bringing lower rates and better service for Tacoma<sup>95</sup>; however, more can be accomplished.

With the establishment of a “Digital Equity Action Committee”, Tacoma could coordinate efforts for developing a “Community Broadband Roadmap” for digital inclusion. This committee could follow strategies outlined by ConnectHome USA<sup>96</sup>.

This “Roadmap” would contain Tacoma’s strategic vision and goals for digital inclusion. By locating and identifying existing community resources, the “Roadmap” will help public officials, planners, citizen groups and other stakeholders achieve the goal of getting residents connected.

Last month the City of Pittsburgh and the Housing Authority of the City of Pittsburgh announced their success; *“The ConnectHome USA platform catalyzes collaboration towards a bigger vision for the city and county around digital inclusion. The initiative provides a framework for building a more substantial plan for digital inclusion in addition to providing resources through local and national partnerships and mentorship from cities leading in connecting residents. to close divide in HUD housing”*<sup>97</sup>

This important issue cannot wait! With a lack of access to the Internet, and the equipment and skills necessary to use it, disadvantaged families are becoming increasingly isolated from our digital society.<sup>98</sup>

Under the current business model, the ISP partners can be enlisted to deploy their resources and knowledge in bringing solutions for digital equity to Tacoma.

## 14.2 Equitable Internet Access and Computers Too

With a Digital Equity Action Committee, and a Community Broadband Roadmap, we can coordinate efforts to distribute computers in support of digital inclusion efforts. Click!’s ISP partners are willing to donate computers and help organize these efforts.<sup>99</sup> It is estimated that over 500 computers per year could be given to qualifying families by such a program.<sup>100</sup>

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<sup>95</sup> A [recent study by the Berkman Klein Center](#) for Internet and Society at Harvard University looked at the prices charged by community-owned broadband networks and found that in 23 out of 27 networks the municipal supported offering had the lowest price in the market for broadband.

<sup>96</sup> ConnectHome was a pilot, launched by the White House and HUD in 2015, to narrow the digital divide for K-12 families living in public housing. ConnectHomeUSA builds upon the success of the ConnectHome pilot by expanding to reach new communities with digital inclusion best practices and resources provided by numerous stakeholders to help their residents get connected. Under the leadership of national nonprofit EveryoneOn, ConnectHomeUSA aims to reach 100 new communities by 2020 with a potential impact of connecting 350,000 residents.

<sup>97</sup> On March 13, 2018 Allegheny County and the Allegheny County Housing Authority and the City of Pittsburgh and the Housing Authority of the City of Pittsburgh have announced their acceptance into the ConnectHome USA Program. <http://www.sopghreporter.com/story/2018/03/13/news/city-county-accepted-into-connecthome-digital-inclusion-program-to-close-divide-in-hud-housing/18630.html>

<sup>98</sup> From <https://connecthomeusa.org> “As of 2016, 46% of families living in public housing do not have high-speed Internet at home or rely solely on smartphones. These Americans are missing out on the high-value educational, economic, and social impact of the Internet, and being left behind. Kids on the wrong side of the “homework gap” lack the tools they need to do their coursework outside of school.”

<sup>99</sup> Advanced Stream has led such programs in the past, where computers are loaned or given to families that need them.

<sup>100</sup> Advanced Stream would be willing to donate 200 computers per year. Rainier Connect and Net Venture have indicated they would likely match that number. Chromebox and notebooks can be provided for about \$150 each

Local businesses and community organizations—such as universities, schools, government agencies, libraries, hospitals, nonprofits, foundations, and even housing agencies—regularly upgrade and replace their computers before the end of their useful life. Rather than go to waste, these computers can be refurbished and updated for reuse.<sup>101</sup> Refurbished devices can then be made available to housing agencies and assisted residents for free or reduced cost.

With a program to train youth to refurbish these devices, we can impart valuable job skills in the process. For example, Kansas City pays and trains youth residents to refurbish computers and offers “digital literacy” classes through a summer youth employment program.

Advanced Stream has coordinated similar programs in the past and is prepared to immediately re-activate those efforts should a “Plan B 2.0” strategy be adopted by City Council -with the Click!/ISP contracts being renewed.

### **14.3 Bringing Competitive Broadband To the TPU’s Service Areas Not Currently Served By Click!**

The future expansion of the network will likely employ FTTH technology. For example Click! recently rolled out such FTTH technology in a FTTH pilot project in at The Knolls -a new subdivision consisting of 165 homes in University Place.

Additionally, Click! is currently in the process of completing the integration of the Calix AXOS platform with existing back office systems, conducting staff training, and developing sales and marketing plans. Marketing of FTTH service will begin once these activities have been completed.

In the very far reaches of Pierce County, like areas in the southern footprint of TPU’s service area, such as Fredrickson, where running fiber is too expensive, Click! can inexpensively deploy hybrid point-to-multipoint technology, using a combination of frequencies including WiFi and 3.65 GHz. This is done by placing transmitters on towers and beaming signals to dishes at the customer location. This is now becoming more and more common around the world.

As TPU Consultant, Doug Dawson, mentioned recently, *“A hybrid model makes a huge difference in financial performance. I’ve now seen an engineering comparison of the costs of all-fiber and a hybrid network in half a dozen counties and the costs for building a hybrid network are in the range of 20% – 25% of the cost of building fiber to everybody. That cost reductions can result in a business model with a healthy return that creates significant positive cash over time”*.<sup>102</sup>

## **15. Affordable Access**

Click! can be the foundation for curing Tacoma’s digital divide. By embracing the private ISP partners, and leveraging their marketing skills and entrepreneurial expertise, Click! can grow faster and more efficiently.

The ISPs, as private entities, are not encumbered by layers of counterproductive bureaucracy that can impede the swift action required when accepting, or making donations. They are not burdened by concerns about “gifting public funds” etc. Consequently, these ISP are well suited to administer a computer donation, refurbishing, and redistribution program. These important digital equity goals are best accomplished under the current Click! business model.

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<sup>101</sup> Advanced Stream is prepared to announce such a program, in conjunction with The Boys and Girls Club of South Puget Sound, to provide computers to qualified families.

<sup>102</sup> CCG Doug Dawson <https://potsandpansbyccg.com/tag/hybrid-broadband-model/>

The greater Click!'s profits, the more that can be done to lower prices in support of digital inclusion efforts. There are many potential opportunities for expanding commercial activities and raising additional revenue through Click!. These will be discussed in more detail under section 3.8, "Financial Stability".

Under the current model, Click! offers discounted residential Cable TV services to low income customers.<sup>103</sup> Advanced Stream has its \$14.95 Digital Inclusion package for qualified low-income customers.

Click! can providing the ISPs with a wholesale "Digital Inclusion" package. The ISPs would deliver these services to the end users, without a profit, at the wholesale cost<sup>104</sup>.

Significant resources are expended in delivering retail ISP services to end users. Facilitating monthly payments, coordination Installations, providing customer support, expert troubleshooting, and enforcing acceptable usage policies are some examples of the tasks performed by the ISPs.

Since the ISP partners currently perform these functions, they are in the best position to perform these functions in support of Tacoma's digital inclusion efforts.

### 15.1 Discounted Internet Programs

While the current Click! business model supports low rates, additional efforts can be deployed to bridge the digital divide. Internet rates in Tacoma<sup>105</sup> are almost 50% less than in Seattle, due to the competition that Click brings to the market<sup>106</sup>. Comcast matches the lower rates that Click! Network offers in Tacoma. This competition saves local users an estimated \$20 Million per year.<sup>107</sup>

This is just the beginning of what is possible. There remain significant disparities in internet access and digital literacy skills for those of lower education, low-incomes, seniors, disabled, minorities, and immigrants. The City has significant disadvantaged districts/corridors. City parks could also benefit from low-cost or free wireless access. Coordinated efforts are needed to achieve affordable access to broadband services and to provide needed computers.

With a Digital Equity Action Committee charged with formulating our "Community Broadband Roadmap" for a "Digital Inclusion Program", Click!'s private ISP partners could be contractually obligated to provide and expand their discounted Internet programs. Revenue sharing formulas, to set aside funding for such discounted services could easily be established; similarly, franchise holders, such as Comcast, could also be made to expand the eligibility criteria for its discounted Internet program as part of any future franchise agreement renewal.

### 15.2 "Inclusion Zones" Bring Free or Low-Cost WiFi Service To Prioritized Areas

Under this option, Click! could update the agreements with the wholesale ISP partners and require them to provide some WiFi and cable modem services for free, or at low cost, to prioritized areas, or "inclusion zones", as part of their contracts. Similar requirements which benefit the public, have traditionally been a part of CATV franchises. It would not be difficult to place WiFi requirements on the ISPs.

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<sup>103</sup> Customers that qualify for TPU's Energy Assistance Program also receive discounted CATV services.

<sup>104</sup> The ISPs should not be profiting from customers on this program. It's their turn to "give back" to society -for the 20 years of success that they have enjoyed by operating over Click! Network.

<sup>105</sup> <http://www.advancedstream.com/content/residential>

<sup>106</sup> <https://www.xfinity.com/locations/washington/seattle/internet-service>

<sup>107</sup> Average of \$20 monthly savings going to approximately 100K Cable modem customers in Tacoma area.

Click! would support this effort by providing the backhaul capacity, with aggregation nodes, allowing access to the Internet over the Click! Gateway.

### 15.3 Street Lights and WiFi

For an example of municipal WiFi, see how Plainville Connecticut made free Internet available over their streetlight fixtures. The WiFi service was added to 123 of the 1,424 new energy-efficient LED fixtures installed on all municipal light posts. These high-tech streetlights sip energy, dim by remote control and are also free WiFi hotspots.<sup>108</sup>

### 15.4 Deploying WiFi and the Digital Inclusion Program

With support from its ISP partners, Click! could easily deploy WiFi and other technologies in addressing Tacoma's digital equity and digital inclusion needs. A City run digital inclusion program would identify "digital inclusion areas" -like low-income areas, multi-dwelling public housing facilities and parks. Then these "inclusion zones" would receive public WiFi access, with state of the art technology utilizing Click! Network.

The ISP partners would support this effort by adding wireless access points, to create a wireless local area network (LAN) with a controller that would operate in conjunction with an API authentication system based on the Tacoma Public Library membership database. Essentially anyone with a Tacoma Public Library card and a device would be able to login with those credentials<sup>109</sup>.

As part of their contracts, the retail ISP partners could be required to provide the management, installation, security, support and enforcement of Click! Network's acceptable use policies<sup>110</sup> for this system -at no cost to the City<sup>111</sup>. Additional corporate sponsorship could even play a role in supporting free WiFi services<sup>112</sup>.

## 16. Net Neutrality For All Customers

With Click! remaining in control of the Internet gateway routers, IP address block and DNS servers, a retail ISP partner cannot speed, slow, or block internet content based upon political views, paid prioritization or other businesses interests

With Advanced Stream's "Plan B 2.0" option, there are no changes in Click's ability to set and adhere to net neutrality principles. This supports Tacoma's strong belief in Net Neutrality – that all lawful internet content be equally accessible, regardless of its subject matter or viewpoint.

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<sup>108</sup> Bill Leukhardt "Plainville Streetlights To Provide WiFi, Not Just Light"

<http://www.courant.com/community/plainville/hc-plainville-streetlights-WiFi-0921-20160920-story.html>

<sup>109</sup> What Barcelona has done:

<http://datasmart.ash.harvard.edu/news/article/how-smart-city-barcelona-brought-the-internet-of-things-to-life-789>

<sup>110</sup> Click! Network Use Policy <https://www.clickcabletv.com/about/legal-notice/internet-acceptable-use-policy/>

<sup>111</sup> For example, 10% of ISP gross sales could be placed in a non-profit joint venture entity that the ISPs jointly manage and operate to provide this service.

<sup>112</sup> TAYLOR SOPER, GeekWire "Google donates \$344K for free WiFi in Seattle"

<https://www.geekwire.com/2016/google-donates-344k-provide-WiFi-seattle-community-centers-affordable-housing-developments>

## 17. Fostering Competition with Open Access

“Plan B 2.0” preserves Tacoma’s tradition of having an open access network. The public-private partnership with the ISPs has been the foundation of Click! success since its inception. Customers benefit from the competition and better service that open access brings to our local market.

This open access model is a proven strategy for winning new customers. The ISPs have demonstrated their ability to bring additional customers when called upon.

### 17.1 The More The Merrier! Opening up our Open Access Network

By building on the successful open access formula, allowing additional qualified ISPs to join the network, prices can be even lower and customer service all the more amazing. Competition between the ISPs demands that. These new ISPs would bring fresh and exciting ideas and resources to Click! They would support Click! marketing efforts and help take additional market share. We must expand Click!’s wholesale ISP and retail Cable TV customer base.

Think of these ISPs as channel partners. Supporting a channel distribution model is a time proven method of building a business. Increasing the number of channel partners (ISPs),<sup>113</sup> is a win-win for Click!. When an ISP partner signs up a customer, most of these new customers also subscribe to CATV services<sup>114</sup>.

Why limit the network to just 2 or 3 ISP providers? Advanced Stream supports an “All Hands On Deck” approach, with more ISPs promoting our municipal Internet service to potential customers.

It’s a numbers game. With more marketing resources being deployed to acquiring customers for Click!, the wholesale Internet customer and CATV base grows even faster.

Profits from these activities can be reinvested to further network expansion and support the community’s important digital equity initiatives.

## 18. Privacy

The Tacoma City Council passed a resolution in 2017 that protects customer privacy in Tacoma. It prevents the private ISP partners from collecting or selling customers’ personal information without written approval.

With “Plan B 2.0” the City, TPU and Click!’s well established policies for protecting customer privacy continue.<sup>115</sup>

TPU employees are always careful when gathering information to provide needed services and in protecting the public’s privacy. Click! carefully follows the requirements of Section 631 of the Cable Communications Policy Act of 1984<sup>116</sup>. Preserving the current business model insures these practices continues.

Given federal rollbacks of net neutrality and internet privacy protections; and, since private telecom companies can now collect and sell their customers’ private online usage information, a “Plan B 2.0”

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<sup>113</sup> There were 22,613 ISP customers and 16,010 CATV customer, in Jan 2018

<sup>114</sup> From Click! 2018 RFIQ Attachment -ISP w/CATV Penetration based on total ISP Subs

<sup>115</sup> CANDICE RUUD, [News Tribune April 2017: ISPs can’t sell your personal info](http://www.thenewtribune.com/news/politics-government/article145363804.html)  
<http://www.thenewtribune.com/news/politics-government/article145363804.html>

<sup>116</sup> Click! Customer Privacy Notice <https://www.clickcabletv.com/about/legal-notices/catv-subscriber-agreement/>

strategy of municipal ownership and operation of Internet services protects customers' constitutional rights to free speech and privacy.

To counteract these federal rollbacks of net neutrality and internet privacy, the ACLU recently asked local governments to consider taking a direct role in providing broadband to residents.<sup>117</sup>

Tacoma was a pioneer in the effort to provide municipal access to the Internet. Tacoma was the first municipality to take such action and actually cast off the chains of monopoly.

If the ACLU is recommending other cities follow this path now, we cannot make drastic changes to Click! Network's business model and give up all that has been accomplished. It would be a huge embarrassment for our community if policy makers were to do so.

## 19. Local Participation - Promoting Economic Development And Educational Opportunities

Click! Is an amazing asset that holds tremendous untapped potential for our community. How can Tacoma policymakers seriously consider abandoning Click! now? Especially when so many other municipalities around the country are jumping headlong into developing their own broadband solutions and trying to provide these essential services to their citizens at reduced cost.

### 19.1 Underutilized Dark Fiber -Additional Revenue from Local Governments

Click!'s 180-count fiber network backbone is a broadband superhighway -with tremendous room for expansion and increased utilization. Click! currently utilizes just 12 strands, and more than one-half of the network is unused dark fiber -just waiting to be deployed for our community! Also, Click! Also holds tremendous potential for smart city functionality, such as added public safety services, intelligent traffic and parking systems; and, the many not yet imagined smart city functions - that future developments (especially with the Internet of Things) is sure to bring.

### 19.2 Expanding Usage of I-NET

By expanding usage of I-NET, Click! can gain support from other local governments and public stakeholders - to help by sharing the costs for operating and maintaining this essential community asset.

The City of University Place, for example, could be invited to support Click! by bringing its schools and government offices onto I-NET. When Click! was built, those drops were put in place, so the connections already exist and are ready to be lit. Pierce County could also benefit from utilizing Click! to support their efforts - especially in the southern part of TPU's footprint.

Pierce County recently commissioned a study<sup>118</sup> to evaluate the lack of broadband connectivity in these areas. This study will soon *"provide recommendations on how to expand broadband access in the County with a focus on rural areas such as Frederickson"*<sup>119</sup>

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<sup>117</sup> Jay Stanley, Senior Policy Analyst, ACLU MARCH 30, 2018: [Public Broadband Can Help Protect the Open Internet and Close the Digital Divide](#)

<sup>118</sup> 2018 Contract for Pierce County Broadband Study:  
<http://stickwithclick.com/images/Contract-for-Pierce-County-Broadband-Study-2018.pdf>

<sup>119</sup> Pierce County: Evaluation of Broadband Connectivity and Access in Pierce County  
<http://stickwithclick.com/images/Evaluation-of-Broadband-Connectivity-and-Access-in-Pierce-County.pdf>

Click! can also benefit by securing other I-NET users within its service area. There are many libraries (all the Pierce County Library System), many K-12 schools and higher education institutions that could utilize the surplus TPU fiber to lower their telecommunications costs.

Click! would benefit from the additional revenue these sources could provide. That revenue would offset the costs for maintaining and operating the telecommunications plant.

Advanced Stream's founder, the author of this report, has close ties to members on the Pierce County Council ; and, is in close contact with them about their goals for improving broadband access.

### 19.3 Gigabit Speeds Bring Economic Growth

Click! Management has plans for delivering symmetrical Gigabit speeds -both over the current DOCSIS platform<sup>120</sup> and over the FTTH roll out<sup>121</sup>. The cost estimates for deploying Gigabit service over Click! have recently been drastically reduced. Deploying Gigabit will result in tremendous economic growth

As reported by Muni NetWorks, these investments improve the productivity of existing businesses and attract new businesses to communities: *"They also create millions of dollars in savings that can be reinvested into local economies. networks improve the productivity of existing businesses and attract new businesses to communities, allow individuals to work from home more effectively, support advanced healthcare and security systems, strengthen local housing markets, and represent long term social investments in the form of better-connected schools and libraries. They also create millions of dollars in savings that can be reinvested into local economies"*.<sup>122</sup>

### 19.4 Becoming a "Gig City"

With the launch of Click! In 1997, Tacoma began promoting itself as "America's most wired city". 20 years ago City policymakers were ahead of their time. They had a clear "vision" of the future. They knew that broadband Internet would become an essential public utility - that broadband and ALL of its benefits could be harnessed and used to improve the lives of the citizens of Tacoma.

Many significant economic development events occurred at the time of Click!'s creation. During this period the University of Washington located its campus in Tacoma. Similarly, seeing broadband speeds, that were unavailable in other communities, many companies relocated their businesses to Tacoma.

The creation and expansion of Click! Network has supported Tacoma's amazing progress. By upgrading Click! now, to become a "Gig City" offering gigabit internet service, Tacoma can bring economic development and educational opportunities to our community for years to come.

The Advanced Stream alternative, of "Plan B 2.0" and becoming a "Gig City", is the best way to support, not only Tacoma's economic development and educational goals, but all 12 of the most important policy goals outlined in this proposal.

Tacoma has the history; hopefully, we have the visionary leaders of today, thinking of tomorrow, who understand that redoubling our efforts and "Plan B 2.0" best serves Tacoma's citizens.

The future of Click! Network is in your hands.

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<sup>120</sup> Breakthroughs in DOCSIS 3.1 now allow for symmetrical gigabit speeds.

<sup>121</sup> Click! has rolled out FTTH in greenfield areas and future expansion will utilize this technology.

<sup>122</sup> muninetworks.org <https://muninetworks.org/content/municipal-networks-and-economic-development>

## 20. Conclusion

Since Click!'s operational statements are a "disputed issue", wouldn't it be prudent to get the facts straight before throwing in the towel and allowing private sector interest to acquire this precious community asset thru this RFI/Q process?

Even if the City's attorneys are right,<sup>123</sup> and the Courts ultimately determine Click!'s business model is a proper, prudent and legal activity, much time will have been lost. Time is not our friend in this fast moving industry. Click! staff and the private sector ISP partners should immediately turn our attention towards building upon Click!'s success and celebrating Click!'s 20<sup>th</sup> anniversary in conjunction with a membership drive.<sup>124</sup> We must not delay moving forward together in achieving the 12 policy goals.

Time is of the essence in such fast moving technological endeavors. There is a tremendous first mover advantage for whoever introduces gigabit service in the Tacoma market.

Click is ready to go with gigabit now - having already installed the CBR-8 router in the NW section of the network. Click! could turn up gigabit service tomorrow in that area. What are we waiting for? Click! has an opportunity to scoop the competition with a Gigabit Service announcement.

In the time required to settle the Court case, Advanced Stream's Plan B 2.0 could render any issue of losses moot - by making Click! so profitable that there would be no question of ratepayer funds being used by the operation.

We hope policymakers will recognise the wisdom of our proposal and quickly put the ISP partners back to work. Your ISPs stand ready to implement the win-win solution that Plan B 2.0 represents.

## 21. References

A few entities having long term business relationships with Advanced Stream. More can be provided on request.

1. Click! (City of Tacoma and TPU).  
3628 S 35th St,  
Tacoma, WA 98409

2. Momentum Telecom Inc  
29363 Network Place  
Chicago, IL 60673-1293

3. Arris Solutions, Inc.  
3871 Lakefield Drive  
Suwanee, GA 30042

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<sup>123</sup> <http://stickwithclick.com/images/City-of-Tacomans-Response-to-Plaintiffs-Mo-for-Partial-SJ-50739118.pdf>

<sup>124</sup> July 2018 Will mark the 20<sup>th</sup> Anniversary of Click! installing its first customer.

## 22. Responsibility Matrix

City of Tacoma | RFI/Q for Click! Partnership Arrangement | March 2018

### Questions / Matrix to Be Completed

Do you propose to act as a retail internet service provider (ISP)? YES

Do you propose to allow multiple retail internet service providers (ISP)? YES

Do you propose to lease the HFC network from the City? NO

Functional Area	Tasks/ Responsibilities	Operational Responsibility				Funding Responsibility			
		City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications	City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications
Debt Service Payments	New debt for customer expansion and network upgrade		X				X		
Security for Financing	New debt for customer expansion and network upgrade		X				X		
Ownership	HFC network (fiber and coaxial) – existing	X	X			X	X		
	HFC electronics – existing	X	X			X	X		
	Customer drop and grounding block – existing	X	X			X	X		
	Entry from grounding block and in-premises wiring – existing	X				X			
	CPE – existing				XX				
	Customer ownership – existing				XX				
	HFC network (fiber and coaxial) – new	X	X			X	X		
	HFC electronics – new/upgrade	X	X			X	X		
	Customer drop and grounding block – new	X	X			X	X		
	Entry from grounding block and in-premises wiring – new	X				X			
CPE – new				X				X	

Functional Area	Tasks/ Responsibilities	Operational Responsibility				Funding Responsibility			
		City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications	City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications
Insurance	Customer ownership – new				X				X
	Outside plant – existing	X	X						
	Drop and grounding block – existing	X	X						
	Network electronics – existing	X	X						
	Entry cable, CPE, and in-premises wiring – existing				X				X
	Outside plant – new	X	X						
	Drop and grounding block – new	X	X						
Replenishment	Network electronics – new	X	X						
	Entry cable, CPE, and in-premises wiring – new				X				X
	CPE				X				X
Taxes	Subscriber electronics				X				X
	Core electronics	X				X			
	USF and other federal tariffs and fees				X				X
	Sales (state, county, municipal)				X				X
Outside Plant	PILOT				X				X
	Other (list)				X				X
	Pole attachments	X	X			X			
	ROW fees (backbone, middle-mile, and last-mile)	X	X						
	ROW fees (drops)	X	X						
	Locates	X	X			X			
	Trouble ticket processing				X				X
HFC maintenance – material	X	X			X				
HFC maintenance – labor	X	X			X				

Functional Area	Tasks/ Responsibilities	Operational Responsibility				Funding Responsibility			
		City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications	City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications
	Strand management	X						X	X
	Inventory maintenance	X			X			X	X
	Real estate for hub sites and equipment in field	X				X			
	Facilities (warehouse, crew, etc.)	X				X			
	NOC for OSP (lease)	X				X			
	Design	X				X			
	Construction oversight	X				X			
	Network engineering – fiber and/or coax (last mile)	X				X			
	Network engineering – fiber and/or coax (backbone and middle mile)	X				X			
	Drop installation (network demarcation to building entry)	X				X			
	Maintain inventory (optical and coaxial network elements)	X				X			
	Network operations center – facilities	X				X			
	Network operations center – staffing 24x7	X				X			
Network Operations	Facilities (staff)	X				X			
	Facilities (warehouse & staging)	X				X			
	Provide DIA	X				X			
	Network engineering-electronics (last mile)	X				X			
	Network engineering-electronics (backbone and middle mile)	X				X			
	In-building wiring	X				X			

Functional Area	Tasks/ Responsibilities	Operational Responsibility				Funding Responsibility			
		City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications	City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications
	Customer installation (on-premises)				XXX				XXX
	Customer activation and provisioning				XXX				XXX
	Maintain inventory (active network elements)				XXX				XXX
	Hardware and support maintenance fees (vendor charges)	XX				XX			
	Contract management (retail ISPs)	XX				XX			
	Contract management (customer)				X				XXX
Customer Service	Billing and invoicing				XXX				XXX
	Bad debt (customer)				XXX				XXX
	Collections				XXX				XXX
	Tier 1 support 24x7 (basic customer issues)				XXX				XXX
	Tier 2 support 24x7 (basic technical support)				XXX				XXX
	Tier 3 support 24x7 (advanced technical support)				XXX				XXX
	Prepare and manage SLAs	XX			Y	XX			X
	Branding	XX				XX			
Marketing				X				XX	
Sales and Marketing	Sales	XX			XX				XX
	Customer acquisition and retention				XX				XX
	Service performance objectives				XX				XX
	Service catalog				XX				XX
	Monitor pricing				XX				XX
	Set pricing (based on contract conditions)				XX				XX
	Develop and manage customer contracts				XX				XX

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Functional Area	Tasks/ Responsibilities	Operational Responsibility				Funding Responsibility			
		City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications	City	Respondent	Retail ISP (if Not Respondent)	Exceptions / Clarifications
	Execute customer contracts								
	Provide subscription records				XXX				XXX
	Provide subscriber invoice and payment status (payments)				XX				XX
Reporting	Provide network status information (for tier 1 support)				X				X
	Provide network status information (for tier 2 support)				X				X
	Provide network status information (for tier 3 support)	X				X			
	Provide with network status (uptime, outages, etc.)				XX				XX
	Provide monthly sales and leads reports				XX				XX

## Responses to Appendix A: Responsibility Matrix Clarifications.

Respondent is uncertain by the Responsibility Matrix's usage of the term "CITY" in the column headings, under Operational and Funding Responsibility - we have assumed it to mean the current municipal entity that operates the Click! Network. Which is TPU, or the operational division, Click! Network. All of our responses to the Responsibility Matrix reflect this assumption.

### Ownership

**CPE – Existing:** Respective ISPs will retain their own Internet customers' equipment and Click! will retain its own CATV customers' equipment. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Customer ownership – existing:** Respective ISPs will retain their own Internet customers and Click! will retain its own CATV customers. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**CPE – New:** ISPs will take ownership of new Internet customers' equipment they sign up. Click! will be responsible for new CATV customers' equipment they sign up. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Customer ownership – new:** ISPs will take ownership of new Internet customers they sign up. Click! will be responsible for new CATV customers they sign up. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

### Insurance

**Entry cable, CPE, and in-premises wiring – existing:** The wholesale ISP partners and Click! will be responsible for insuring their own customers' CPE. Click! will be responsible for insuring Entry cable, and in-premises wiring. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Entry cable, CPE, and in-premises wiring – new:** The wholesale ISP partners and Click! will be responsible for insuring their own customers' CPE. Click! will be responsible for insuring Entry cable, and in-premises wiring. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

### Replenishment

**CPE:** The wholesale ISP partners and Click! will be responsible for replenishing their own customers' CPE. Click! will be responsible for replenishing their own customers' CPE. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Subscriber Electronics:** The wholesale ISP partners and Click! will be responsible for replenishing their own customers' subscriber electronics. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Taxes

**USF and other federal tariffs and fees:** The wholesale ISP partners and Click! will be responsible for paying their own federal taxes and fees. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Sales:** The wholesale ISP partners and Click! will be responsible for paying their own sales tax. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**PILOT:** The wholesale ISP partners and Click! will be responsible for paying their own PILOT. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Other:** The wholesale ISP partners and Click! will be responsible for paying their own taxes. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Outside Plant

**Trouble Ticket processing:** The wholesale ISP partners and Click! will be responsible for their own trouble ticket processing. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Inventory maintenance:** The wholesale ISP partners and Click! Will be responsible for their own inventory management. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Network Operations

**Customer installation (on-premises):** Click! will be responsible for installing the coax or fiber lines to and within the customers' homes, the ISP's will be responsible for installing CPE to connect customer to the Internet. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Customer activation and provisioning:** Click! will be responsible for the provisioning system and the ISPs will be responsible for the activation in the provisioning system. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Maintain inventory (active network elements):** The wholesale ISP partners and Click! will be responsible for their own inventory management. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Contract management (customer):** The wholesale ISP partners and Click! will be responsible for maintaining their own customer's contracts. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Customer Service

**Billing and invoicing:** The wholesale ISP partners and Click! will be responsible for billing and invoicing their own customers. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Bad debt (customer):** The wholesale ISP partners and Click! will be responsible for their own customer's bad debt. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Collections:** The wholesale ISP partners and Click! will be responsible for their own collections. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Tier 1 support 24x7 (basic customer issues):** The wholesale ISP partners and Click! will be responsible for their own Tier 1 support. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Tier 2 support 24x7 (basic customer issues):** The wholesale ISP partners and Click! will be responsible for their own Tier 2 support. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Prepare and manage SLAs:** To the extent it's an Internet related matter, the wholesale ISP or MSA addresses such issues. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Branding:** The wholesale ISP partners and Click! will be responsible for their own branding. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Marketing:** The wholesale ISP partners and Click! will be responsible for their own marketing. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Sales and Marketing

**Sales:** The wholesale ISP partners and Click! will be responsible for their own sales. The ISPs have traditionally promoted the Click! products and brand. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Customer acquisition and retention:** The wholesale ISP partners and Click! will be responsible for their own customer acquisition and retention. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Service Performance Objectives:** The wholesale ISP partners and Click! will be responsible for their own Service Performance Objectives. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Service catalog:** The ISPs and Click! are responsible for their own service catalogs. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Monitor pricing:** To the extent that it relates to Internet service and MSA those entities are responsible for monitoring their own pricing. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Set Pricing (based on contract conditions):** The wholesale ISP partners and Click! will be responsible for their own pricing. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Develop and manage customer contracts:** The wholesale ISP partners and Click! will be responsible for their own customer contracts. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Execute customer contracts:** The wholesale ISP partners and Click! will be responsible for executing their own customer contracts. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Provide Subscription Records:** The wholesale ISP partners and Click! will be responsible for their own subscription records. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Provide subscriber invoice and payment status (payments):** The wholesale ISP partners and Click! will be responsible for their own invoicing and payments. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

## Reporting

**Provide network status information (for tier 1 support):** The wholesale ISP partners and Click! will be responsible for their own network status reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

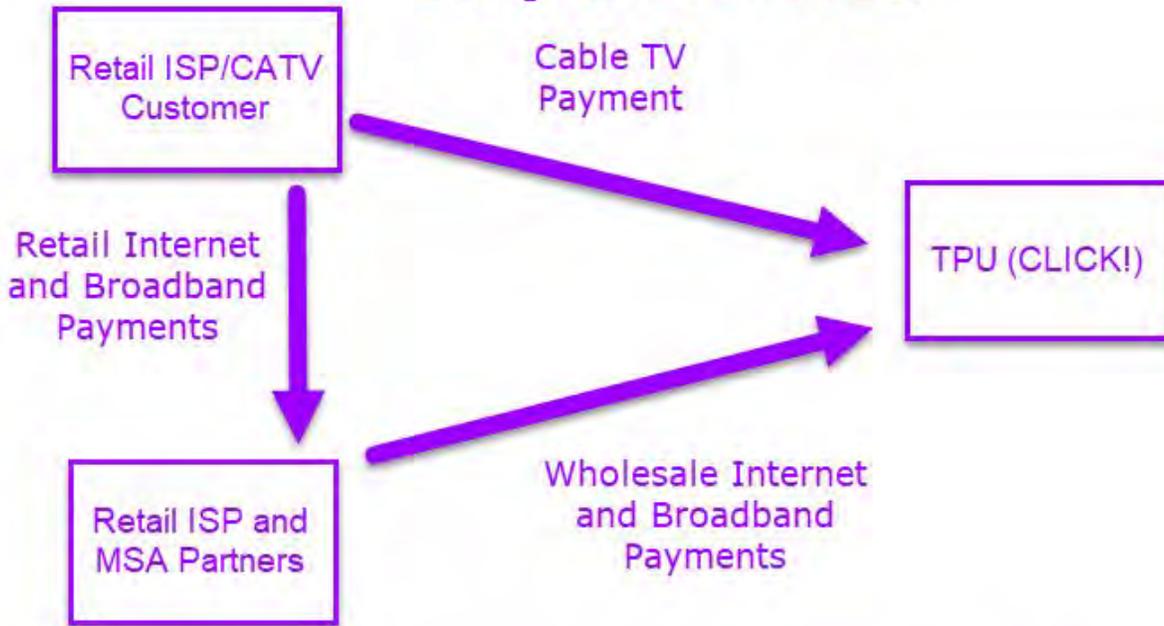
**Provide network status information (for tier 2 support):** The wholesale ISP partners and Click! will be responsible for their own network status reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

**Provide network status information (for tier 3 support):** The wholesale ISP partners and Click! will be responsible for their own network status reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

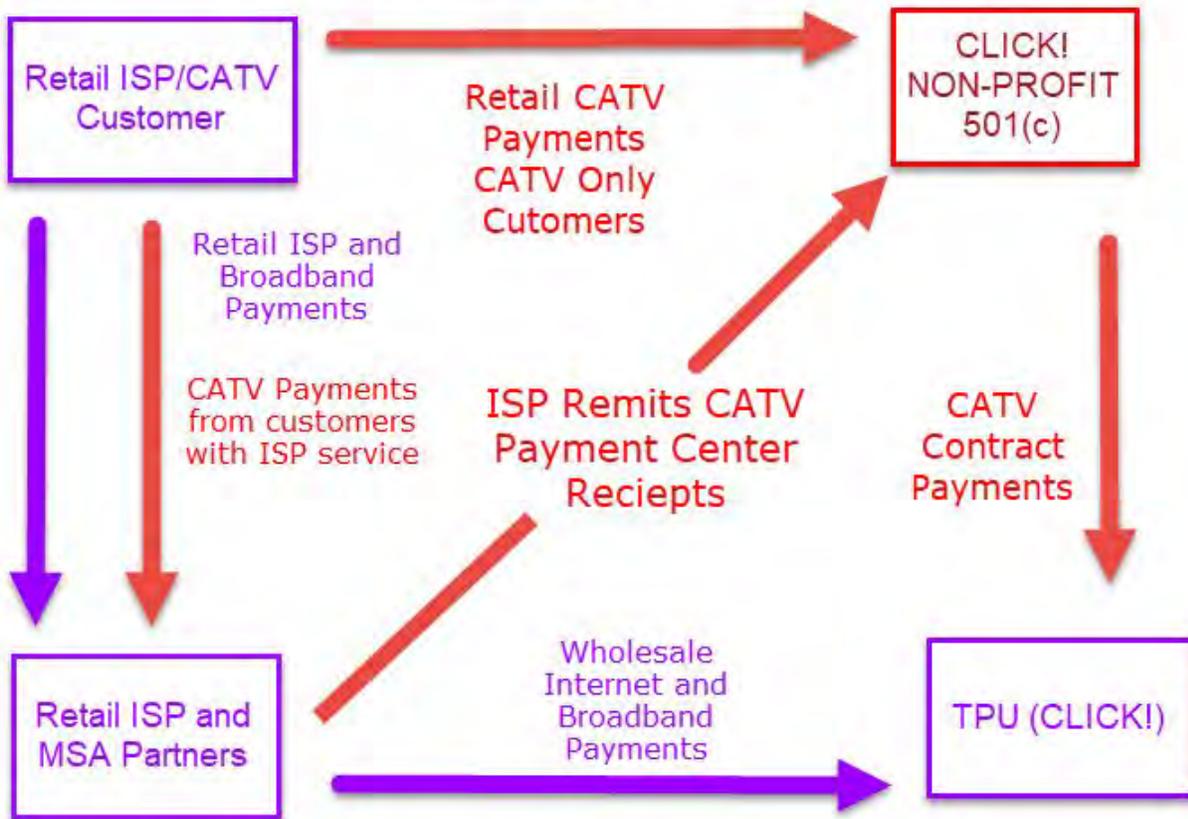
**Provide monthly sales and leads reports:** The wholesale ISP partners and Click! will be responsible for their own sales and leads reporting. In the event circumstances force policy makers to follow the emergency 'pivot plan', the Click! duties would then fall to the new 501 (c) non profit entity, as our proposal contemplates.

EXHIBIT A

# Stay the Course



# Emergency Pivot Alternative



- Exhibit B shows revenue growth and customer growth on a monthly basis.
- Beginning ARUP is \$27 - based on RFI (\$7.3 million in ISP revenue / customer count of 22,650).
- Depreciation and Amortization remains constant with Capital Additions being amortized - offsetting sunk costs which are rolling off.
- Starting Customer TV and ISP Counts are from the RFI material.
- Sales and Admin expenses include the elimination of 1 non-union management FTE.
- ISP ARPU increases by \$2.50 at the beginning of year 1 and by another \$2.50 at beginning of year 2.
- CATV ARPU increased by \$5 after 18 months.
- Assumes constant CATV customers count, with a declining ratio of CATV to ISP customers.

## Exhibit B - Financial Projections for Plan B 2.0

Revenue	Monthly 2017 Pervious Rate	ISP +\$2.5											
		Year 1											
		Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Customer Count TV	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787
Customer Count ISP	22,650	22,650	22,890	23,130	23,370	23,610	23,850	24,090	24,330	24,570	24,810	25,050	25,290
Retail CATV product	\$1,485,008	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848
Wholesale ISP	\$610,537	\$668,175	\$675,255	\$682,335	\$689,415	\$696,495	\$703,575	\$710,655	\$717,735	\$724,815	\$731,895	\$738,975	\$746,055
Other Revenue	\$114,194	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193
<b>Total Revenue</b>	<b>\$2,248,175</b>	<b>\$2,424,216</b>	<b>\$2,431,296</b>	<b>\$2,438,376</b>	<b>\$2,445,456</b>	<b>\$2,452,536</b>	<b>\$2,459,616</b>	<b>\$2,466,696</b>	<b>\$2,473,776</b>	<b>\$2,480,856</b>	<b>\$2,487,936</b>	<b>\$2,495,016</b>	<b>\$2,502,096</b>
<b>Expenses</b>													
Sales and Admin	\$1,545,583	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938
Operations and Maintenance	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500
Taxes	\$305,000	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213
Depreciation and Amortization	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333
<b>Total Expenses</b>		<b>\$2,636,984</b>											
<b>Profit &amp; Loss</b>		<b>-\$212,768</b>	<b>-\$205,688</b>	<b>-\$198,608</b>	<b>-\$191,528</b>	<b>-\$184,448</b>	<b>-\$177,368</b>	<b>-\$170,288</b>	<b>-\$163,208</b>	<b>-\$156,128</b>	<b>-\$149,048</b>	<b>-\$141,968</b>	<b>-\$134,888</b>

Revenue	Monthly 2017 Pervious Rate	ISP +\$2.5												TV +\$5											
		Year 2												Year 2											
		Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Customer Count TV	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	
Customer Count ISP	22,650	22,650	22,890	23,130	23,370	23,610	23,850	24,090	24,330	24,570	24,810	25,050	25,290	25,530	25,770	26,010	26,250	26,490	26,730	26,970	27,210	27,450	27,690	27,930	28,170
Retail CATV product	\$1,485,008	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	\$1,641,848	
Wholesale ISP	\$610,537	\$668,175	\$675,255	\$682,335	\$689,415	\$696,495	\$703,575	\$710,655	\$717,735	\$724,815	\$731,895	\$738,975	\$746,055	\$816,960	\$824,640	\$832,320	\$840,000	\$847,680	\$855,360	\$863,040	\$870,720	\$878,400	\$886,080	\$893,760	\$901,440
Other Revenue	\$114,194	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193
<b>Total Revenue</b>	<b>\$2,248,175</b>	<b>\$2,573,001</b>	<b>\$2,580,681</b>	<b>\$2,588,361</b>	<b>\$2,596,041</b>	<b>\$2,603,721</b>	<b>\$2,611,401</b>	<b>\$2,619,081</b>	<b>\$2,626,761</b>	<b>\$2,634,441</b>	<b>\$2,642,121</b>	<b>\$2,649,801</b>	<b>\$2,657,481</b>	<b>\$2,573,001</b>	<b>\$2,580,681</b>	<b>\$2,588,361</b>	<b>\$2,596,041</b>	<b>\$2,603,721</b>	<b>\$2,611,401</b>	<b>\$2,619,081</b>	<b>\$2,626,761</b>	<b>\$2,634,441</b>	<b>\$2,642,121</b>	<b>\$2,649,801</b>	<b>\$2,657,481</b>
<b>Expenses</b>																									
Sales and Admin	\$1,545,583	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	
Operations and Maintenance	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	
Taxes	\$305,000	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	\$337,213	
Depreciation and Amortization	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	
<b>Total Expenses</b>		<b>\$2,636,984</b>																							
<b>Profit &amp; Loss</b>		<b>-\$63,983</b>	<b>-\$56,303</b>	<b>-\$48,623</b>	<b>-\$40,943</b>	<b>-\$33,263</b>	<b>-\$25,583</b>	<b>-\$17,903</b>	<b>-\$10,223</b>	<b>-\$2,543</b>	<b>\$5,137</b>	<b>\$12,817</b>	<b>\$20,497</b>	<b>-\$63,983</b>	<b>-\$56,303</b>	<b>-\$48,623</b>	<b>-\$40,943</b>	<b>-\$33,263</b>	<b>-\$25,583</b>	<b>-\$17,903</b>	<b>-\$10,223</b>	<b>-\$2,543</b>	<b>\$5,137</b>	<b>\$12,817</b>	<b>\$20,497</b>

	Year 3											
Revenue	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Customer Count TV	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787	15,787
Customer Count ISP	28,410	28,650	28,890	29,130	29,370	29,610	29,850	30,090	30,330	30,570	30,810	31,050
Retail CATV product	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783	\$1,720,783
Wholesale ISP	\$909,120	\$916,800	\$924,480	\$932,160	\$939,840	\$947,520	\$955,200	\$962,880	\$970,560	\$978,240	\$985,920	\$993,600
Other Revenue	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193	\$114,193
<b>Total Revenue</b>	<b>\$2,744,096</b>	<b>\$2,751,776</b>	<b>\$2,759,456</b>	<b>\$2,767,136</b>	<b>\$2,774,816</b>	<b>\$2,782,496</b>	<b>\$2,790,176</b>	<b>\$2,797,856</b>	<b>\$2,805,536</b>	<b>\$2,813,216</b>	<b>\$2,820,896</b>	<b>\$2,828,576</b>
<b>Expenses</b>												
Sales and Admin	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938	\$1,527,938
Operations and Maintenance	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500	\$563,500
Taxes	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425	\$353,425
Depreciation and Amortization	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333	\$208,333
<b>Total Expenses</b>	<b>\$2,653,196</b>											
<b>Profit &amp; Loss</b>	<b>\$90,900</b>	<b>\$98,580</b>	<b>\$106,260</b>	<b>\$113,940</b>	<b>\$121,620</b>	<b>\$129,300</b>	<b>\$136,980</b>	<b>\$144,660</b>	<b>\$152,340</b>	<b>\$160,020</b>	<b>\$167,700</b>	<b>\$175,380</b>

## YEARLY SUMMARY

	Total	Total	Total
Revenue	Year 1	Year 2	Year 3
Customer Count TV	15,787	15,787	15,787
Customer Count ISP	25,290	28,170	37,050
Retail CATV product	\$19,702,176	\$20,254,721	\$20,649,396
Wholesale ISP	\$8,485,380	\$10,310,400	\$11,416,320
Other Revenue	\$1,370,316	\$1,370,316	\$1,370,316
<b>Total Revenue</b>	<b>\$29,557,872</b>	<b>\$31,935,437</b>	<b>\$33,436,032</b>
<b>Expenses</b>			
Sales and Admin	\$18,335,256	\$18,335,256	\$18,335,256
Operations and Maintenance	\$6,762,000	\$6,762,000	\$6,762,000
Taxes	\$4,046,556	\$4,160,040	\$4,241,100
Depreciation and Amortization	\$2,500,000	\$2,500,000	\$2,500,000
<b>Total Expenses</b>	<b>\$31,643,812</b>	<b>\$31,757,296</b>	<b>\$31,838,356</b>
<b>Profit &amp; Loss</b>	<b>-\$2,085,940</b>	<b>\$178,141</b>	<b>\$1,597,676</b>

# EXHIBIT 73



APPROVED 11-9-16

MINUTES  
City of Tacoma  
Public Utility Board Meeting  
October 26, 2016  
6:30 p.m.

Mr. Patterson called the Public Utility Board meeting to order at 6:30 p.m. at the Public Utilities Administration Building.

**Present:** Mark Patterson, Monique Trudnowski; Woodrow Jones, Karen Larkin, Bryan Flint

The meeting was quorate.

**Minutes of the Previous Meetings**

Ms. Trudnowski moved that the minutes of the previous meetings be adopted; seconded by Mr. Jones. Voice vote was taken and carried with Mr. Flint abstaining as he was not present for the October 12 meeting. The minutes were declared adopted and made part of the record.

**Recognitions**

There were no recognitions

**Comments from the Public**

There was no public comment.

**Consent Agenda**

There were no items on the consent agenda.

**Regular Agenda**

- D-1 Resolution U-10884 – Award contracts and approve purchases:
1. Award contract to CCI Systems, Inc., for Cisco routers and migration assistant services (\$1,034,100.11 including sales tax and a trade-in credit of \$78,840.48 for old Cisco equipment; net expense \$955,259.63, including sales tax);
  2. Award contract to Avante Solutions, Inc., for the purchase of the IT service management software tool and consulting services for implementation and training (\$525,000, plus sales tax);

3. Increase contract to Regional Disposal Co., for the disposal of solids from the Green River Filtration Facility (\$138,000, sales tax not applicable, plus the option to extend three additional one-year terms for a cumulative total of \$690,000, sales tax not applicable).

Ms. Trudnowski moved to adopt the resolution; seconded by Mr. Jones.

In response to a Board request for additional information on the software in item number two, Johnny Rivera, Power Supervisor, answered that Utility Technology Service (UTS) has adopted an IT Service Management (ISM) framework as this is an industry standard of best practices for delivering IT services by ensuring the right processes, people, and technology are in place to meet business goals. UTS has developed processes and procedures on the ISM framework and are at a milestone in implementation and are ready to plug these processes and procedures into an ISM tool. This approval is to purchase the software product and will help consolidate other tools into a robust toolset.

In response to a Board request for a description of the capabilities and enhancements associated with item number two, Pat Bacon, Telecom Manager, explained that this equipment will serve as a link between cable software and the customer and the key function is to cluster the internet customer by nodes/service groups to optimize bandwidth and the customer experience. The current equipment is at the end of its useful life and can't keep up with demands. This will enable Click! to manage steady growth and faster internet speeds. This is budgeted in the current biennium and is independent of the all-in business plan. In response to a Board inquiry as to why one node is being replace and not four, Mr. Bacon stated that the northwest hub is the most congested and in need of an upgrade.

In response to a Board inquiry on item number three regarding exactly what is being evaluated, Celina Mina, Associate Engineer, answered that Tacoma Water is trying to evaluate what solids are being produced by the filtration plant. Currently, the solids don't have beneficial uses, like Tagro, but are composed of river salts, clays, and treatment materials. The process of optimizing the treatment processes and testing solids to examine different alternatives for removal of solids is under way. Also, work is being done with the University of Washington Tacoma and Environmental Services to treat the solids in a secondary process. In response to a Board inquiry on the contract term, Ms. Mina answered that the previous contracts were for one year. However, because different testing options on the solids are under way, more time is needed so this contract includes options to extend the contract.

Voice vote was taken and carried. The resolution was declared adopted.

- D-2 Motion 16-11 – The Department of Public Utilities 2017/2018 budget, as submitted and filed with the Clerk of the Board, be accepted and approved and the City Council is requested to approve the same as provided by Section 4.12 of the Charter of the City of Tacoma.

Ms. Trudnowski moved to approve the motion; seconded by Mr. Jones.

# EXHIBIT 74

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97 MAY -5 PM 3:20

The Honorable Grant L. Anderson

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SUPERIOR COURT  
ADMINISTRATION

MAY 5 1997

THOMPSON, KRILICH, LAPORTE  
ATTORNEYS AT LAW

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CITY OF TACOMA, a municipal corporation, )

Plaintiff, )

v. )

THE TAXPAYERS AND THE RATEPAYERS )  
OF THE CITY OF TACOMA, )

Defendants. )

No. 96-2-09938-0

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY

1. My name is Steve Klein. I am the Superintendent of the Light Division of Tacoma Public Utilities. The purpose of this declaration is to support the City of Tacoma's reply brief on its motion for summary judgment. I am over the age of eighteen, competent to testify in this matter, and make this declaration based upon my own personal knowledge.

2. The City of Tacoma, through its Light Division, plans to construct and operate telecommunications facilities and services to enhance the Light Division's ability to provide highly reliable, cost-effective and convenient electric service to its customers (the "Telecommunications Project"). Such a system would also be capable of carrying other telecommunications services, including cable television service.

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY BRIEF- 1

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COPY

1           3.       As my staff has described previously, the City adopted the Bond Ordinance  
2 (Complaint, Ex. 1) in July 1996 for the purpose of partially funding the Telecommunications Project.<sup>1</sup>  
3 The City's purpose in bringing this litigation is to test the validity of the Bond Ordinance, which  
4 provides for the issuance of revenue bonds only. The City is not asking the Court to determine  
5 whether the City could issue any other type of bonds.

6           4.       The Bond Ordinance unequivocally provides for the issuance of revenue bonds rather  
7 than general obligation bonds. The Bond Ordinance expressly states that it provides "for the issuance  
8 and sale of the City's Electric System Revenue Bonds[.]" Complaint, Ex. 1, title page; *see also* id. at  
9 sections 1.2.B ("Bonds" defined to mean revenue bonds); 2.3 (Bonds' only lien is upon net revenues  
10 of electric system); 2.4 (finding that sufficient revenues over and above operation and maintenance  
11 will be available to pay debt service on Bonds); 3.1 and 4.7(a) (reiterating that the type of bond  
12 involved is a revenue bond).

13           5.       The difference between revenue bonds and general obligation bonds is highly  
14 significant. The City's obligation under a revenue bond is limited to funds available from the Electric  
15 System (which includes the Telecommunications Project). Bond holders will buy a bond that says,  
16 "Principal of and interest on this bond are payable solely out of the special fund of the City known as  
17 the Electric System Revenue Bond Fund[.]" Bond Ordinance section 4.7(a). The bond will also  
18 make clear that the City is obligated to set aside only "Revenues of said Electric System" to pay off  
19 the bonds. *Id.* Thus, no general fund dollars are committed and no general obligation is incurred  
20 under the Bond Ordinance. By the same token, revenues from electric customers are retained by the  
21 Light Division and are not available to the General Fund.

22           6.       The only other funding source that is currently contemplated for the  
23 Telecommunications Project is a surplus of approximately \$40 million in the Light Division current  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Declaration of Jon Athow in Support of Motion or Summary Judgment (Nov. 5, 1996),  
paragraph 15.

1 fund. This is the money that I mentioned at a City Council meeting on April 8, 1997.<sup>2</sup> This money is  
2 generated exclusively by Light Division activities, primarily sales of electric power. As I stated, that  
3 \$40 million might otherwise be used to buy down debt. But contrary to the unsupported implication  
4 of Defendants' Response, the money would only be used to buy down Light Division debt, not  
5 general fund or other City debt. Because the Telecommunications Project is an element of the  
6 Electric System, it will enhance the capability and value of the Electric System, and will be owned and  
7 operated by the Light Division, it is an appropriate investment for Light Division surplus.

8 7. The Light Division produced a Telecommunications Study<sup>3</sup> that includes a Business  
9 Plan. The Business Plan was *unanimously* approved by both the Tacoma Public Utility Board and the  
10 Tacoma City Council in April 1997.

11 8. The Business Plan is based upon assumptions that are fully substantiated in light of  
12 current trends in the telecommunications industry. It involved a review of the industry both nationally  
13 and locally. *Id.* at page 1. It was based on input from a wide range of experts. The  
14 Telecommunications Study, including the Business Plan, was prepared by a multidisciplinary group  
15 called the Telecommunications Study Team. This team of approximately twenty people included Jon  
16 Athow, other Light Division staff and outside consultants practicing in the areas of  
17 telecommunications, finance, business planning, marketing and the law.

18 9. The Telecommunications Study also included an economic development study  
19 produced expressly for purposes of analyzing whether the City should proceed with the  
20 Telecommunications Project. *See* Appendix D. Two of the five authors of this economic  
21 development study hold doctorate degrees, and the authors consulted with about 20 other  
22 professionals in the community.

23  
24  
25 <sup>2</sup> My comments are excerpted in the Declaration of Heidi Imhoff dated April 28, 1997.

26 <sup>3</sup> This study, which is contained in a three-ring binder, was submitted as Exhibit D to Jon Athow's declaration dated April 11, 1997.

1           10. Through the Telecommunications Study, the City carefully considered issues similar to  
2 those raised by Defendants' witnesses. *See, e.g.*, chapter on options (fifth section of Study). This  
3 section of the Study analyzes in detail the various options for telecommunications services from  
4 various private providers, considering such factors as types of service offered, current and potential  
5 technology utilized by different providers, projections for future growth and financial risk, investment  
6 profile, etc. This options analysis is thoroughly documented through 73 endnotes. *See also*  
7 Appendix B (Light Division response to TCI letter regarding municipal ownership of  
8 telecommunication and cable systems).

9           11. The members of the Utility Board and the members of the City Council participated  
10 actively in analysis of financial plan issues. After the Telecommunications Study was complete, they  
11 held a three-hour work session on the Telecommunications Project and entertained about two hours  
12 of public testimony and discussion before unanimously voting to proceed with the Project as set forth  
13 in the Study. Discussion was vigorous both at the work session and at the public hearing.

14           12. As Light Division staff explained to the Board and Council, and as the Council itself  
15 found in the Resolution approving the Project,<sup>4</sup> a key purpose of the Telecommunications Project is  
16 to protect and enhance the value of the Light Division's existing electric utility assets by having a  
17 telecommunications system that is sophisticated enough to enable the Light Division to compete  
18 effectively in the rapidly evolving electric industry. To fulfill this important purpose of protecting the  
19 value of existing Light Division *electric* assets, it is not at all necessary that the revenues from the  
20 provision of telecommunications and cable television services cover the entire cost of the  
21 Telecommunications Project.

22           13. The Council and Board were aware when they voted to proceed that revenues from  
23 the provision of telecommunications and cable services might fall short of projections. As Light  
24 Division staff informed the Board and Council, under a "worst case" shortfall, electric rates might

25 \_\_\_\_\_  
26 <sup>4</sup> This resolution as adopted is attached as Exhibit B to Jon Athow's declaration dated April 11,  
1997.

1 have to be increased by as much as 2.5%. This scenario assumed that we incurred all the cost of  
2 building the system but obtained no revenues from provision of cable television service or from  
3 provision of telecommunications service to third parties. This "worst case" scenario is significantly  
4 worse than the scenario that Defendants' experts present.

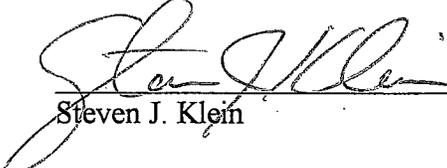
5 14. Light Division staff explained to the City Council our view that even if the  
6 Telecommunications Project's revenues fell short of projections, even to the point of a worst case  
7 scenario (resulting in a 2.5% rate increase), still the City should proceed with the Project in order to  
8 secure the value of the City's electric system assets. I believe that in voting to proceed with the  
9 Project, the Council fully understood and accepted the risk of an electric rate increase.

10 15. Thus, it is not terribly important whether the Telecommunications Project's own  
11 revenues will be sufficient to cover its costs. Similarly, although I believe our Financial Plan is very  
12 sound, including our assumptions regarding interest rates and other factors, whether we used  
13 precisely correct assumptions is not significant.

14 16. The important question is whether Light Division revenues will be sufficient to cover  
15 Telecommunications Project costs, since we are issuing electric system revenue bonds for the Project  
16 and other Project costs will be funded by accumulated Light Division revenues. Obviously, Light  
17 Division revenues are sufficient. Indeed, Light Division revenues are 40 times greater than worst-  
18 case Project costs. Thus there is zero possibility that the Telecommunications Project could  
19 somehow affect the City's general fund and its taxpayers.

20 I swear under the penalty of perjury of the laws of the State of Washington that the foregoing  
21 is true and correct.

22 Dated: May 5, 1997 at Tacoma, Washington.

23  
24   
25 Steven J. Klein  
26

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY BRIEF- 5

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SUPERIOR COURT OF WASHINGTON, PIERCE COUNTY

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EDWARD E. (TED) COATES, et )  
 al., )  
 )  
 Plaintiff(s), )  
 )  
 vs. ) 17-2-08907-4  
 )  
 CITY OF TACOMA, )  
 )  
 Defendant(s). )

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30(b)(6) Deposition Upon Oral Examination of  
 CITY OF TACOMA  
 STEVEN J. KLEIN

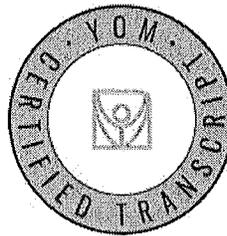
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9:56 a.m.

September 26, 2017

1001 Fourth Avenue, Suite 4200

Seattle, Washington



REPORTED BY: Mindi L. Pettit, RPR, CCR #2519



1 Seattle, Washington; September 26, 2017

2 9:56 a.m.

3 --oOo--

4 (Ms. Kazaryan not present.)

5 STEVEN J. KLEIN,

6 sworn as a witness by the Certified Court Reporter,

7 testified as follows:

8 EXAMINATION

9 BY MR. JURCA:

10 Q. And would you give us your name, please.

11 A. Steven -- that's -e-v-e-n -- middle initial J  
12 for John, J-o-h-n, Klein, K-l-e-i-n.

13 Q. And what's your present residence address?

14 A. 1712 South Sunset Drive, Tacoma, Washington,  
15 but I also own a condo in Queen Anne.

16 Q. Okay. But you spend most of your time at  
17 the --

18 A. Now I do. Now that I'm retired.

19 Q. Okay. I was -- my next question was going to  
20 be are you employed, and is the answer that you're not  
21 because you're retired or --

22 A. Well, it's a little more complicated than  
23 that.

24 Q. Okay.

25 A. I do some consulting work. And one of the

Answers by Steve Klein, Tacoma Power Superintendent During Creation of Click!

2 point-to-point service or Internet service, if you can  
3 get a sense from my personality, I don't do anything  
4 lazily or partially. If we're going to do it, we're  
5 going to do the best job we can.

6 So, once the intent was we're going to move  
7 forward because we can't find anyone that we can  
8 partner with to do all of these things, then we're  
9 going to do them, and we're going to do them well. So  
10 I'll pause there, and basically say that's pretty  
11 much --

12 Q. I appreciate that explanation. I really do.  
13 That's very helpful. Would it be fair to say that --  
14 although I'm -- as with most big projects like this,  
15 there are -- multiple people are involved. Would it be  
16 fair to say that the formation and -- of Click was  
17 really as much your vision as any other individual's?  
18 I mean, were you sort of the --

19 A. True.

20 Q. -- chief visionary?

21 A. I -- I did -- I -- I would think so.

22 Q. Okay.

23 A. I've been called the father of -- of it.

24 Q. Okay.

25 A. But the truth is I'm the kind of leader that

1 you're thinking of this or perhaps you're thinking of  
2 another document called the complaint. This is just a  
3 notice of deposition that describes various topics.  
4 And I'm going to ask you about the topics that you're  
5 here to talk about. You're not sure -- I mean, do I  
6 take --

7 A. The topics look familiar --

8 Q. Okay. All right.

9 A. -- but I -- I don't remember specifically this  
10 document.

11 Q. Okay. I understand from counsel for the City  
12 that you are designated to testify today on two  
13 subjects that are listed here. One is Topic 1, up  
14 through the 2006 time period --

15 A. Okay.

16 Q. -- and the other is Topic 7. Do you -- is --  
17 is it your understanding that you are designated by the  
18 City --

19 A. Yes.

20 Q. -- to testify about those two subjects?

21 A. Yeah.

22 Q. Okay. Now, maybe the easiest way to begin is  
23 to just -- can you describe, again, in a general way,  
24 how did the idea of forming the Click Network come  
25 about?



1           A. It was an evolutionary process. And one of  
2 the triggering things for it was the passage of the  
3 Energy Policy Act of 1992 by Herbert Walker Bush in  
4 October of 1992. I became the superintendent in July  
5 of '93. And that was a very big deal. We had all seen  
6 what happened in the banking and trucking industries  
7 and deregulation, how it opened up competition and  
8 basically changed the way in which those industries  
9 competed and existed.

10           So here we were a monopoly and, on top of  
11 that, a government monopoly. And there was just all  
12 kinds of concerns and fears about what the potential of  
13 that was. And I'm coming in the door as the head of  
14 Tacoma Power, and I'm certainly familiar, as most of  
15 the Tacoma Power people are, with the proud history of  
16 Tacoma Power and all the people before us that had made  
17 some pretty amazing decisions to build major hydro  
18 projects and such that were tremendous assets and  
19 valuable to the citizens of Tacoma.

20           And so I'm coming into that office, and I want  
21 to make sure that I do the right thing and that we  
22 react appropriately to what's on the horizon for change  
23 in our industry. So I got together with the leadership  
24 of the various departments in Tacoma Power. And we  
25 started a strategic planning process where we went



1 through the strengths and weaknesses, analyzed our  
2 competition -- I mean, even to the point where we're  
3 presuming that Costco and the Catholic church will be  
4 selling power, and we'll have to wheel it on our  
5 system. And how would we be able to compete with them,  
6 or should we even attempt to compete? Should we focus  
7 on some other aspect and be the best at that and just  
8 presume we're going to lose that -- that side of it?  
9 But this is a somewhat long story. I'll try to --

10 Q. No, that's --

11 A. -- be patient. But a major theme that came  
12 out of all of this was the fact that the electrical  
13 systems virtually everywhere -- Tacoma Power wasn't  
14 unique -- were not a whole lot different infrastructure  
15 and equipmentwise than what had been in place for a  
16 hundred years.

17 And the joke was that Thomas Edison could walk  
18 into a substation and he would be able to point out the  
19 oil circuit breaker and the transformer. And he would  
20 know everything that was in there. So not a whole lot  
21 of new and sophisticated equipment.

22 But you were beginning to see microprocessors  
23 coming into play, and you begin to see the potential of  
24 that. So, instead of mechanical relays -- which  
25 interestingly, engineers would often visit substations



1           A. So then John starts to put together  
2 preliminary plans for a telecommunication system, and  
3 we begin to formulate all of the ideas that later are  
4 documented in a lot of the going forward documents --  
5 the kind of value streams and the benefits and  
6 efficiencies and so forth. So it gets to the point in  
7 '95, where so far I'm getting thumbs up -- and I'm  
8 skipping a lot of the things we changed in Tacoma  
9 Power, but I need to digress just to tell you one  
10 thing.

11                   And I was in charge of this for many years.  
12 Scheduling power -- and this is the same for Puget or  
13 Seattle City Light, Tacoma Power -- when you have  
14 generation in a hydro-based system, sometimes you have  
15 more than you need. Now, with wind, that's also the  
16 case and then solar too. You have more than you need  
17 when you don't need it and then not enough when you  
18 don't. And so you're basically transacting in the  
19 wholesale power markets. And even back then, it was  
20 mainly bilateral, but there was still a market where  
21 you would call amongst parties and trade and sell  
22 energy.

23                   And the way it was structured in my career  
24 coming in until I became the superintendent is it was  
25 scheduled day ahead, and the schedule for Friday,



1 Saturday, and Sunday and Monday was done on Thursday.  
2 And so the person that's getting the phone calls about  
3 my power's out or a car hit a thing, he's the same guy  
4 that's following these instructions. So imagine if  
5 he's in a hurry, if it says, you know, if you have any  
6 extras, sell it -- anybody he can find that will buy  
7 it, you know, great. You know, sold it and he's done  
8 with it and doesn't have to worry about it the whole  
9 rest of the weekend.

10 What we decided was that sort of thing was not  
11 sufficient. We weren't optimizing the value of that.  
12 So one of the things we did in this same time frame --  
13 so I'm trying to tell you, it wasn't all just  
14 telecom -- was we went to a 24 hour, seven day a week  
15 power trading operation, with full-time, 12-hour shift  
16 traders. That's -- that's all they did. And we  
17 virtually produced hundreds of millions of dollars in  
18 value. And that's actually where the source of the  
19 cash came from that paid for the -- for the initial  
20 build-out of the Click -- Click Network.

21 Q. This power trading that you just described --

22 A. Yeah.

23 Q. -- that was under the aegis of the power  
24 management --

25 A. Yeah.



1 banking and trucking and all of these sorts of things,  
2 I recognized that you don't want to be seers and try to  
3 do too many things and lose sight of who you are.

4           But on the other hand, the banks recognized  
5 the more relationships they had with you, the less  
6 likely you were to switch for a six pack of Coke, so if  
7 you had your vacation account, your charge card, your,  
8 you know, investments there -- so that was also in the  
9 mind at the time -- loyalty, multiple relationships  
10 with customers, but don't try to do so many things that  
11 you lose focus of why -- why you're there.

12           Q. Um-hum.

13           A. So I wasn't enamored initially with the  
14 telecommunication side of it -- anything that required  
15 a call center related to telecommunications. And so  
16 initially if anybody was reticent about the telecom  
17 things, doing them commercially -- I had nothing  
18 against selling the capacity -- the excess capacity to  
19 generate additional revenue, but I wasn't that enthused  
20 initially about going into them.

21           But during that same time period, as we're  
22 also briefing the city council, they're having a heck  
23 of a problem with the cable -- the incumbent cable  
24 provider who still has the crummy system, refuses to  
25 upgrade it. And they don't come to the table to



1 negotiate the franchise agreement. They can just tell  
2 the -- the city government to jump in the lake. And if  
3 you don't like it, we'll just shut it -- we'll shut it  
4 down.

5           And so, when the Stanford Research Institute  
6 came back and said, you know, you're beloved by this  
7 community; crappy service is provided; you're going to  
8 have excess capacity because once you stick the pipe up  
9 there -- put a little bit bigger pipe is very small  
10 incremental costs and you have the opportunity --  
11 because it's going to take a number of years for this  
12 digital world that you want on the electric side to  
13 actually come to be. Why not generate some revenue on  
14 that in the interim? So that report comes out in '96.

15           I have to digress a little and say that the  
16 deregulation of the electric utility industry and now  
17 law in '92, finally got traction in the four western  
18 states of Washington, Oregon, Idaho, and Montana, with  
19 the four governors calling together in 1995 a special  
20 comprehensive review with people in the energy  
21 industry -- people from all facets, environmentalists,  
22 tribes -- you know, the whole nine yards to come  
23 together for a comprehensive review of what direction  
24 should the Northwest take.

25           And what's interesting at -- at this -- in



1 December of '96, the comprehensive review was  
2 published, and it said that utilities in the Northwest  
3 should all provide retail choice no later than July of  
4 1999.

5 Q. But that -- they were talking about retail  
6 choice for electricity?

7 A. Electricity, yeah.

8 Q. Yeah.

9 A. But understand, if you have this dumb system I  
10 talked about, how is the Catholic church power going to  
11 go through, go to the customer, it's going to be  
12 accounted for, if they suddenly in the middle of the  
13 month switch to somebody -- somebody else, how is all  
14 of this transacted?

15 Those meters on the side of the house are just  
16 spinning plates. The only data you get from them, it  
17 just went a little bit farther from the last time you  
18 read it. In order to differentiate all of these  
19 things, you needed telecommunications and those kind of  
20 digital technologies.

21 So that immediately put even more pressure on  
22 all of us to say we need to move on this because we  
23 don't want to be in a situation where the governor is  
24 demanding we're in, you know, retail wheeling and we're  
25 looking like, you know, industry that won't step aside



1 and, you know, what happens if you don't go with the  
2 flow or you don't get out of the way?

3 Q. Yeah.

4 A. So -- so then John is assigned -- John Athow  
5 is assigned, and he names it the Athena. He was really  
6 enamored with the Greek goddess Athena and the story of  
7 her and her strengths and powers and that sort of  
8 thing. So he puts a group together under my direction  
9 and guidance.

10 And the idea is to take the SRI  
11 recommendations, turn it into a business plan that can  
12 be adopted by the board and the city council, which  
13 they did. The board adopted in March of '97 and the  
14 city council in April of '97. And that was the  
15 go-ahead.

16 Now, I left out, in '95, we went for authority  
17 in the superior court to verify we had the authority to  
18 do it. And that was decided by Judge Grant Anderson, I  
19 think --

20 Q. Yeah, I think that's right.

21 A. -- in '96. And so that -- and I'm sorry I  
22 went through all that, but it kind of puts all those  
23 early pieces -- a lot of stuff was going, but there was  
24 a momentum that wasn't fixated on cable television,  
25 although cable television, once it was a part of the



1 Q. -- study. Is this what you were referring to?

2 A. This is, yes. Yes.

3 Q. Okay. Well, let me ask you this. Can you  
4 describe for us, what was the purpose of -- what was  
5 TPU's purpose in asking Pricewaterhouse to do this  
6 work?

7 A. The telecommunication business plan was passed  
8 unanimously by the city council. Once it was passed  
9 and we hired Deb Stewart, who was well known in the  
10 telecom industry, that suddenly caught the attention of  
11 TCI brass, whereas to date, probably to them, the  
12 little backwater town of Tacoma and something stirring  
13 around and Barbara Wyatt's got alligators, but they've  
14 got bigger fish to try. John Malone and Leo Hendery  
15 were taking over the world. But when they suddenly  
16 realized -- in particular, Leo Hendery, who went to  
17 Bellarmino Prep in Tacoma --

18 Q. I never knew that.

19 A. -- and -- yes. And that's also where Mike  
20 Crowley went, who was a city councilmember. And they  
21 reconnected. At that point, from a unanimous support,  
22 we started getting pushback politically. And it came  
23 in different -- different ways. And so the issue  
24 around Tacoma electric utility subsidizing the Click  
25 Network became a reoccurring theme that came up over

Page 54

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14 got bigger fish to try. John Malone and Leo Hendery

15 were taking over the world. But when they suddenly

16 realized -- in particular, Leo Hendery, who went to

17 Bellarmine Prep in Tacoma --

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20 Crowley went, who was a city councilmember. And they

21 reconnected. At that point, from a unanimous support,

22 we started getting pushback politically. And it came

23 in different -- different ways. And so the issue

24 around Tacoma electric utility subsidizing the Click

25 Network became a reoccurring theme that came up over

Page 55

1 and over and over and over again.

2 The ones that still stood by their decision

3 and thought Click was great didn't feel it was

4 necessary, but the ones that wanted to create conflict

5 and dissension continued to bring it up to the point

6 where even the people supportive of Click said let's

7 just do it and put this issue to rest.

8 And so Tim Strege, who had been a city

9 councilman years ago at a very young age --

10 Q. Can you spell his last name.

11 A. S-t-r-e-g-e, I believe --

12 Q. Thank you.

13 A. -- Tim Strege. He had been appointed by the

14 mayor as a new public utility board member. So one of

15 the first things he did as he came on to the utility

16 board was not only insist that we do this, he called up

17 Price and set this whole thing up.

18 So it's a little bit of a long answer, but it

19 wasn't a circumstance where I felt the need to do it

20 and I went out and brought them in. It was more or

21 less something imposed. On the other hand, did not

22 fear it. Worked with the people. The report was

23 positive. But that's how it came about.

24 Q. Okay.

25 A. We didn't feel a need to do it. It was --

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1 more or less, came about as a result of that issue

2 popping up and trying to get resolved. The one side

3 wanted it to come back, oh, yeah, it is subsidized, and

4 the other one wanted to verify once and for all what --

5 so this was the first -- the Virchow Krause was another

6 attempt when that --

7 Q. We'll get to that a little bit later.

8 A. -- when that rose to a head again too. So

9 it's a common theme.

10 Q. Okay.

11 A. Even today.

12 Q. Even today. Okay.

13 A. Yes.

14 Q. And, again, I -- this is not a memory test,

15 but it will -- it's helpful if you can describe

16 about -- what portion of the physical infrastructure

17 had been built out by this time, April of 2000? Was it

18 just getting started, or was it substantially --

19 A. Oh, no, no, no. We had our first Click

20 customer in 1998. And if I recall, by this time, we

21 were in the neighborhood of having the 15,000 customer

22 success --

23 Q. Oh, okay.

24 A. -- basically at the break -- break-even point

25 or slightly better with revenues exceeding based on our

Page 57

1 formulation.

2 Q. Okay. So the system was more than 50 percent

3 built out by this time?

4 A. Yeah. Yeah.

5 Q. Was it substantially more than 50 percent?

6 A. Yes, yes. Yeah.

7 Q. Okay.

8 A. Yeah, because by this time, as I said, Deb

9 Stewart is leaving because the construction -- she --

10 she wanted to build the finest -- she had always wanted

11 to build the finest telecom system you could because

12 she had been managing these mom and pop, crummy systems

13 her whole career. She wanted to build something and

14 build it right.

15 And so -- and she had an illustrious career,

16 so having finished that, she was ready to go off and

17 retire. And Dana's coming in about this time. And she

18 was the one that sat down with the folks from Price

19 Waters and went through them with her staff -- through

20 the details of -- of their operation.

21 Q. Okay. So would you turn to -- I guess it's

22 page 8 of the document. The Bates number at the bottom

23 is 995. And the paragraph right above the heading

24 there that says, "Capitalization of General and

25 Administrative Expenses," that paragraph says, "We

1 and bring the SCADA system up.

2           If you could have some additional capacity and  
3 generate some revenue in the interim, delight your  
4 customers like the banks do and develop relationships,  
5 generate economic development in a community that was a  
6 second or third tier city, particularly when it came to  
7 telecom, and retain large customers that provided  
8 revenue to Tacoma on the electric side -- and the list  
9 goes on and on and on -- these were all of the values  
10 that the Click Network brought to all electric  
11 ratepayers that you can't take out of -- out of  
12 context.

13           Q. For the benefit of our reporter, you used the  
14 term "SCADA." I think that -- that's an acronym,  
15 S-C-A-D-A --

16           A. Supervisory control and data acquisition.

17           Q. Okay. You've already explained at  
18 considerable length -- and explained very well, I  
19 thought -- how the telecommunication -- how the Click  
20 infrastructure was intended to and was beneficial to  
21 the electric utility?

22           A. (Nodding.)

23           Q. And we've talked a little bit about the Price  
24 Coopers recommendation to make an attempt to segregate  
25 Tacoma Power capital and operating costs from Click



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1 We're going to improve it. Carry out this -- this plan  
 2 and try to generate some additional revenue over the  
 3 time while you build up all of these uses.  
 4         The fact that that didn't occur still does not  
 5 take away from the original legislative principle. And  
 6 that is is that this is the responsibility of the  
 7 ratepayer. And there is an accumulation of years of  
 8 benefits that if I were to sit down and value, you  
 9 could challenge this from the perspective of DaVita,  
 10 the dialysis company that provided tremendous amounts  
 11 of jobs and tax base and economics. I believe that the  
 12 Frank Russell Company would have left a lot earlier  
 13 than they did.  
 14         And that just goes on and on with industries  
 15 and businesses, educational, academic -- all kinds of  
 16 things that would not have gotten a benefit if this --  
 17 and you say, well, what does that have to do with the  
 18 electric ratepayers? If there is commerce occurring in  
 19 a community, then they're consuming electricity. And  
 20 the more electricity that's consumed, basically that  
 21 holds down the overall cost for everybody because it  
 22 covers the fixed cost.  
 23         So I could still present an argument -- and  
 24 that was the theme of this -- that the electric  
 25 ratepayers still benefit. It's more difficult to, you

Page 75

1 know, put value on those sort of things, but an  
 2 economist could come in and do it, and you could argue  
 3 until the cows come home.  
 4         Now, going on forever, at some point, you have  
 5 to deal with the circumstance with either utilizing  
 6 more of the system or changing the tenets of the  
 7 original legislation, but I'm not here to speculate or  
 8 talk about that.  
 9         Q. (By Mr. Jurca) Okay. Thank you.  
 10         MR. JURCA: All right. Let's mark as  
 11 the next exhibit -- let's take -- off the record for a  
 12 moment.  
 13                 (Recess taken.)  
 14         MR. JURCA: Back on the record, and we  
 15 are ready to mark as the next exhibit . . .  
 16                 (Deposition Exhibit 5 was marked for  
 17 identification.)  
 18         MR. JURCA: Okay. This is 5.  
 19         Q. (By Mr. Jurca) Mr. Klein, you have before you  
 20 what's been marked as Exhibit 5. Do you recognize  
 21 that --  
 22         A. Yes.  
 23         Q. -- as a copy of what's sometimes referred to  
 24 as the Virchow Krause report?  
 25         A. Yes.

Page 76

1         Q. And it's dated on the bottom of the front page  
 2 July 23, 2003. I guess I could ask you to describe  
 3 what the purpose of this was, but I guess it's already  
 4 given on the second page under the heading foreword.  
 5 So I'll ask you this. Did Tacoma Power contract with  
 6 Virchow Krause & Company to assess the reasonableness  
 7 of its method of allocating the capital investment and  
 8 operating expenses of Click Network between power and  
 9 commercial applications?  
 10         A. We did so at the request of the local  
 11 politicians.  
 12         Q. And by "local politicians," who do you mean?  
 13         A. It was the case where there was another of the  
 14 rising of the issue to attack Click on the basis of a  
 15 subsidy.  
 16         Q. So was --  
 17         A. My sense -- and this is my sense when I was  
 18 there, and it's fairly accurate -- is the people in  
 19 Click were wonderful. The service was wonderful. It  
 20 was a local utility trying to do and doing good. How  
 21 do you attack something like that? And so basically  
 22 the opposition came up with, well, how do you attack  
 23 it? You make people feel like they're being ripped  
 24 off. And so every so many years, this theme would  
 25 build up again, and here -- here it was again.

Page 77

1         Q. When you refer to the local politicians, are  
 2 you referring to people on the city council?  
 3         A. Yes.  
 4         Q. Okay. Anyone in particular or . . .  
 5         A. I would say, for the most part, the ones that  
 6 were the most negative were Kevin Phelps and Michael  
 7 Crowley. But they were very influential, and so they  
 8 were able to oftentimes get others to -- to join them,  
 9 but they were the two main individuals. And they also  
 10 were -- kept in touch with Leo Hendery and AT&T then  
 11 and that sort of thing.  
 12         Q. So was it your sense that those members of the  
 13 city council that you mentioned somehow caused the  
 14 Tacoma -- the utility board to cause --  
 15         A. Yes.  
 16         Q. -- TPU to enter into this contract?  
 17         A. Um-hum.  
 18         Q. Okay. This sentence that we just looked at a  
 19 moment ago refers to allocating between power and  
 20 commercial applications. I think it's -- I think I  
 21 know what they mean, but for our record here, can you  
 22 tell us what you understood the distinction to be  
 23 between power applications and commercial applications.  
 24         A. They're referring to -- in the commercial,  
 25 those items that had -- have to deal specifically with

5 So I'll ask you this. Did Tacoma Power contract with  
6 Virchow Krause & Company to assess the reasonableness  
7 of its method of allocating the capital investment and  
8 operating expenses of Click Network between power and  
9 commercial applications?

10 A. We did so at the request of the local  
11 politicians.

12 Q. And by "local politicians," who do you mean?

13 A. It was the case where there was another of the  
14 rising of the issue to attack Click on the basis of a  
15 subsidy.

16 Q. So was --

17 A. My sense -- and this is my sense when I was  
18 there, and it's fairly accurate -- is the people in  
19 Click were wonderful. The service was wonderful. It  
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17 A. Um-hum.

18 Q. Okay. This sentence that we just looked at a  
19 moment ago refers to allocating between power and  
20 commercial applications. I think it's -- I think I

1 the light department, Tacoma City Light, Tacoma  
2 Power -- all those things -- and TPU.

3 Q. Yeah. Okay. If you turn to page 5 of the  
4 document, the last paragraph under the heading network  
5 overview, says the authorization to build the  
6 telecommunication network was given in April of '97.

7 Do you understand that to be the authorization by --

8 A. City council.

9 Q. The city council. Okay.

10 A. Yeah. The board was in March.

11 Q. Okay. "The stated purpose was to enhance  
12 electric service reliability, reduce operating costs,  
13 and diversify the utilities' revenue base"?

14 A. Yeah.

15 Q. Now, you've already described those?

16 A. Yeah.

17 Q. Okay. And by diversify the utilities' revenue  
18 base, that meant to find other sources of revenue  
19 besides merely from the sale of electricity. Is that  
20 correct?

21 A. True, recognizing that the light division had  
22 quite an asset in terms of poles and substations. And  
23 if you could attach something else to that pole that  
24 you didn't have to put a new pole up and generate some  
25 revenue, you are making money -- additional money

1 these outside firms come in and they preprepare  
2 questions.

3 And a lot of times you're shocked because you  
4 thought they understood. And then you're sitting there  
5 behind the glass thing and you're watching the person  
6 you paid -- I mean, I was -- I don't recall being at  
7 this one, but obviously I probably would have jumped  
8 when I heard it because it's simply not true.

9 Q. Okay. On the next page, it refers to original  
10 cost estimates, and it -- there is an indication of a  
11 June '96 estimate of 45 to 55 million, and then a  
12 little over a year later, it jumps up to 96 million.  
13 Do you know what that is about?

14 A. Yeah, because Leo Hendery gave me a  
15 tongue-lashing in front of the city council on that  
16 that, yeah, are you going to trust a guy that can't  
17 even -- the June 1996 was SRI's estimate. And so they  
18 basically did a cursory consulting view of it. Once we  
19 put John and company together and then --

20 Q. John Athow?

21 A. John Athow.

22 Q. Yeah.

23 A. -- and developed a true sense of all of the  
24 make ready -- because -- I need to emphasize this  
25 enough -- there was a tremendous amount of make ready.

1 And what I mean by that is the electric utility has all  
2 of these poles that they're using for power. And so  
3 they put their power wherever they want on the pole.  
4 If anybody else wants to use it, good luck, you know.

5 And so, in the meantime, any available space  
6 possible, then US West and TCI had all used up. And so  
7 when you come along and now you're going to add the  
8 Click Network -- additional telecom thing, you've got  
9 to now move things so that you have proper separation  
10 and space. So there was -- there was analysis done  
11 that SRI wouldn't have understood or even known to do.  
12 So my point here is, very cursory analysis, SRI. The  
13 96 million was much more thorough and accurate. And  
14 that's the one that --

15 Q. Ahow?

16 A. Yeah.

17 Q. Put it together?

18 A. Yeah.

19 Q. Okay.

20 A. Which, by the way, he passed away in 2004.

21 Q. Okay. Thank you. I meant to ask that, and I  
22 forgot. So thank you.

23 A. Yeah.

June 22 2017 12:28 PM

KEVIN STOCK  
COUNTY CLERK  
NO: 17-2-08907-4

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK d/b/a Steele Manor Apartments; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon nonprofit corporation,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

NO.

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

Plaintiffs allege as follows:

**I. PARTIES**

1.1. Plaintiff Edward E. (Ted) Coates resides in Tacoma, Pierce County, Washington. He is a former Director of Utilities for the City of Tacoma, and is a Tacoma Power electric ratepayer. As an electric utility ratepayer, he has standing to sue for the relief requested in this complaint.

1.2. Plaintiff Michael Crowley resides in Tacoma, Pierce County, Washington. He is a former Mayor of the City of Tacoma and a former member of the Tacoma City Council. He

# AT&T: Don't Be Like Tacoma

BY JOE ESTRELLA · APR 1, 2001

Almost three years after its launch, the nation's largest municipal overbuild has come up short of expectations, according to a study commissioned by principal rival AT&T Broadband.

An analysis of Tacoma, Wash.'s Click Network found that it failed to reach its expected subscribership, revenue and profit targets, while capital spending grew from an estimated \$55 million in 1997 to \$86.5 million by October 2000.

Conducted by Arthur Andersen LLP, the study compared actual results with estimates contained in a 1997 study commissioned by Tacoma Public Utilities.

The results also mirrored findings contained in the 1997 Coopers & Lybrand study, which found that a municipally owned network would still have 5 percent negative cash flow after 20 years.

AT&T Broadband executives hope to use the latest study to discourage local governments that may be considering overbuilds of their own.

"It [Click] hasn't made a profit, so we thought it made sense to tell the other side of the story," said AT&T Broadband Northwest division executive director of communications Steve Kipp. "We want to show other cities what has happened in Tacoma."

What has happened, according to Arthur Anderson, is that Click had 17,260 subscribers at the end of 2000, compared with 1997 projections of 34,312 customers. At the end of 1999, its revenues totaled \$2.7 million against earlier estimates of \$22.7 million.

An expected profit of \$1.9 million after one year of operation turned out to be a loss of \$15.7 million after three years. Meanwhile, TPU's capital spending plan calls for another outlay of \$36.2 million, pushing the overall cost of the network to \$138 million by the end of next year.

In order to reach its projected subscriber numbers, the study concluded, the Click Network would need to pirate away a significant number of AT&T cable customers while capturing the bulk of the area's nonsubscribers.

"We must be doing something right, or they would be ignoring us," said Click general manager Dana Toulson, adding that the municipal network has penetrated 28 percent of the 63,000 households it passes.

## **CLICK STARTED STRONG**

Evidence of the public's confidence in the local utility surfaced in an early market study by Market Data Research Corp. and Dethman & Associates. A telephone sampling of area households found that 81 percent of respondents supported a municipally owned telecom network, while just 7 percent opposed the idea.

Early on, TPU gave TCI a run for its money. In its first 11 months, Click siphoned off 6,000 TCI customers, growing at a rate of 660 subscribers a month.

But AT&T now argues that the failure of the telecom network to generate any profit was at least an indirect factor in the city's decision to impose a 50-percent surcharge on local electric bills. The city also had to give TPU authority to borrow \$100 million to keep buying power.

Toulson said the study falsely claimed that Click's first full year of operation was 1998, and that it failed to produce a profit.

"It's disingenuous to claim that our first full year was 1998, when we didn't even finish construction until June 2000," she said, adding that the city expects the network to generate an operating profit this year.

Meanwhile, industry sources predicted that the Arthur Andersen study's effect on other jurisdictions is unclear, given that the report will certainly be labeled as self-serving.

Such was the fate of a similar study conducted several years ago at the University of Denver. That study was dismissed as industry propaganda when it reached the conclusion that municipal overbuilds are poor investments.

"We thought that the Denver study would have an impact and it didn't," said Tom Graves, director of the Iowa Cable Telecommunications Association, an industry trade group that has seen its share of municipal overbuilds. "And because it's AT&T, people are going to be suspicious."

Graves said cities might be more inclined to believe other municipalities that have seen their telecom networks become a drain on city coffers.

"We've got them coming up to the capital all the time and saying, 'We're not making any money on these things,'" he said.

Click also offers five Internet-service provider alternatives to AT&T's [Excite@Home](#) Corp. service over its network.

Toulson accused AT&T of obscuring the original purpose of the network-to provide TPU with remote meter-reading capability and better outage control.

Tension between Tacoma and its cable operator date back to the days when the system was owned by Tele-Communications Inc., an MSO not revered locally for its customer service.

Former TCI and AT&T Broadband president Leo J. Hindery, himself a Tacoma product, tried to head off an overbuild by offering a partnership between TCI and the city. But it turned out that cable wasn't what city officials were most interested in selling.

Instead, the city envisioned a network that would offset the effects of pending electric-industry deregulation, which threatened to torpedo Tacoma by allowing its customers to shop for the best possible deal on power.

But AT&T responded to the competitive threat by upgrading to 750-megahertz capacity. For the last year, it has offered high-speed [AT&T@Home](#) service and a cable telephony product throughout the city.

Kipp said some residents subscribe to Click for video and AT&T for telephone service, "so our customers are their customers as well."

As operator of the nation's 19th-largest municipal electric utility-with some 140,000 customers-Tacoma had a lot to lose if it didn't protect its share of the power market.

"But now [AT&T] can't make their argument without ignoring the fact that we're here to serve Tacoma Power Utilities, and that anything we make from cable and Internet service is incremental revenue," Toulson said.

From the beginning, city officials had their own studies to fall back on.

# EXHIBIT 75

## Asset Study

The main purpose of the asset study was to help inform the recommended expense allocations. We have not completed a comprehensive review of the assets at this time to determine whether they should be a Click! or a Power asset. This is an important next step as it would have a material effect on how the power rates are allocated across the customer classes. Adding HFC Asset Base to Tacoma Power's rate model would most likely increase the proportion of rates paid by the Residential customer class since it would be considered Distribution.

The first step in this exercise was to obtain a full listing of the Fiber/Coax system infrastructure and understand how it is currently split between Click! and Tacoma Power. The data was separated into understandable categories in order to facilitate discussion. There are some issues with the data and accounting classifications have changed over time, but overall it was deemed sufficient for this exercise. Below is the breakout that was used:

Row Labels	Historical Cost - Comm.	Historical Cost Pwr.	Book Value - Comm.	Book Value Pwr.
Coax	14,781,385	87,373,426	3,667,421	43,171,879
Fiber	1,995,061	7,458,972	560,397	3,026,195
HTU/Converter-Descrambler_HTU/Converter-Descrambler	17,728,326	1,752,854	4,536,495	-
Capital Connect	5,732,630	5,776,209	3,864,838	2,648,467
Sonet Equipment	5,081,400	2,064,760	1,809,290	523,121
Sonet Construction	3,004,760	4,713,587	1,503,851	2,051,205
MDU	1,460,282	5,267,545	457,035	1,973,418
Head End Equipment	3,557,380	826,517	1,952,574	577,117
Land and Structures_Hub Electronics	5,746,817	6,197,580	1,178,652	930,850
Land and Structures_Hub Labor/Assembly	1,922,189	1,218,434	1,602,467	989,303
Immaterial	7,068,627	9,625,484	1,499,917	1,299,457
<b>Grand Total</b>	<b>68,078,857</b>	<b>132,275,367</b>	<b>22,632,938</b>	<b>57,191,012</b>

Note that overall, there is approximately \$200 million in historical cost and approximately \$80 million in book value of the Fiber/Coax system today. The initial capitalization date was around 1999 and certain parts of the system are still being added today. The "immaterial" classification includes several asset classes, mostly capitalized in the late 1990's or early 2000's.

A more detailed description of the assets by year of capitalization are as follows:

## In This Issue

- Strategic Plan Update
- Technical Operations Update
  - Service/Installation
  - Network Operations
  - Broadband Services
  - Technical Administrator
  - Converter Inventory Control
- Business Operations Update
  - Customer Care
  - Sales & Marketing
  - Launching Fiber Services
  - Other Interesting Happenings

## Strategic Plan Update

Strategic plan updates will be provided via e-mail on a semi-monthly basis. As such, this section of the monthly report will be discontinued beginning with the next issue.

## Technical Operations Update

### Service & Installation

Technician Quality ratings for February were 3.9 for service work and 3.9 for residential and commercial installation quality.

During February, 1,094 jobs were completed by the **Service Tech group. These included 448 SRO's, 96** activations of service, 35 reconnects, 14 transfer connects and 13 transfer disconnects, 157 voluntary disconnects, 172 service calls, 93 changes of service, and 66 non-pay disconnects.

Additionally, FTTH trim out work installing 135 smart **panel covers at the "Napoleon" were completed and building 5 at "Orchard Street Apartments" had micro** ducts installed. Service techs also performed CLI repairs and filter exchanges.

The service technicians have worked 296 consecutive days with no OJI time-loss injuries. A big thank you to our field crews that endured the cold temps and record setting snowfall this winter.

### Network Operations

Temporary fiber splice feed was installed at Schneebeck Hall to support the State of the City speech by Mayor Woodards.

The Fiber Team is currently working a fiber splice project for the Cushman facility. The project includes

the splicing of 8 fiber connections scheduled to connect the location.

On-going UPS battery replacements continue in all areas of the HFC Network and are based on Pass/Fail from the automated status monitoring system.

Annual FCC-required Proof of Performance for HFC network has been scheduled, and construction work has begun on the FTTH outside plant in the Orchard Apartments.

## Broadband Services

A new state-of-the art Cisco Firewall was successfully installed to increase cyber security of the Click! Network.

During February 11 data filters were replaced to improve cable modem service.

EAS system performed flawlessly during most recent required weekly and monthly tests for February.

Discovered issue with Video On Demand (VOD) provider pitching content into the incorrect locations. Working with provider to move content to correct subcategories.

## Technical Administrator

The Splunk Log and Event Management System has captured over 305 million firewall access events Since the system was installed. These events were reviewed and no threats were found. Most current firewall installed between the City and Click Network has been configured and is delivering event data to Splunk.

On-going work supporting the revision and development of the Continuity of Operations Plan (COOP) update.

Development under way for Monthly Click! Network Safety Committee meeting.

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## Business Operations Update

### Customer Care

Three Customer Care SSRs returned after trying out Customer Services. We are happy to have them back

with Click!. SSRs fielded calls from some customers who had questions about the TiVo Experience 4 upgrade which was pushed out to all TiVo subscribers in February. The agents also worked to upsell TiVo service and equipment with existing customers.

Disconnects returned to a more normal level in February, with a churn rate of 1.59%, down from 2.07% in January. We had fewer non-pay disconnects and lost fewer customers to competitors, although there was an uptick in customers leaving due to cost.

### Sales & Marketing

With respect to Broadband Sales a recent project has been to facilitate an agreement to temporarily use Click! dark fiber to deliver live video feeds from a downtown theater and also from the UPS campus.

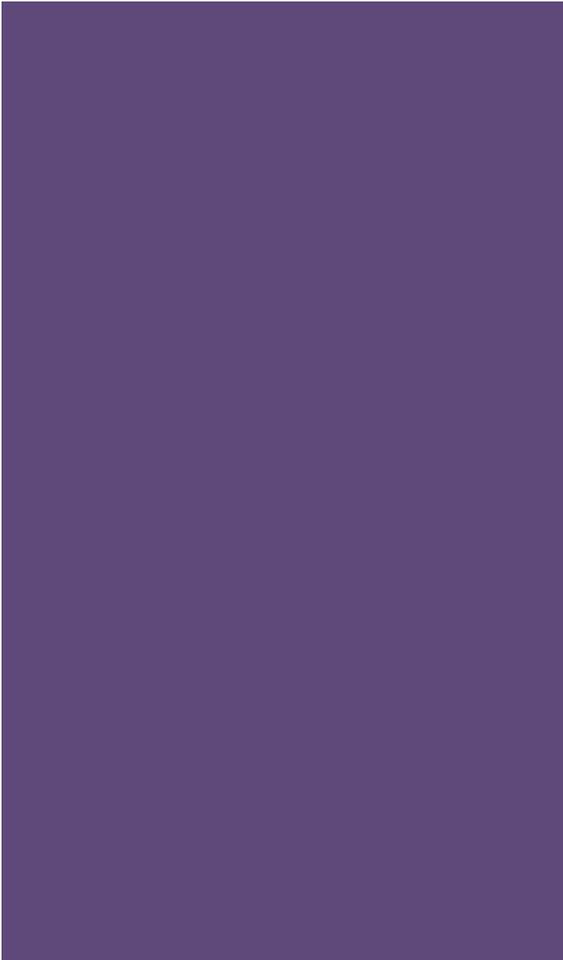
	Jan	Feb
Cable TV	14,467	14,441
ISP	21,807	21,739
Phone Calls	5,490	4,949
Call Handling	90%	95%

### Launching Fiber Services

Our team working on fiber service sales and delivery continues to learn and refine the processes. Training on provisioning devices was conducted in February. Installation processes were refined as technicians provided additional input. We anticipate releasing the first few addresses in the Orchard Street Apartments in March and hope to obtain a few video customers, as well as good penetration by our ISP partner Advanced Stream. Additional new construction locations that fit within the fiber build criteria are being solicited for right of entry and service agreements.

### Other Interesting Happenings

A customer report was received of missing VOD assets on the TiVo platform, so time was invested in comparing the assets of both VOD systems. The missing asset was recovered from the provider, and it was determined that there was parity in content between them. Occasionally, however, a glitch causes an asset to be lost or become unavailable. A problem also was seen with the new global search function. It did not seem to be working across VOD. After working with TiVo, it was determined that the primary issue was that we opted for the standard VOD search



capability which relies on the “lowest common denominator” of content. We had considered a custom catalog for VOD search, but decided the cost was not appropriate for us. Therefore, many of our VOD assets are not included in the search catalog because we have many more assets than most of our peer TiVo participants.

**We completed the launch of the “talking guide”** by adding an accessibility page to our website. A link to that page was placed at the bottom of our homepage as well.

A shout-out is in order for Randi. She has been utilizing a new GLDS tool for a few months to populate census tract data in preparation for our semi-annual FCC broadband reporting. She then produced an error-free upload file. Thank you, Randi, for making that report much easier than usual!

In response to the employee survey results, several staff meetings were held to obtain ideas for solutions **to inform our work groups’ action plans. A lot of great** feedback and ideas were received. Our thanks go out to everyone who contributed.

2019/2020 Tacoma Power Capital and A&R Requests as of 11/29/18							
including Continuing Bond Fund, Billable and LID Projects							
Total 2019/2020 Request:						\$149,723,000	
FS	Project No. STATUS	Old Project Number	New Project Number	Project Title	2019/2020 Request	Project Lead	17/18 Budget
	<b>Click! A&amp;R's</b>						
CF	New & Close	PWR-00856	PWR-00961	Broadband Services A&R-Comm	\$150,000	Bacon	\$619,000
CF	New & Close	PWR-00858	PWR-00962	Click! Equipment A&R-Comm	\$50,000	Yomes	\$50,000
CF	New & Close	PWR-00859	PWR-00963	Click! Headend Repl & Upgrades A&R-Comm	\$150,000	Bacon	\$614,000
CF	New & Close	PWR-00861	PWR-00964	Click! Network Infill MDU A&R-Comm	\$149,000	Jamison	\$421,000
CF	New & Close	PWR-00864	PWR-00965	Click! New Service Drop Capitalization-Comm	\$200,000	Jamison	\$326,000
CF	New & Close	PWR-00857	PWR-00966	Customer Related Equip A&R -Comm	\$694,000	Freeman	\$1,718,000
CF	New		PWR-00967	FTTH ONT/OLT & Cabinets A&R-Comm	\$100,000	Bacon	\$0
CF	New & Close	PWR-00860	PWR-00968	HFC Network Infrastructure Enhance A&R-Comm	\$80,000	Bacon	\$138,000
CF	New & Close	PWR-00863	PWR-00969	Network Upgrades & Replacements A&R-Comm	\$164,000	Bacon	\$1,250,000
CF	New		PWR-00970	Node Upgrades A&R-Comm	\$60,000	Bacon	\$0
N/A	Close	PWR-00862		Network Security Enhancements A&R-Comm	\$0	Yomes	\$80,000
	<b>Click! Capital</b>				<b>\$1,797,000</b>		<b>\$5,136,000</b>
N/A	Close	PWR-00947		Cable Modems-Comm Apps	\$0	Bacon	\$1,650,000
N/A	Close	PWR-00948		Network Upgrade-Comm Apps	\$0	Bacon	\$11,100,000
N/A	Close	PWR-00949		Voice Gateway-Comm Apps	\$0	Bacon	\$263,000
					<b>\$0</b>		<b>\$13,013,000</b>
				<b>TOTAL CLICK! CAPITAL:</b>	<b>\$1,797,000</b>		

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  - Marketing
  - Projects
- Strategic Plan Update

## Technical Operations Update

### Service & Installation

September Technician Quality Ratings were 3.9 for service and 3.8 for residential and commercial installation work. We have completed exchanging ISP only filters in NW01 through NW06 and are now focusing our efforts in NW07.

The Grand at 252 Broadway in downtown Tacoma is finally finished and has been released for activations. This complex is one of the largest high rise buildings we have wired; taking eight months to complete. We used 41,000 feet of coax and 41,000 feet of CAT5-E to run 296 strikes into each unit along with running 1,064 outlets specific to the interior of the units. Wi-Fi modems have been installed recently in Salishan moving the BPA/Conservation hot water heater project to approximately 98% complete.

Eight Service Technicians are actively involved in a wide range of educational opportunities including the NWPPA Frontline Leadership course offered by TCC, NCTI Technical Training Certification courses and city provided computer classes. All of our technicians continue to make positive progress in their educational pursuits.

### Converter Inventory Control

After testing the auto staging process, Click! upgraded from TiVo software 3.12 to 3.13. These changes were mainly in the menu structure and a more modern color scheme. This will be the second to last upgrade to the current Encore software platform. This platform will require one more upgrade to version 3.14 which will add features such as voice activated remotes and universal search.

The CIC has also begun testing the next generation of TiVo software called Hydra. This upgrade will

make dramatic changes to the user interface and will take several months to fully test. TiVo, Pace and NCTC are hoping to release Hydra to our customers in Jan 2018. If initial testing goes well, Click! employees, with TiVo in their homes, will be utilized in the Hydra software field trials as well.

The CIC has placed an order for the next generation **of TiVo DVR's (main box) called the MG2 or Arris DCX900**. This box is the same size as the MG1 but looks slightly different on the outside with rounded corners and a TiVo image on the front. The new unit has full 4K output and can stream up to 2 devices at the same time. You will see these deploying to customers sometime mid to late October 2017.

## Network Operations

During the month of September, the Network Technicians continued to focus on preparing our network for DOCSIS 3.1 by finding and repairing signal leaks on the HFC Network. Their efforts resulted in the repair of 821 leaks.

There were meetings with vendors to look at options to provide better security for our underground backup battery power supplies where we have had several incidents of battery theft. Through these meetings an option is being tested and if successful will have a field trial.

Our FTTH platform for the Knolls is finalized and is ready for customers! All equipment is in place and verified to be functioning as planned.

Testing is ongoing for new nodes to replace our current aging HFC nodes and for the hub optics that are providing the connectivity to the nodes. Working with multiple vendors to find the right nodes and the right optics.

## Engineering

The Harmonic video cloud service connections have been completed. Equipment has been installed in the Headend to test IP signals and the video quality looks very good. This service allows content to access the video streams via an application available on various hand-held devices.

In preparation for the November 8<sup>th</sup> channel launch,

we have configured the satellite receivers to authorize the new channel signals. The new channels that will be available for video subscribers will include Nat Geo WILD, Sundance and the Stadium Channel. Click! is ready for the launch!

The Headend and Data Teams have been working closely with the Harmonic engineers to mount and configure the equipment used for testing the Harmonic CMTS solution. The work is going well and we expect to be finished sometime in October 2017.

## Broadband Engineering

A software based cable modem router solution by Harmonic Inc. is being evaluated in a lab environment. The test will soon be moved to a live field trial. Harmonic technicians are on site working with Steve Merriam and Patrick Jacobs.

Fiber connectivity is close to being established in the Centeris Colocation Center. We are now testing DWDM (dense wave division multiplexing) devices that will be installed to carry wavelength services.

The Broadband Team has completed a circuit for Internet connectivity for The Grand at 252 Broadway in downtown Tacoma. This new connection will service tenants in the new high-rise facility.

## Technical Administrator

The Splunk Log and Event Management system is online and has collected over 14,271,893 auditable events. The Splunk server is currently indexing events at an overall average of 12.54 KB/s and has archived nine months of data so far.

There was one successful Master Technician course examination proctored during the month of September. All six Service and Installation Technicians are currently enrolled in their individual courses and are making positive progress towards completion with two technicians approaching testing dates in October. Click! employees have completed 341 hours of internal training this month towards the overall training goal of 680 hours required.

Progress is on-going in the Asset Management initiative as Functional Locations for the Metro Ethernet Asset Registry have been created. There

have been 80 Functional Locations created so far, and these will be used as locations for the Metro Ethernet assets.

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## Business Operations Update

### Customer Care

The Sales and Service Reps in Customer Care were busy in September answering the phones, as our call volume continued to be steady with callers coming into the sales queue accounting for 23.4% of the total calls. The Reps also make outbound calls from time to time to accomplish specific tasks. Recently, calls have been made to customers on the early interest list for channels to let them know that Nat Geo WILD will be coming to the lineup, as quite a few customers have requested that channel over time. They have also been assisting in our attempts to recover as many TiVo boxes from disconnecting customers as possible. They have been calling former customers with unreturned TiVo equipment to ask them to please return the boxes to us so we can serve more customers. The Reps have also been working hard to continue driving Tivo penetration rates and have been making calls to customers with DVRs and internet service to make a personal attempt to get all the great benefits of TiVo into more homes.

### Sales

Connect activity remained strong in September with 355 new connect orders placed. We experienced the loss of quite a few bulk service units on the UPS campus; they decided to scale back the services being provided in individual dormitory rooms but retained service in common areas. Residents of dormitory rooms may order individual services if they desire. We gained a new commercial customer with Wingman Brewery signing up for cable TV service. The table below contains customer counts for the Click! services and other metrics.

	August	September
Cable TV	16,349	16,265
TiVo	757	813
ISP	22,829	22,650
Phone Calls	6,331	5,885
Call Handling	90%	89%

## Marketing

The Mobile Movies concluded for the year with the final event on September 2<sup>nd</sup> at the UPS Log Jam event. In September we participated in the remaining outdoor activities with a booth at the Proctor **Farmer's Market on the 16<sup>th</sup>**, and putting together our own **"park" downtown for "Park"ing Day on the 15<sup>th</sup>**. Passers-by were able to stop in for a quick game, some Click! information and fun giveaways. Work was completed on our 4<sup>th</sup> quarter campaign, **It's TV Season**, featuring a bundle of Broadcast, TiVo and 12 mbps internet for \$67. This campaign will roll out in October and November. Click! signed up for a 30 day free preview of HD Net Movies in October, so we hope many customers enjoy this preview and that it drives some new sign-ups for the HD Premium Package.

## Projects

The new telecommunications franchise with the City of Puyallup was approved by the Public Utility Board and the final step will be obtaining a concurring Resolution from Tacoma City Council to complete acceptance of the franchise. Work is underway to construct the fiber tie to the Centeris Data Center, and our technical team will be accompanying Public Utility Board members on tours of the facility in November.

Near the end of last year a decision was made to discontinue our SONET platform at the end of 2017 because the equipment is far past end of life, and replacements are becoming completely unavailable. We have had a number of broadband customers with DS-1 and DS-3 circuits on this platform and our Broadband Accounts Rep has been working with our carrier partners to migrate these customers to an Ethernet solution. Some of the circuits were no longer needed and are being disconnected; some circuits for Rainier Connect Customers are being managed with a SONET to Ethernet conversion technology being deployed by Rainier Connect. Other circuits are being successfully migrated to the Ethernet platform. We anticipate this project to be completed by the end of December.

Job shadowing has been occurring between Customer Care supervision and our remaining WCS staff to ensure a full understanding of all the processes

necessary to support our ISPs and their end users. Training documents have been prepared and the staff is preparing to begin training SSRs in the Customer Care Dept. to support the ISPs. This includes managing the ISP data only and data add on orders, disconnects, trouble issues, and communications with the ISPs and our technical staff, and a number of other duties.

Work has commenced on moving the next planned cable TV rate increase through the approval process. Through the multi-year programming contracts we can anticipate most upcoming increases in license fees and incorporate those increased costs into our budget. Correspondingly, we anticipate the need for rate increases to recover those license fees and plan for the rate increases in the budget also. Our 2017/2018 budget included the rate increase we implemented in March 2017 and it includes an additional 11.3% rate increase to be implemented in 2018. We plan to make this increase effective January 1<sup>st</sup>, as that is when our costs increase. The matter will go before the Public Utility Board study session in early October. Staff will receive information on the new rates in time for customer questions.

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## Strategic Plan Update

Nothing new to report on the Power ratepayer lawsuit or **on Click!'s** long term strategic plan at this time. And Union negotiation is ongoing.

## In This Issue

- Technical Operations Update
  - Service/Installation
  - Network Operations
  - Engineering
  - Broadband
  - Technical Administrator
  - Converter Inventory Control
- Business Operations Update
  - Customer Care
  - Sales & Marketing
  - Business Systems
  - NSA and Dispatch
- Strategy Update

## Technical Operations Update

### Service & Installation

Technician Quality ratings were 3.9 in January and 3.8 in February for service work and 3.7 and 3.9, respectively, for residential and commercial installation quality. Customers are impressed and continue to comment on the great customer service experiences received from all Click! staff.

### Job Completion:

	Jobs	SRO	Con-nects	V Disco	SVC	COS	NP
Jan.	1417	689	159	187	162	136	84
Feb.	1324	658	130	188	143	103	74

Techs verified or exchanged the newest ISP only filters in NW08 – NW23 nodes and SE04 – SE11 nodes. They have addressed any intermittent Wi-Fi connectivity issues at the Salishan project. Assistant supervisors led the installation of video and internet outlets in the TPU auditorium and that effort continued into February. We have trained two new contract installers which enabled in-house techs to train with the Network techs performing CLI, fiber splicing and power supply maintenance duties. Service techs have also received other general system maintenance opportunities while training with the Network technicians. In February, We reduced the number of contract installers since in-house staff can handle the current demand for Click! products and services.

We are working with Fleet Services preparing some worn out vehicles for surplus. Several vehicles have been in service for nearly twenty years.

### Network Operations

Network Technicians found and repaired 200 system

leaks with the new CLI platform in January and 410 in February.

Fiber splicing for the Centeris Data Center was completed in January. The fiber connectivity from DTS and DTN to Centeris was also tested for continuity and to make sure total loss was within technical specifications.

Fibers from the SONET dissolution project were reclaimed by re-splicing the fibers to make them contiguous around the backbone so that they can be re-used for future projects.

First quarter FCC Proof of Performance testing has been finished. All tests were completed, passed and documented.

Randy Sherman and Tim Hogan have continued to lead the ongoing SCTE Cable Games preparation by coordinating monthly training sessions through each of the game events to get our technicians ready to compete in the June 27<sup>th</sup> Cable Games.

## Engineering

The router upgrade project was approved and the RFP team began the evaluation phase of the system proposal for a router solution to support the upgrade to Gigabit and DOCSIS 3.1 services.

After testing DWDM data center connectivity in the Click! lab and determining stability of the connection between the DTN and DTS locations feeding the Centeris data center, the network systems will extend the 10 GB Ethernet network core as well as support other circuits of 1, 10 or even 100 GB.

State of the Network: The Click! ISP and Broadband networks can sustain the current customer load without further upgrades. Reliability can be maintained without any major upgrades for up to nine months if cable modem package speeds remain at current levels. Commercial Metro Ethernet network is running at 20% utilization at peak times with high reliability. Software upgrades are planned for the near future to expand the capabilities of the systems and to address software bugs.

### Video Services

Video Services have remained extremely busy. Multiple video channels were rebranded to new service providers. These changes required updates to the video database to accommodate the switch. In addition, preparation was made for the Chiller channel going dark and its removal from the channel lineup. In February, Starz and Encore HD West moves were finalized. CBUT transitioned to CBAT by tuning Dish 14 **to Galaxy 19's position.**

Video Technicians began the process of testing a new IP video on demand instance for TiVo. Technicians dealt with multiple technical issues including a new streaming capability available with Vu-iT. Technicians also dealt with multiple technical issues including replacing a faulty hard drive on legacy ARRIS VOD platform as well as keeping the HE drawings and databases up to date with all the channel moves.

Headend personnel worked with Marketing to restructure the Arris Video on Demand, migrate the SCALA character generator to a new workstation platform, and the successful movement of several channels to new satellite transponders.

### Broadband

Hong Kim oversaw the upgrade to the Netflix server to ensure continued customer access, as well as participated on the router solution RFP approval team.

Broadband team has begun the finalization of tasks required for the SONET dissolution project. Maintenance work is underway to upgrade the Dantel environmental alarm monitoring system used to monitor the SONET network.

### Technical Administrator

The Splunk Log and Event Management System continues to manage log events from network devices which provides a running history of log events and an auditable trail for review. The system is designed to ingest 2 GB per day and has cataloged and processed over 20 million events since its installation in February of 2017.

UTS PC Support has begun the delivery of replacement workstations and laptops to Click! personnel. There were 31 workstations ordered and will be delivered

during January and early February. Currently work is being done to cleanup active directory to remove old entries and users from the system and a physical inventory of machines will be scheduled in March 2018.

The Technical Administrator has begun creating records for HFC Distribution optical equipment assets in SAP. An individual record will be created for each of the 814 optical devices from each of the four HFC hubs and the Headend. In February, records have been created for the NW, and NE hubs. Work has begun to input data for the SE hub equipment.

### Converter Inventory Control

CIC continues working with TiVo to validate the MSO Early Access of TiVo Experience 4 codename: Hydra.

The TiVo eVUE VOD upgrade was successfully deployed to customers in January. With this successful roll-out, TiVo has asked Click! to evaluate a new upgrade that other organizations have failed to get operational.

CIC has placed an order for replacement TiVo voice remotes from Universal Electronics. A software release is scheduled for May 9<sup>th</sup> that will allow the voice remotes to operate with the TiVo system.

The CIC team is currently utilizing 190 non-functioning DCX – 3425 DVR boxes that are no longer of use as cosmetic spares for the 461 reusable spares inventory. CIC team is focused on churn and continues to work on cleaning efforts in the warehouse.

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## Business Operations Update

### Customer Care

Our Customer Care unit closed 184 sales in January and 178 sales in February, averaging just over 7 sales per day each month. We know that the video market continues to be challenged by the entry of so many new streaming choices, so many thanks to our Customer Care team who receive the inquiries about our services and tailor services to match the customers' needs.

HD Experience was a promotional package that was offered when the HD Premium Tier was launched. It

bundled the HD Premium tier and an HD DVR for a package price. The package has not been sold for quite a few years and the pricing has not been increased consistently with our general rate increases. In an effort to migrate the customers remaining on this legacy package, Customer Care has been making **outbound calls to review these customers' services with** them. These are high value customers and our Sales and Service Reps are giving them the personalized service and attention needed to retain them and to fit their packages to their current needs.

Bulk and vacation rate accounts are being audited to ensure accuracy of billings. The reps have maintained calls answered within 30 seconds in the 90% range through February. We are happy to be fully staffed again with the return of employees who had been out for extended periods.

### Sales & Marketing

The January and February campaign offer has been focused on Broadcast, TiVo and 12 Mbps Internet for \$67.67. We also continue to reach out to prior customers who disconnected for what is considered a controllable reason to entice them to come back to Click! We continue to promote our Purple Perks Loyalty Program, and at February month end we had **1,962 members. That's just over 12% of our cable TV** subscribers. We are tracking the impact of Purple Perks by calculating the rate at which members disconnect their Click! service and comparing that to the overall disconnect rate. This tracking shows us that members of Purple Perks disconnect at a slower pace than the overall pace. That means we are succeeding at retaining more customers when they join the Club!

	January	February
Cable TV	15,838	15,724
ISP	22,616	22,578
Phone Calls	5,416	4,864
Call Handling	94%	94%

### Business Systems & NSA

Business Systems said a sad good-bye to Trina Morris as she moved on to a new position in Generation. There are several ongoing projects that Business Systems is watching and providing input as needed. One is the paybox project. TPU is in the process of replacing the payboxes, and it is undetermined at this

time whether Click! will move forward with participation in the project. The payboxes will become unavailable to Click! customers once the replacement begins, and once the original scope of work for the project is completed, Click! will assess whether a second scope of work to incorporate Click! customer accounts should be pursued. We know we have a small but consistent group of customers who make their payments in this way. We are happy that our customers have multiple options for making payments, i.e. in person, by phone with an agent, online, by mail and through self-service by phone.

A Click! representative has been participating in a city-wide project to issue an RFP for a new collection agency. That RFP is currently receiving responses, and Click! will also participate on the response evaluation team.

### NSA and Dispatch

The NSA wished Jeff Vincent well as he moved on to a position with UTS. With his departure, it was necessary to evaluate the work assignments for the Network Operations Center Technicians. The Dispatch and NSA groups were merged recently so that the hours of operations supporting both the installation and repair technicians and surveilling the network could be maintained. Both groups are operating out of the NSA work space.

### Strategy Update

CTC Consulting has been hired by the City to conduct an RFI/Q process to solicit proposals for potential partnership arrangements with qualified private or public entities interested in developing a collaborative partnership arrangement for Click! Network. The RFI/Q was published on March 23 and reflects the twelve policy goals developed by the Public Utility Board and City Council. Proposals are due no later than April 27.

A hearing was held on March 2nd to consider a Motion For Partial Summary Judgement filed by the Plaintiffs in the lawsuit involving Click! The Judge ruled in favor of the Plaintiffs at that time. The City is considering what actions it might take in response to that ruling.

## POWER MANAGEMENT

- Tacoma Power became a certified California Independent System Operator (CAISO) Scheduling Coordinator which allows Tacoma Power to transact directly with the CAISO wholesale electric market. We anticipate that this will enable better integration of renewable generation and increase revenue in the future by over a million dollars a year.
- Wholesale electric prices were low, but Tacoma Power sold nearly \$5 million in non-traditional wholesale products, which reduces the need for increasing retail rates.
- Net wholesale power sales in 2018 were 1.8 million MWh, exceeding the budget estimates of 1.4 million MWh. Annual revenue was \$47.1 million compared to budget estimates of \$33 million.
- Power Management acquired over 8 MW of conservation in 2018, more than double the target at a substantially lower cost than budgeted.
- In collaboration with the City of Tacoma's Public Works Division, we completed installation of over 16,000 cobra-head LED street lights. The two-year project saves energy, provides better and safer lighting, and reduces costs for the City.
- Tacoma Power successfully completed its residential solar plan, including better information for customers considering rooftop installations and our second announced Evergreen Options grant for a solar project with Tacoma Housing Authority that will benefit low-income customers.
- Tacoma Power made significant efforts to advance electrification of transportation, including:
  - Development of a special pilot rate for DC Fast charging providers – which will incentivize additional investment in electric vehicle charging in the service territory
  - The construction and opening of DC Fast charging station at the LeMay Car Museum
  - Customer outreach and education efforts including two "Ride and Drive Electric Vehicle Events" and five "EV 101" events
  - Collaboration with Pierce Transit to pilot eight plug-in hybrid electric commuter vans that will charge at TPU campus and reduce fuel expense and maintenance for Pierce Transit.

CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
TACOMA WATER

TEN-YEAR FINANCIAL REVIEW

STATEMENTS OF NET POSITION	2018	2017 (As Restated)	2016	2015
<b>ASSETS</b>				
Utility Plant - Net .....	\$871,008,433	\$873,518,773	\$879,547,650	\$884,721,107
Special Funds & Non-Util Prop ....	160,497,908	154,455,341	157,320,446	143,802,732
Current Assets .....	79,459,959	73,857,244	68,927,643	64,476,112
Other Assets .....	4,669,297	1,810,430	2,866,478	4,689,200
Total Assets .....	1,115,635,597	1,103,641,788	1,108,662,217	1,097,689,151
Deferred Outflows .....	5,881,479	10,113,888	10,623,174	4,002,699
<b>TOTAL ASSETS AND DEFERRED OUTFLOWS .</b>	<b>1,121,517,076</b>	<b>1,113,755,676</b>	<b>1,119,285,391</b>	<b>1,101,691,850</b>
<b>NET POSITION .....</b>	<b>581,738,357</b>	<b>556,846,481</b>	<b>549,652,226</b>	<b>542,501,823</b>
<b>LIABILITIES AND EQUITY</b>				
Long-Term Debt .....	447,562,815	463,619,285	478,617,199	478,400,742
Current Liabilities .....	23,031,002	20,524,364	20,986,727	18,261,548
Long-Term Liabilities .....	27,703,192	35,406,357	33,932,418	26,021,937
Total Liabilities .....	498,297,009	519,550,006	533,536,344	522,684,227
Deferred Inflows .....	41,481,710	37,359,189	36,096,821	36,505,800
<b>TOTAL NET POSITION, LIABILITIES, AND DEFERRED INFLOWS .....</b>	<b>\$1,121,517,076</b>	<b>\$1,113,755,676</b>	<b>\$1,119,285,391</b>	<b>\$1,101,691,850</b>
<b>STATEMENTS OF REVENUES, EXPENSES AND CHANGES IN NET POSITION</b>				
<b>OPERATING REVENUES</b>				
Residential and Domestic .....	\$56,391,501	\$52,539,643	\$50,742,135	\$48,263,128
Commercial and Industrial .....	19,056,277	17,408,529	17,558,905	17,233,617
Special Rate-WestRock/Other .....	6,873,675	6,322,195	5,845,719	5,951,348
Municipal .....	-	-	-	-
Wholesale .....	3,253,029	3,069,448	3,971,839	5,192,149
Unbilled .....	472,999	660,078	(137,857)	318,945
Total Water Sales .....	86,047,481	79,999,893	77,980,741	76,959,187
Other Operating Revenues .....	15,893,978	14,644,528	14,820,869	21,179,637
Total Operating Revenues .....	101,941,459	94,644,421	92,801,610	98,138,824
<b>OPERATING EXPENSES</b>				
Operation and Maintenance .....	45,892,214	48,921,970	46,894,363	41,804,233
Taxes .....	5,273,751	4,776,164	4,639,031	4,681,114
Depreciation .....	26,117,843	24,038,103	23,822,527	17,102,664
Total Operating Expenses .....	77,283,808	77,736,237	75,355,921	63,588,011
<b>NET OPERATING INCOME (LOSS) .....</b>	<b>24,657,651</b>	<b>16,908,184</b>	<b>17,445,689</b>	<b>34,550,813</b>
<b>NON-OPERATING REVENUES (EXPENSES)</b>				
Other Income .....	3,215,049	1,216,295	(221,125)	(30,042)
Interest Income .....	3,876,762	1,762,813	1,826,299	1,112,850
Gain from Disposition of Property .....	-	-	-	-
Interest Charges (Net) .....	(19,269,514)	(18,321,085)	(19,000,536)	(16,677,645)
<b>Net Income (Loss) Before Contributions &amp; Transfers .....</b>	<b>12,479,948</b>	<b>1,566,207</b>	<b>50,327</b>	<b>18,955,976</b>
Total Capital Contributions .....	16,440,749	9,138,434	10,274,030	9,052,674
Grants & Federal BAB Subsidies .....	3,596,241	3,582,475	3,579,107	3,609,706
Transfers Out .....	(7,625,062)	(7,092,861)	(6,753,061)	(6,873,467)
<b>CHANGE IN NET POSITION .....</b>	<b>\$24,891,876</b>	<b>\$7,194,255</b>	<b>\$7,150,403</b>	<b>\$24,744,889</b>

In accordance with Governmental Accounting Standards Board Statement No. 65 both 2012 and 2011 were restated for comparative purposes. Years prior to 2011 are shown as originally reported.

# EXHIBIT 76

City of Tacoma, Washington  
 Department of Public Utilities  
 Click! Network Commercial Operations  
 Operational Summary (Unaudited)  
 August 31, 2019

**Click! Profits  
 August 2019**

	August 2019
<b>TELECOMMUNICATIONS REVENUE</b>	
CATV	\$1,321,714
Broadband	80,005
<b>ISP</b>	<b>691,833</b>
Interdepartmental	23,360
Total Operating Revenue	<u>2,116,912</u>
<b>TELECOMMUNICATIONS EXPENSE-COMMERCIAL</b>	
Administration & Sales Expense	
Salaries & Wages Expense	141,401
General Expense	49,697
Contract Services	1,025,090
<b>IS &amp; Intergovernmental Services</b>	<b>123,892</b>
Fleet Services	229
Capitalized A & G Expense	(764)
Total Admin & Sales Expense	<u>1,339,545</u>
Operations & Maintenance Expense	
Salaries & Wages Expense	231,993
General Expense	15,845
Contract Services	42,825
IS & Intergovernmental Services	4,705
Fleet Services	19,923
New Connect Capital	(7,923)
Total Oper & Maint Expense	<u>307,368</u>
Total Telecommunications Expense	1,646,913
Net Revenues (Expenses) Before Taxes and Depreciation and Amortization	469,999
<b>Taxes</b>	<b>287,487</b>
<b>Depreciation and Amortization</b>	<b>142,442</b>
	429,929
<b>NET OPERATING REVENUES (EXPENSES)</b>	<u><u>\$40,070</u></u>

**Click! Pays 7.5%  
 Utility Tax On  
 ISP Sales**

**Includes Over  
 \$100K in  
 "Assessments"**

**Taxes Include \$52K  
 "Utility Tax" on ISP  
 Broadband Sales.  
 A 7.5% Illegal Tax**

**Paid off \$142K  
 in Depreciation**

**PROFIT**

City of Tacoma, Washington  
 Department of Public Utilities  
 Click! Network  
 Commercial Operations  
 Operational Summary (Unaudited)  
 September 30, 2019

	September 2019
<b>TELECOMMUNICATIONS REVENUE</b>	
CATV	\$1,269,012
Broadband	84,071
ISP	692,362
Interdepartmental	23,360
Total Operating Revenue	<u>2,068,805</u>
 <b>TELECOMMUNICATIONS EXPENSE-COMMERCIAL</b>	
Administration & Sales Expense	
Salaries & Wages Expense	143,304
General Expense	40,338
Contract Services	1,041,776
IS & Intergovernmental Services	107,816
Fleet Services	257
Capitalized A & G Expense	(674)
Total Admin & Sales Expense	<u>1,332,817</u>
 Operations & Maintenance Expense	
Salaries & Wages Expense	208,299
General Expense	13,039
Contract Services	53,201
IS & Intergovernmental Services	2,473
Fleet Services	15,829
New Connect Capital	(4,194)
Total Oper & Maint Expense	<u>288,647</u>
 Total Telecommunications Expense	1,621,464
 Net Revenues (Expenses) Before Taxes and Depreciation and Amortization	447,341
 Taxes	278,147
Depreciation and Amortization	142,269
	<u>420,416</u>
 <b>NET OPERATING REVENUES (EXPENSES)</b>	 <u><u>\$26,925</u></u>

City of Tacoma, Washington  
 Department of Public Utilities  
 Click! Network  
 Commercial Operations  
 Operational Summary (Unaudited)  
 October 31, 2019

	<u>October 2019</u>
<b>TELECOMMUNICATIONS REVENUE</b>	
CATV	\$1,324,858
Broadband	80,228
ISP	688,345
Interdepartmental	22,293
Total Operating Revenue	<u>2,115,724</u>
<b>TELECOMMUNICATIONS EXPENSE-COMMERCIAL</b>	
Administration & Sales Expense	
Salaries & Wages Expense	141,938
General Expense	72,238
Contract Services	1,027,273
IS & Intergovernmental Services	119,183
Fleet Services	1,646
Capitalized A & G Expense	(137)
Total Admin & Sales Expense	<u>1,362,141</u>
Operations & Maintenance Expense	
Salaries & Wages Expense	233,629
General Expense	18,355
Contract Services	44,245
IS & Intergovernmental Services	2,403
Fleet Services	17,462
New Connect Capital	(9,145)
Total Oper & Maint Expense	<u>306,949</u>
Total Telecommunications Expense	1,669,090
Net Revenues (Expenses) Before Taxes and Depreciation and Amortization	446,634
Taxes	287,462
Depreciation and Amortization	<u>142,210</u>
	429,672
<b>NET OPERATING REVENUES (EXPENSES)</b>	<u><u>\$16,962</u></u>

CITY OF TACOMA, WASHINGTON  
DEPARTMENT OF PUBLIC UTILITIES  
CLICK! NETWORK  
COMMERCIAL OPERATIONS

OPERATIONAL SUMMARY - October 31, 2018

	October 2018
<b>TELECOMMUNICATIONS REVENUE</b>	
CATV .....	\$1,381,948
<u>Broadband .....</u>	<u>82,893</u>
<u>ISP .....</u>	<u>613,026</u>
Interdepartmental .....	25,408
Total Operating Revenue .....	2,103,275
 <b>TELECOMMUNICATIONS EXPENSE-COMMERCIAL</b>	
Administration & Sales Expense .....	
Salaries & Wages Expense .....	231,155
General Expense .....	29,284
Contract Services .....	1,047,144
IS & Intergovernmental Services .....	131,467
Fleet Services .....	208
Capitalized A & G Expense .....	(1,055)
Total Admin. & Sales Expense .....	1,438,203
 Operations & Maintenance Expense ...	
Salaries & Wages Expense .....	323,335
General Expense .....	25,645
Contract Services .....	45,693
IS & Intergovernmental Services .....	3,344
Fleet Services .....	18,521
New Connect Capital .....	(9,642)
Total Oper. & Maint. Expense .....	406,896
 Total Telecommunications Expense .	1,845,099
 Net Revenues (Expenses) Before Taxes and Depreciation and Amortization ....	258,176
 Taxes .....	289,349
Depreciation and Amortization .....	189,291
	478,640
 NET OPERATING REVENUES (EXPENSES) ....	(220,464)

# Purple Perks FAQ

## What is the Purple Perks Loyalty Club?

It's an exclusive email based program that rewards our best customers with discounts and special offers. Be sure to check your email from Click! Cable TV and watch for special offers.

## How do you join?\*

[Join here](#)

## How much does it cost to join?

It is free to join.

## What do members receive?

Members receive quarterly money saving coupons primarily through email including:

- Welcome letter with a \$10 off cable bill coupon emailed to you after joining.
- Birthday card with a \$10 off cable bill coupon emailed during your birthday month.
- Free On Demand movie coupon emailed
- Holiday card with a \$5 off cable bill coupon emailed
- Free month of one premium channel emailed quarterly
- Other giveaways and perks emailed during the year

## How do I redeem the offers?

- Cable bill discount coupons - after coupons are received, fill out and redeem before the end of that quarter:
  - Email completed coupon to [PurplePerks@click-network.com](mailto:PurplePerks@click-network.com)
  - Or, mail completed coupon to: Click! Network, Attn: Purple Perks, 3628 South 35th Street, Tacoma, WA 98409 (can include with your bill.)
- Free premiums – after email is received, call us at 253-441-4100 to activate the free premium before the end of that quarter.

## When do the offers expire?

The Welcome letter \$10 off coupon expires 3 months from the date of receipt. Cable bill discounts and free premiums expire at the end of the quarter they are received. Other perks expiration dates vary. Read your emails carefully for full disclaimers.

# EXHIBIT 77

# PREFACE

The staff of the Federal Communications Commission (FCC) created the National Broadband Plan. To an extraordinary extent, however, the author of this plan is America itself.

The FCC started the process of creating this plan with a Notice of Inquiry in April 2009. Thirty-six public workshops held at the FCC and streamed online, which drew more than 10,000 in-person or online attendees, provided the framework for the ideas contained within the plan. These ideas were then refined based on replies to 31 public notices, which generated some 23,000 comments totaling about 74,000 pages from more than 700 parties. The FCC also received about 1,100 *ex parte* filings totaling some 13,000 pages and nine public hearings were held throughout the country to further clarify the issues addressed in the plan.

The FCC also engaged in significant collaboration and conversations with other government agencies and Congress, since the scope of the plan included many issues outside of the FCC's traditional expertise. Many people from across government contributed expertise and advice along the way, for which the FCC staff is eternally grateful.

The Internet also provided new ways to involve the public. Through an innovative Web presence at [www.broadband.gov](http://www.broadband.gov), the FCC posted more than 130 blog entries and received nearly 1,500 comments in return. The FCC's Twitter feed now has more than 330,000 followers, making it the third most popular government Twitter feed after the White House and the Centers for Disease Control.

The FCC staff digested this extensive record and worked long hours analyzing and debating the record. Every comment cannot be referenced in the plan, but they were all read, considered and valued.

Public comment on the plan does not end here. The record will guide the path forward through the rulemaking process at the FCC, in Congress and across the Executive Branch, as all consider how best to implement the plan's recommendations. The public will continue to have opportunities to provide further input all along this path.

This is America's plan, written by and for Americans. It's now time to act and invest in our nation's future by bringing the power and promise of broadband to us all.

## THE OMNIBUS BROADBAND INITIATIVE (OBI)

# EXECUTIVE SUMMARY

Broadband is the great infrastructure challenge of the early 21st century.

Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.

Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year. Increasingly capable fixed and mobile networks allow Americans to access a growing number of valuable applications through innovative devices.

But broadband in America is not all it needs to be. Approximately 100 million Americans do not have broadband at home. Broadband-enabled health information technology (IT) can improve care and lower costs by hundreds of billions of dollars in the coming decades, yet the United States is behind many advanced countries in the adoption of such technology. Broadband can provide teachers with tools that allow students to learn the same course material in half the time, but there is a dearth of easily accessible digital educational content required for such opportunities. A broadband-enabled Smart Grid could increase energy independence and efficiency, but much of the data required to capture these benefits are inaccessible to consumers, businesses and entrepreneurs. And nearly a decade after 9/11, our first responders still lack a nationwide public safety mobile broadband communications network, even though such a network could improve emergency response and homeland security.

## Fulfilling the Congressional Mandate

In early 2009, Congress directed the Federal Communications Commission (FCC) to develop a National Broadband Plan to ensure every American has “access to broadband capability.” Congress also required that this plan include a detailed strategy for achieving affordability and maximizing use of broadband to advance “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.”

Broadband networks only create value to consumers and businesses when they are used in conjunction with broadband-capable devices to deliver useful applications and content. To fulfill Congress’s mandate, the plan seeks to ensure that the entire broadband ecosystem—networks, devices, content and applications—is healthy. It makes recommendations to the FCC, the Executive Branch, Congress and state and local governments.

## The Plan

Government can influence the broadband ecosystem in four ways:

1. Design policies to ensure robust competition and, as a result maximize consumer welfare, innovation and investment.
2. Ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry.
3. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; and ensure that low-income Americans can afford broadband; and in addition, support efforts to boost adoption and utilization.
4. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations.

**1. Establishing competition policies.** Policymakers, including the FCC, have a broad set of tools to protect and encourage competition in the markets that make up the broadband ecosystem: network services, devices, applications and content. The plan contains multiple recommendations that will foster competition across the ecosystem. They include the following:

- **Collect, analyze, benchmark and publish detailed, market-by-market information on broadband pricing and competition,** which will likely have direct impact on competitive behavior (e.g., through benchmarking of pricing across geographic markets). This will also enable the FCC and other agencies to apply appropriate remedies when competition is lacking in specific geographies or market segments.
- **Develop disclosure requirements for broadband service providers** to ensure consumers have the pricing and performance information they need to choose the best broadband

## IN EVERY ERA, AMERICA MUST CONFRONT THE CHALLENGE OF CONNECTING OUR NATION ANEW.

In the 1860s, we connected Americans to a transcontinental railroad that brought cattle from Cheyenne to the stockyards of Chicago. In the 1930s, we connected Americans to an electric grid that improved agriculture and brought industry to the Smoky Mountains of Tennessee and the Great Plains of Nebraska. In the 1950s, we connected Americans to an interstate highway system that fueled jobs on the line in Detroit and in the warehouse in L.A.

Infrastructure networks unite us as a country, bringing together parents and children, buyers and sellers, and citizens and government in ways once unimaginable. Ubiquitous access to infrastructure networks has continually driven American innovation, progress, prosperity and global leadership.

Communications infrastructure plays an integral role in this American story. In the 1920s, '30s, '40s and '50s, telephony, radio and television transformed America, unleashing new opportunities for American innovators to create products and industries, new ways for citizens to engage their elected officials and a new foundation for job growth and international competitiveness.

Private investment was pivotal in building most of these networks, but government actions also played an important role. Treasury bonds and land grants underwrote the railroad,<sup>1</sup> the Rural Electrification Act brought electricity to farms and the federal government funded 90% of the cost of the interstate highways.<sup>2</sup>

In communications, the government stimulated the construction of radio and television facilities across the country by offering huge tracts of the public's airwaves free of charge. It did the same with telephony through a Universal Service Fund, fulfilling the vision of the Communications Act of 1934 "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>3</sup>

Today, high-speed Internet is transforming the landscape of America more rapidly and more pervasively than earlier infrastructure networks. Like railroads and highways, broadband accelerates the velocity of commerce, reducing the costs of distance. Like electricity, it creates a platform for America's creativity to lead in developing better ways to solve old problems. Like telephony and broadcasting, it expands our ability to communicate, inform and entertain.

Broadband is *the* great infrastructure challenge of the early 21st century.

But as with electricity and telephony, ubiquitous connections are means, not ends. It is what those connections enable that matters. Broadband is a platform to create today's

high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety.

Due in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before. Yet there are still critical problems that slow the progress of availability, adoption and utilization of broadband.

Recognizing this, one year ago Congress echoed the Communications Act of 1934 and directed the FCC to develop a National Broadband Plan ensuring that every American has "access to broadband capability." Specifically, the statute dictates:

*"The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. The plan shall also include:*

- *an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States,*
- *a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public,*
- *an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section, and*
- *a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes."<sup>4</sup>*

This is a broad mandate. It calls for broadband networks that reach higher and farther, filling the troubling gaps we face in the deployment of broadband networks, in the adoption of broadband by people and businesses and in the use of broadband to further our national priorities.

Nearly 100 million Americans do not have broadband today.<sup>5</sup> Fourteen million Americans do not have access to broadband infrastructure that can support today's and tomorrow's applications.<sup>6</sup> More than 10 million school-age children<sup>7</sup> do not have home access to this primary research tool used by most students for homework.<sup>8</sup> Jobs increasingly require Internet skills; the share of Americans using high-speed Internet at work grew by 50% between 2003 and 2007,<sup>9</sup> and the number of jobs in information and communications technology is growing 50%

## 17.4 CONCLUSION

This plan is premised on the potential of broadband to improve lives today and for generations.

But broadband alone will not solve America's problems. It cannot guarantee that the United States will lead the world in the 21st century. It cannot promise that the U.S. and other nations will conquer crippling inequality. It cannot ensure that the U.S. bestows the best job, education, health care, public safety and government services on every American.

Broadband is a critical prerequisite, though, to solutions to many of America's problems. It can open up ways for American innovators and entrepreneurs to reassert U.S. leadership in some areas and extend it in others. It can unlock doors of opportunity long closed by geography, income and race. It can enable education beyond the classroom, health care beyond the clinic and participation beyond the town square.

In 1938, President Roosevelt travelled to Gordon Military College in Barnesville, Georgia, to speak at the dedication of a local utility. "Electricity is a modern necessity of life, not a luxury," the President told the audience, "That necessity ought to be found in every village, in every home and on every farm in every part of the wide United States."<sup>47</sup>

He added, "Six years ago, in 1932, there was such talk about the more widespread and the cheaper use of electricity." But words did not matter until the country, "reduced that talk to practical results."<sup>48</sup>

Broadband, too, is a modern necessity of life, not a luxury. It ought to be found in every village, in every home and on every farm in every part of the United States.

There has long been talk of the widespread and affordable use of broadband. This plan is a transition from simple chatter to the difficult but achievable reality of implementation. It is a call to action for governments, businesses and non-profits to replace rhetoric with targeted, challenging actions.

It is time again to reduce talk to practical results.

# EXHIBIT 78

# THE UNITED STATES HAS A MARKET CONCENTRATION PROBLEM

## REVIEWING CONCENTRATION ESTIMATES IN ANTITRUST MARKETS, 2000-PRESENT

ISSUE BRIEF BY **ADIL ABDELA AND MARSHALL STEINBAUM**<sup>1</sup> | SEPTEMBER 2018

Since the 1970s, America’s antitrust policy regime has been weakening and market power has been on the rise. High market concentration—in which few firms compete in a given market—is one indicator of market power. From 1985 to 2017, the number of mergers completed annually rose from 2,308 to 15,361 (IMAA 2017).

Recently, policymakers, academics, and journalists have questioned whether the ongoing merger wave, and lax antitrust enforcement more generally, is indeed contributing to rising concentration, and in turn, whether concentration really portends a market power crisis in the economy. In this issue brief, we review the estimates of market concentration that have been conducted in a number of industries since 2000 as part of merger retrospectives and other empirical investigations. The result of that survey is clear: market concentration in the U.S. economy is high, according to the thresholds adopted by the antitrust agencies themselves in the Horizontal Merger Guidelines.

By way of background, recent studies of industry concentration conclude that it is both high and rising over time. For example, Grullon, Larkin, and Michaely conclude that concentration increased in 75% of industries from 1997 to 2012. In response to these and similar studies, the antitrust enforcement agencies recently declared that their findings are not relevant to the question of whether market concentration has increased because they study industrial sectors, not antitrust markets. Specifically, they wrote, “The U.S. Department of Justice and Federal Trade Commission find the claims of increasing concentration are unsupported by data for meaningful markets” (DOJ/FTC 2018).

In fact, we find that claims that market concentration is high are well-supported in the data for properly defined antitrust markets. Given the sparsity of studies that document market concentration in a given sector and in antitrust markets within that sector, there is indeed insufficient evidence to conclude that concentration in antitrust markets is rising. But the antitrust enforcement agencies themselves are in the best position to investigate that question, and so we hope they will do so—rather than publicly castigate outside attempts to shed light on the issue.

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<sup>1</sup> The Roosevelt Institute released an earlier version of this issue brief in April 2018 under the title “Market Concentration and the Importance of Properly Defined Markets.” Here, we update and augment the previous publication in order to respond to policy debates that have arisen since then.



## RECENT CONCERNS ABOUT CONCENTRATION

The Organisation for Economic Co-operation and Development (OECD) held a meeting in June of 2018 on the topic of market concentration, motivated by evidence of a moderate increase in broad measures of concentration in the U.S. and Japan, though not as much in European countries. Part of the OECD’s motivation for holding this meeting was that a range of other indicators suggest that on average market power is increasing. For example, markups and profits have significantly increased in the U.S. and internationally (Diez, Leigh, and Tambunlertchai 2018). Output and productivity growth have weakened. The OECD stated that “it remains unclear precisely what is driving the increase in market power” (OECD 2018).

As noted above, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), responded to the OECD’s concerns by stating that they find the claims of increased concentration unsupported by the data for meaningful markets (DOJ/FTC 2018). They pointed to multiple papers that based their findings of increased industry concentration on data from the U.S. Census Bureau. They claim that such measures of concentration are meaningless for competition analysis because industrial sectors are not relevant antitrust markets. They are not defined by consumer substitution patterns, and are in general much larger than antitrust markets. The example they give is that manufacturers of pencils and wooden blocks would be in the same industrial sector, but those two items cannot substitute for one another in consumption since they have very different uses.

In this issue brief, we first step back to characterize the policy debate by explaining why market definition matters in antitrust analysis and how it came to be that antitrust markets have been allowed to become as concentrated as they are. We then review the other evidence documenting the economy’s market power problem, including how that evidence is inconsistent with the antitrust agencies’ preferred theory for how we got here: that “superfirms” have gained market share thanks to their superior efficiency. Finally, we conclude by characterizing the research and policy agenda going forward, given that the agencies’ account of the evidence is so flawed.

## THE HORIZONTAL MERGER GUIDELINES AND ANTITRUST MARKETS

Section 7 of the Clayton Antitrust Act of 1914 states that a merger is unlawful if “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly” (DOJ 2010). Since 1968, this statute has been enforced according to the Horizontal Merger Guidelines, which have been updated and reissued several times.



The Horizontal Merger Guidelines, promulgated jointly by the DOJ and the FTC, outline the techniques, practices, and enforcement policy with respect to mergers and acquisitions amongst competitors. In the 1968 guidelines, the main concerns were barriers to entry and concentration ratios. In 1982, the guidelines were updated to include the Herfindahl-Hirschman Index and to entertain the concept of offsetting merger “efficiencies.” At the same time, they raised the level of market concentration that made it likely a merger would receive enforcement scrutiny. In 2010, the thresholds were raised even more. As a result, decades of lax merger review and antitrust enforcement gave way to rampant market power.

Before an analysis of market concentration can occur, the relevant market must first be defined. Antitrust officials determine the “relevant market” as the alternative firms or products available to consumers within the same market as the merging firms. For example, if a firm were to raise its prices after a proposed merger, regulators may examine how easy it would be for consumers to switch to another, more affordable product. When determining which products or firms compete in a given market, the geographical extent of the market is often a crucial dimension. Due to travel costs, for instance, customers are unlikely or unable to travel an exceedingly long distance to buy a product from a different company following a price spike.

The guidelines define an antitrust market in both product and geographic dimensions by using the “hypothetical monopolist test”: would a hypothetical monopolist in the proposed antitrust market be able to raise prices without losing enough customers that it would be self-defeating to do so? If the answer is yes, then the market is defined too broadly and should be narrowed. If a hypothetical monopolist could not increase prices without losing so much business that it wouldn’t be worthwhile, the market is defined too narrowly and should be widened—ideally to include the alternatives to which consumers would switch in this hypothetical. The threshold market definition at which such a price increase would be borderline profitable is considered the extent of the antitrust market, and this procedure for establishing that threshold is known as “critical loss analysis.”

## MEASURING MARKET CONCENTRATION

Once markets are defined, the Herfindahl-Hirschman Index (HHI) is the most common measure used for determining market concentration, including by the Horizontal Merger Guidelines. It is calculated by squaring the market share of each firm in a market and summing them up. Market share can be calculated using revenue, sales, or in some cases, number of products, employment, or hiring. For example, if we have four firms in a market with market shares of 35%, 30%, 20%, and 15%, the HHI would be  $35^2 + 30^2 + 20^2 + 15^2 = 2750$ . The index ranges from 1 (perfect competition) to 10000 (a monopoly).



According to the Horizontal Merger Guidelines, a market with an HHI above 2500 is considered highly concentrated. Furthermore, the guidelines state “mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power” (DOJ 2010). Before 2010, the guidelines were more strict. The guidelines considered a highly concentrated market to be one with an HHI above 1800, and a post-merger HHI increase of 100 to be considered potential for enhanced market power.

The Obama administration believed it should loosen the guidelines, since under the old guidelines, too many mergers that exceeded the thresholds went unchallenged. The idea would be that with more leeway for borderline-competitive mergers, enforcement resources could be directed at a greater share of mergers that are presumptively problematic, and hence fewer mergers in violation of the guidelines’ thresholds would go unchallenged. However, the effect has been to simply ratchet up the egregiousness of the mergers being considered, since industry has unsurprisingly interpreted the change in policy as reflecting a greater tolerance for concentration. Therefore, despite the higher thresholds, the merger wave has not been held back, but rather accelerated.

## **THE FALLACY OF THE AGENCIES’ RESPONSE**

The figures reported at the start of this issue brief, from the paper by Grullon et al., refer to industry concentration levels. The authors calculated industry concentrations by summing the squared ratios of firms’ sales to total industry sales and found industry concentrations to be high and increasing over time in most industries. Industry concentration is not the same as market concentration in a relevant antitrust market; however, it can be an indicator of increasing concentrations for antitrust markets within industries. A relevant antitrust market includes the options available to consumers, workers, or other counterparties to the merging firms. That is usually fewer than all the firms in a given industry, as the agencies pointed out in their statement to the OECD. Thus, the market concentration of a properly defined antitrust market within specific industries will normally be much higher than the concentration of each industry overall.

The logical assumption one should make about relevant markets is that the more narrow one defines it, the less firms there would be, and therefore, the concentration would be higher. In the agencies’ response, they use a study that looks at concentrations across the SIC 4-digit level. They use the manufacturing industry as an example as it is split into four groups, one of them being drug manufacturing. They argue that because drugs aren’t close substitutes for one another, the product market is too broad and therefore the concentration calculated has no merit.



The following example in the pharmaceutical industry shows that a narrow relevant market leads to calculating a higher market concentration. A study of the sector by Torrey Partners stated that “it is readily apparent that the generic pharmaceutical segment is not highly concentrated,” but they defined the industry at the global level, looking at revenue of companies that sell generic drugs and calculated the HHI to be 210 (Lefkowitz 2016). One cannot get a prescription from one’s doctor to buy a drug from a different country, so the market should be defined at the country level at least. More importantly, though, the product market should not be defined using all generic drugs in the same market. A consumer cannot substitute their diabetic medication with an antidepressant in the way they might be able to substitute one fast food item for another. Instead, the pharmaceutical industry would have its markets defined by specific drugs.

In the failed attempt by the DOJ to block the Pfizer-Warner merger in 2000, the DOJ lawyers pointed out that the HHI for specific drug markets would increase by a substantial amount. For example, over the counter pediculicides would see an HHI increase from 2,223 to 4,024. Pfizer’s Aricept had 98% of the Alzheimer’s treatment market, with Warner’s Cognex being their only competition (FTC 2000). With better-defined markets, antitrust officials can block anti-competitive mergers—and, in the case of the pharmaceutical industry at least, protect Americans’ access to affordable medication. In this example, we see the DOJ acknowledge that the pharmaceutical industry is highly concentrated when using the relevant market definition.

In their statement to the OECD, the agencies argue that reliable data is limited except for the banking and airlines sectors. They cite studies that show that there is not a rise in concentration in either industry. The study on airlines concentration from the U.S. Government Accountability Office (GAO) shows that concentration for airport routes did not rise by much from 2007 to 2012, but markets have been highly concentrated throughout the period (GAO 2014). The most recent banking study they cited also showed that concentration did not rise by much, from 2000 to 2010, in metropolitan, micropolitan, and rural areas. However, micropolitan and rural areas were highly concentrated throughout the time period (Adams 2012).

## **INADEQUATE ENFORCEMENT OF THE GUIDELINES**

Market definition is one of the most crucial tasks in antitrust enforcement, and in sectors where the antitrust agencies have reviewed many mergers, they tend to have established rules of thumb about the appropriate market definition. For example, in mergers between hospitals, they might conclude that the relevant market for a given merger is a 20-mile radius around hospitals owned by the merging parties. What that means is that when



patients consider which hospital to go to, they generally choose from the options within that radius. The point of the exercise undertaken in this issue brief is that when you look at the studies that have made an attempt to define antitrust markets, the average concentration they report for whatever market definition they come up with tends to be high.

As shown in the table below, nearly all of the markets reviewed are highly concentrated across the different industries where market definition has been undertaken. The internet search engine market is composed of companies looking to advertise their products by purchasing ads and listings using search services. It was highly concentrated with an HHI of 5105 in 2010, with Google, Microsoft, and Yahoo sharing over 96% of the revenue. Just two years later, the HHI grew to 5506, following the Search Alliance made by Microsoft and Yahoo (Noam 2016). The study defined the relevant market using revenue from ads at the national level and calculated market share by using search volume. The Search Alliance was a deal that enabled Microsoft to bypass acquiring Yahoo by instead powering Yahoo's search engine in exchange for listings and ads on Bing, Microsoft's search engine. The DOJ shut down a potential Google-Yahoo pact a year prior in fear of the highly concentrated search engine market becoming even more so. However, they did not challenge the Search Alliance in court, even though the guidelines would suggest that they would do so, given that the market was already highly concentrated. To have an online presence, companies must now either choose between signing up for Google Adwords or Microsoft's Bing Ads.

There is also a huge, growing concern about user privacy. Following the adoption of the broadband privacy rule in 2016, Internet Service Providers (ISPs) had been prohibited from selling users' browser history without their consent. President Trump signed a bill rolling back restrictions and allowing ISPs to sell one's search history without user consent. Meanwhile, the search engines themselves (Google and Bing) have never had any restrictions in how they can sell our search data to third parties, other than the FTC's mild warning that they must comply with their own terms of use (which few consumers bother to actually read, and in any case, they are written to be as opaque as possible and universally favorable to providers).

In our current duopoly—in which two companies dominate the market for online advertisements—we have no other choice than to accept that whatever we search on Google or Bing can be sold to whomever without our knowledge. In a competitive search engine industry, we would be able to instead use a competitor's service to avoid this practice, possibly discouraging Google, Microsoft, or the ISPs from continuing to invade our privacy.



The Whirlpool acquisition of Maytag in 2006 led to the refrigerator industry’s already high HHI growing from 2244 in 2007 to 2484 in 2008 (Taylor 2013). That study defined the relevant market as sales of each type of home appliance at the national level. The effects of a merger higher up the supply chain—in this case, at the manufacturing level—can still directly affect final consumers and must be considered. Appliance retailers (and other retailers in a similar situation) can face a price increase from their supplier as they will have fewer sourcing options. Before the acquisition, the top four companies within the industry had a 98% share of the market. At the time, the standard for enforcement was lower than it is today. Yet, even with a lower standard, antitrust regulators did not challenge the merger, and it turned out to have increased prices (Ashenfelter, Weinberg, and Hosken 2011).

## **PROPER MARKET DEFINITION CAN STRENGTHEN ANTITRUST POLICY**

The health insurance industry has had many large mergers in the past two decades. When analyzing a potential merger between two large insurance agencies, it would be wrong to define the market at the national level. At the national level, there are many insurance companies and the HHI would be low, so any merger would probably not increase the calculated HHI significantly. But health insurance is regulated at the state level, so insurance regulators have to approve policies offered in their state. Therefore, the proper geographic market definition in health insurance is, at the very widest, the state level. It may even be at the local level, since many insurers specialize still further, marketing to local communities or employers. One study looked at health insurance premiums offered by 800 employers in 139 geographical areas. It calculated the average HHI to be 2984 in 2006 (Daffny 2012), revealing that the health insurance industry is highly concentrated.

The Aetna-Humana merger was successfully blocked by the DOJ in 2016. The market here was defined as Medicare Advantage plans at the county level. It was found that the post-merger HHI would have surpassed 5000 for 75% of the counties. In 70% of the counties, the HHI would have increased by over 1000. In 70 counties, where Aetna and Humana are the only two Medicare Advantage plan providers in the market, the merger would have created a monopoly (DOJ 2017). Aetna’s lawyers argued that the Medicare and Medicare Advantage plans should be in the same market. However, Medicare Advantage plans are run by private companies and provide extensive coverage. In exchange for out-of-pocket limits and supplemental benefits, seniors can choose to pay monthly premiums and give up network flexibility by choosing Medicare Advantage over Original Medicare. This difference is the reason why the DOJ decided to define each plan in different markets.



## WHY HIGH CONCENTRATION THROUGHOUT THE ECONOMY MATTERS

The debate over proper market definition and whether concentration in the U.S. economy is, in fact, high should be understood in light of its larger significance: Does the economy currently suffer from a market power problem, and is that problem related to or caused by high measured concentration?

Other research finds that concentrated markets deter healthy competition, leading to low investment by companies who don't need to keep up with competitors (Gutierrez and Philippon 2017). It is also one cause of labor market monopsony—where employers have the discretion to set wages and working conditions on their own terms, without fearing that their workers could check their power by finding another job (Azar, Marinescu, and Steinbaum 2017; Dube and Kaplan 2010; Webber 2016). High market concentration makes it difficult for small businesses to compete or for new businesses to enter the market, since suppliers and customers will be difficult to pry away from incumbents. Moreover, such barriers to entry themselves give rise to concentration that sustains itself in an uncompetitive equilibrium. There's good reason to believe that market concentration and other uncompetitive market structures cause rising inequality and declining labor mobility and entrepreneurship (Konczal and Steinbaum 2016). Industrial concentration also correlates with rising profits and declining returns to productive factors (Barkai 2017). Finally, while no direct link has been shown between concentration (and market power more generally) and the slowdown in aggregate productivity growth, it is nonetheless the case that at the same time that market power has risen to crisis levels in the overall economy, productivity growth has been in decline (Fernald 2015; Syverson 2016).

In their statement to the OECD, after pointing out that industrial sectors are not antitrust markets, the agencies go on to credit interpretations of rising concentration premised on technological transformation, which implies that the reallocation of production to larger firms with greater market share is increasingly efficient. This is the so-called “superfirm” hypothesis, advanced by Autor et al. (2017), among others.

That interpretation is inconsistent with the evidence about both declining productivity growth and rising markups in aggregate and at the individual firm level. If more efficient firms were systematically gaining market share, it is difficult to imagine how, at the same time, productivity growth in aggregate has been declining. Moreover, the means by which more efficient firms would presumably attract a larger share of commerce is by beating the actual or potential competition through their ability to charge lower prices. And yet, the markups they charge are increasing—meaning that their cost advantage, if one exists,



is more likely driven by the ability to monopsonize input markets rather than by coming up with more efficient ways to convert those inputs into output.

It is therefore premature to excuse the economy's concentration problem with reference to superfirms.

## CONCLUSION

If the federal antitrust enforcement agencies do not make significant changes to the enforcement of antitrust policy, first by acknowledging that many markets are highly concentrated, fewer and fewer firms will continue to expand their dominance. Market concentration and market power lead to stagnant wages, fewer new businesses, and a weakened supply chain. As a result, many participants in the economy feel their fate is out of their own hands.

The start of any policy to rectify the economy's market power problem must be a recognition by antitrust enforcers that it exists. Here, we have gathered all the [available literature](#) to show that, at the very least, antitrust markets are highly concentrated per the Horizontal Merger Guidelines. It's time for the agencies to stop ignoring the problem or going out of their way to deny it exists. Instead, they and the rest of the antitrust policy community ought to be putting forward solutions for how to rectify the problems that lax antitrust enforcement has created, and the agencies themselves should be investigating the empirical questions brought forward in this ongoing debate.



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# Horizontal Merger Guidelines



U.S. Department of Justice  
and the  
Federal Trade Commission

Issued: August 19, 2010

# 1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the “Agencies”) with respect to mergers and acquisitions involving actual or potential competitors (“horizontal mergers”) under the federal antitrust laws.<sup>1</sup> The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies’ enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.<sup>2</sup>

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<sup>1</sup> These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

<sup>2</sup> These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

### 5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,<sup>9</sup> and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

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<sup>9</sup> For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ( $30^2 + 30^2 + 20^2 + 20^2 = 2600$ ). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.<sup>10</sup>

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

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<sup>10</sup> For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ( $5 \times 10 \times 2 = 100$ ).

## **6. Unilateral Effects**

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

### **6.1 Pricing of Differentiated Products**

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

## **6.2 Bargaining and Auctions**

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

## **6.3 Capacity and Output for Homogeneous Products**

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

*Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

## **7. Coordinated Effects**

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction.

Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by

retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

## **7.1 Impact of Merger on Coordinated Interaction**

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

## **7.2 Evidence a Market is Vulnerable to Coordinated Conduct**

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

# EXHIBIT 79

# EXHIBIT 12



3628 South 35<sup>th</sup> Street  
Tacoma, Washington 98409-3192

TACOMA PUBLIC UTILITIES

August 11, 2017

Michael Mirra, Executive Director  
Tacoma Housing Authority  
902 South L Street  
Tacoma, WA, 98405-4037

Dear Mr. Mirra:

Subject: Letter Agreement Regarding Water Heater Demand Response Project

This Letter Agreement (“Letter Agreement”) memorializes and specifies the circumstances, terms, and conditions of an agreement between the City of Tacoma, Department of Public Utilities, Light Division d.b.a. Tacoma Power (“Tacoma Power”) and the Tacoma Housing Authority (“THA”), pertaining to the water heater demand response project occurring at Salishan Phase 1 located at 1724 East 44th Street, Tacoma, WA.

## Recitals

- Water Heater Demand Response Project: Tacoma Power and the Bonneville Power Administration are researching the demand response (DR) effectiveness of the Consumer Technology Association (CTA) 2045 modular communication port in residential water heaters. In compliance with the Seventh Power Plan issued by the Northwest Power and Conservation Council, BPA is seeking new conservation opportunities and ways to increase the cost-effectiveness and reliability of demand response. The result of this Water Heater Demand Response Project will determine whether the CTA 2045 modular communications port will be integrated into production water heaters and incorporated into utility demand response programs nationwide.
- Location of the project: BPA is seeking to test up to 600 water heaters across the region; Tacoma Power will test approximately 90 electric resistance water heaters within the service territory. Tacoma Housing Authority has agreed to host these test water heaters at the Salishan housing development located on East 44<sup>th</sup> St., Tacoma.
- Common interest between THA and Tacoma Power: Both Tacoma Power and THA share an interest in installing energy efficient equipment in the Salishan housing development homes in order to reduce water heating costs for their tenants and a common interest in researching and documenting new products and methods to save energy.

- Coordination: BPA will negotiate production of and a price for an electric resistance water heater manufactured by AO Smith. These water heaters as well as heat pump water heaters manufactured by AO Smith and others will be used in the project. The water heaters will be made available for purchase by THA by AO Smith during the early summer of 2017. The price THA pays for these water heaters will be at or below \$350 as negotiated by BPA and AO Smith. Tacoma Power will coordinate with THA on delivery to THA of the CTA-2045 communications modules and module installation instructions. Tacoma Power will coordinate with Click! to design and install a project specific WIFI network for data transfer back to BPA. Neither THA nor their participating tenants will have access to this WIFI network. THA will purchase and install the water heaters and all code required peripherals. Project communications modules will be installed and a WIFI hook up established at time of water heater installation.
- Project timeline and costs: The Water Heater Demand Response Project is scheduled from July 2017 through August 2018. All costs for replacement and installation of electric water heaters will be borne by the THA. Communications modules and WIFI will be provided by BPA and Tacoma Power. The AO Smith PXNT-50 water heater carries an EF 95 efficiency rating and 10 year manufacturer's warrantee. BPA will negotiate the cost of the AO Smith PXNT-50 water heaters to be comparable to the existing EF 92, 6 year warrantee water heaters currently installed at Salishan Phase 1. In consideration for costs associated with the water heaters, communication module installation, and working with tenants in relation to the program, THA will receive the payments specified in Section 8 below.

**Now, therefore,** in consideration of the mutual benefits to be realized hereunder, Tacoma Housing Authority and Tacoma Power agree as follows:

### **Term**

The Term of this Letter Agreement will commence on the last date the Parties have signed this Letter Agreement below and will expire on December 31, 2018, unless mutually extended by both parties.

### **Tacoma Housing Authority Responsibilities**

1. Water heaters: THA shall be responsible for purchase and installation of AO Smith PXNT-50 water heaters in identified duplex and triplex housing in Phase 1 of the Salishan housing development. THA shall install communication ports and modules on the water heaters during installation and establish a WIFI connection with the WIFI set up by Tacoma Power. Water heaters will be priced at or below \$350 each for this project.

2. Communications devices: Tacoma Power shall provide port adapters that will be affixed to the communications port upon water heater installation by the THA. A UCM communications device will connect to the water heater via the port adapter. The UCM device will receive radio signal commands during the project and control the function of the water heater during specified demand response "events." Upon installation, THA will record the unique MAC address found on each UCM device, the physical address and tenant information for each installation and provide them to Tacoma Power. The UCM communication devices will sync with the dedicated WIFI network built for this project to report data back to Tacoma Power on a daily basis.
3. Coordination of Access during Project: Tacoma Power staff shall be granted reasonable access to the project homes for the purpose of troubleshooting WIFI connection, communication issues and retrieval and replacement of faulty UCM modules. When access is required for the aforementioned reasons, THA will coordinate access needs between Tacoma Power and tenants.
4. Financial responsibility for installation of water heaters: THA accepts financial responsibility for the purchase and installation of the replacement water heaters in each project home. THA further consents to the installation of the following monitoring equipment: a communications port to receive a designated UCM communications module. In addition, a WIFI router will be deployed in or near each project home to facilitate transfer of data back to Tacoma Power. THA expressly acknowledges and agrees that, for the term of this Agreement and the Water Heaters Demand Response Project, the monitoring equipment identified above shall remain the property of Tacoma Power and/or the Bonneville Power Administration and shall not be considered fixtures of the project homes except as provided for in this Letter Agreement even though said equipment shall be attached to real property within the homes. THA acknowledges and agrees that it shall have no, and shall not exercise any, lien or other rights in the monitoring equipment during the term of this Agreement. If THA exercises any rights as a mortgagor or lien holder, THA acknowledges and agrees that it has no lien or other interests in the monitoring equipment and said systems and equipment shall be removed by Tacoma Power.

### **Tacoma Power Responsibilities**

5. Communications hardware and WIFI network: Tacoma Power shall provide port adapters and UCM communication devices for installation on water heaters as they are installed by the THA. A dedicated WIFI network will be designed and installed by Tacoma Power for this project. Tacoma Power will bear all cost for installation, operation and decommissioning of this network.
6. Removal of Study Equipment: At the conclusion of the Water Heater Demand Response Project, Tacoma Power will coordinate with THA and occupants for the removal of monitoring and WIFI equipment.

7. Homeowner Training: Tacoma Power will provide an orientation and/or written information to occupants on the purpose and potential hot water impacts of this project. Occupants will be given specific instructions on how they may "opt out" of specific demand response events.
8. Payment: Tacoma Power will pay Tacoma Housing Authority for homes they enroll and retain through the duration of the project. For each home enrolled in the project by August 21, 2017, Tacoma Power will pay THA \$50 at the beginning of the project. For each initially enrolled home that remains in the project at the end of demand response events (approximately one year), Tacoma Power will pay THA an additional \$200.

### **No Warranties or Guarantees**

**Tacoma Power makes no implied or express warranties regarding the Water Heater Demand Response Project, any contractor, the water heaters, monitoring equipment or WIFI equipment and specifically disclaims any and all warranties including warranty of merchantability or fitness for a particular purpose.** Tacoma Power is a coordinator and sponsor of the Water Heater Demand Response Project only. Tacoma Power does not make any representations, promises, or guarantees with respect to the water heaters, energy consumption, and/or energy savings resulting from any installed equipment or water heating systems.

### **Hold Harmless / Indemnity**

THA agrees and acknowledges that Tacoma Power is not the manufacturer or installer of the water heaters or monitoring systems and THA agrees to hold Tacoma Power harmless from any damage, loss, personal injury, property damage, or demands arising from or related in any way from said water heaters, monitors, or related systems or the functioning and/or operation of said water heaters, monitors or related systems.

Tacoma Power shall indemnify, fully release, and hold harmless, THA, its officers, directors, and employees, from and against any all claims, demands, damages, or liability for personal injuries, property damage, or loss of life or property resulting from or in any way connected to the negligence of Tacoma Power and its employees or agents.

THA shall indemnify, fully release, and hold harmless, Tacoma Power, its officers, directors, and employees, from and against any and all claims, demands, damages, or liability for personal injuries, property damage, or loss of life or property resulting from or in any way connected to the negligence of THA and its employees or agents.

We request the concurrence by Tacoma Housing Authority by affixing the appropriate signature where indicated below. Thank you.

Sincerely,

Clay Norris  
Tacoma Power – Power Manager

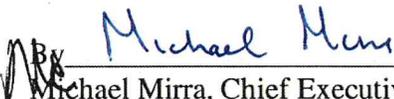
City of Tacoma, Department of  
Public Utilities, Light Division

Tacoma Housing Authority

Accepted:

Accepted:

By:   
Clay Norris – Power Manager

By:   
Michael Mirra, Chief Executive Officer

Date: 8-24-17

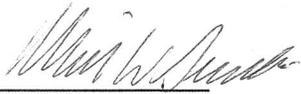
Date: 8.14.17

Approved:

  
Leda Voigt – Senior Financial Manager

Date: 8/16/17

Approved as to Form:

  
Michael Smith – Deputy City Attorney

Date: 8/15/17

# EXHIBIT 80

Section 405 amends the G. I. bill of rights by adding to the readjustment allowance under title V, an additional weekly allowance of \$5 for each of not more than three dependents. Thus, the maximum weekly amount payable under Title V of the G. I. bill of rights would be \$35. Dependents would include unmarried children under 18 or children of any age if because of mental defects they are incapable of self-support, wives, and parents incapable of self-support and dependent on the veteran. The limitation on readjustment allowances of 52 weeks is changed to an amount, in any 2 consecutive years, equal to 52 times the weekly benefit.

Section 501 authorizes the Federal Works Administrator to make, from funds appropriated for that purpose, loans or advances to the States and their subdivisions, to aid in the making of investigations and studies, surveys, designs, plans, specifications, or the like preliminary to the construction of public works funds appropriated for this purpose are to be allotted, 90 percent in the proportion which the population of each State bears to the total population of all the States, and 10 percent in accordance with the discretion of the Federal Works Administrator, except that no State may be allotted less than one-half of 1 percent of the total available funds. Advances are to be repaid if and when the construction of the public works so planned is undertaken.

Section 601 contains definitions. Most of these are routine. The following are important:

A week of unemployment is any 7 consecutive calendar days in which a person has remuneration of less than \$3.

Dependents include unmarried children under 18 dependent on an individual, the wife of an individual dependent on him, and dependent parents incapable of self-support.

Employment means any service performed as a civilian after December 31, 1940, by an employee for his employer and includes civilian service outside of the United States for a United States war contractor by a person who was on September 16 a citizen of or resident in the United States. Governmental service and maritime service is also included. Excluded is service for a foreign government, domestic service, or service for a member of the person's family.

Weekly wages are defined as one-thirteenth of the wages in that quarter of the calendar year preceding the beginning of the benefit year in which wages were highest. This is the usual wage base under State compensation laws.

Section 602 authorizes the necessary appropriations.

Section 603 provides that the act except as otherwise specified becomes effective immediately and terminates 24 months after the termination of hostilities. Termination of hostilities means termination of hostilities of the wars in which the United States is now engaged as declared by a Presidential proclamation or concurrent resolution of the Congress.

Section 604 specifies that if any provision of the act is held invalid the remainder of the act is not to be affected.

Section 605 terminates the present Office of War Mobilization when the Director created by the act takes office, and transfers the records, property, and unexpended appropriations from the present Office of War Mobilization to the new Office of War Mobilization and Reconversion.

Section 606 continues the orders, policies, procedures, and directives prescribed by the present Director of War Mobilization until superseded by the new Director.

Section 607 specifies that no alien shall be employed in any capacity in the administration of this act unless he has served honorably in the armed forces of the United States.

Section 608 titles the act as the War Mobilization and Reconversion Act of 1944.

## Recognition of Italy as a Full and Equal Ally

### EXTENSION OF REMARKS

OF

## HON. VITO MARCANTONIO

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 24, 1944

Mr. MARCANTONIO. Mr. Speaker, under leave to extend my remarks in the RECORD, I include herein a statement by Mr. Joseph Salerno, New England regional director of the C. I. O. Political Action Committee, in support of the recognition of Italy as a full and equal ally:

The working people of Italian descent in America urge our country's recognition of Italy as a full and equal ally among the United Nations for total victory against the evil forces of Hitler and Mussolini.

Full recognition would inspire and encourage millions of Italians to take their proper place among the foes of nezi-ism, fascism, and reaction. The present policy of hit-and-miss support has caused disillusionment and humiliation, which hamper the destruction of fascism, and give comfort and aid to our common enemy.

We believe that Italy's status should be made clear by the United Nations, so there can be a real start toward reconstruction. Are we or are we not friends of the Italian people? For 2 years they have shown their friendship for us.

We suggested that Mussolini should be kicked out. He was kicked out. We advised breaking relations with the Nazis. Relations were broken. We hoped Italian troops would fight with our troops against the Axis.

Not only the troops, but the Italian people at home have been fighting on our side. Long before our troops arrived, the anti-Fascists of Milan, Turin, Bari, Genoa and other industrial cities in the north of Italy were fighting in the streets against the Nazis and Fascists. They are our real friends. What are we waiting for?

The Italians have been in a no-man's land—not knowing whether they were considered friends or enemies by our country. First, the rate of exchange for the Italian lire has been set at 100 to the \$1. That makes the lire almost valueless. In contrast, the French franc was set at 50 francs to the \$1. Why this difference in treatment?

The low rate of exchange for Italy has resulted in skyrocketing prices, which the workers have to pay for food and other necessities of life. Inflation has brought on black markets, which are forcing the cost of food even higher. Food is a weapon during the period of reconstruction to wipe out the last vestiges of fascism.

Recognition will help the Italian people to do their full share in the war of liberation to free the soil of Italy from Nazi tyranny. It will be a source of inspiration and encouragement for the Italian people to fight harder against the common enemy, and thereby spare the lives of thousands of United Nations soldiers who are now fighting on Italian soil.

A resolution introduced to Congress by Congressman VITO MARCANTONIO is now before the Committee on Foreign Affairs, requesting the President to establish friendly diplomatic relations with Italy.

In his resolution Congressman MARCANTONIO points out that the President has pledged the Italian people the right to a free and democratic government of their own choosing. The present Bonomi Government is composed of anti-Fascist and democratic

forces, reflecting the will of the majority of the American people.

The resolution requests our President to recognize the present Italian Government and make Italy a full and equal ally, entitled to lend-lease and a proper role among the United Nations, as the means of releasing untold energies of both liberated and occupied areas of Italy, to give their fullest support to crushing the Axis.

Action is imperative. Delay works in favor of the enemies of democracy.

## Congressional Review of Regulations

### EXTENSION OF REMARKS

OF

## HON. ERRETT P. SCRIVNER

OF KANSAS

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 24, 1944

Mr. SCRIVNER. Mr. Speaker, pursuant to permission granted to extend my remarks in the RECORD, I wish to insert an editorial from the trans-Atlantic edition of the London Daily Mail, of August 9, 1944, apropos a subject which we debated in the House on August 17:

#### THE NEGATION OF DEMOCRACY

Somebody forgot to lay three groups of regulations relating to the N. F. S. before Parliament. So they were printed, issued, and brought into force.

As Mr. Herbert Morrison explained, it was all a mistake, and, of course, it is accepted as such. It may well be that no individual has suffered and no harm been done.

But here is a first-class illustration of the dangers of delegated legislation.

It shows how easy it is for the people to be shackled by new laws without anybody being the wiser.

In such conditions the civil servant becomes the lawmaker and the lawgiver, and there is no check upon him. This is the negation of democracy.

Delegated legislation is defended on the score that the minister may always be called to account. What does that amount to?

In this case Mr. Morrison takes nominal responsibility but it is passed to the department, which has had a shake-up.

## Tacoma and the Power Fight

### EXTENSION OF REMARKS

OF

## HON. HENRY M. JACKSON

OF WASHINGTON

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 24, 1944

Mr. JACKSON. Mr. Speaker, the following article by Senator HOMER T. BONE is an excellent history of the public power fight in the State of Washington. Senator BONE points out the invaluable aid rendered by my colleague, Congressman MAGNUSON, in this long struggle:

#### TACOMA AND THE POWER FIGHT

(By Senator HOMER T. BONE)

Up to 1906 Tacoma had for many years—in fact, practically from the beginning—in 1889 owned the city distribution system. It did not produce its own power, but bought power from the Baker outfit which had built and

owned the Snoqualmie Falls hydro development. Subsequently the Puget Sound Power & Light Co. bought out the Baker-Snoqualmie plant. For several years prior to 1908 there had been agitation in Tacoma for the city to build its own generating plant. Stone and Webster interests fought this proposal bitterly, and the two leading papers in the city of Tacoma, the News and the Ledger, owned by Sam Perkins, were the most bitter enemies of this proposal. George Wright had been mayor of Tacoma about this time and was very active in promoting the building of a municipal generating plant on the Nisqually River, about 35 miles east of Tacoma. Many prominent citizens joined with Mayor Wright in urging this. Some of these men were prominent in the Tacoma Chamber of Commerce, which was badly split on the issue. Tacoma had never given Stone and Webster interests a franchise to serve domestic customers in Tacoma, and the city at all times maintained a monopoly of the domestic and commercial power load, the latter covering store lighting and the like. The private company, however, did have a franchise to serve industrial customers within the city limits.

In 1926 a charter revision commission was elected by the people of Tacoma for the purpose of revising the city charter. I was elected to that commission, receiving many thousands more votes than anyone else who had been a candidate, and without objection was made chairman of the charter revision commission. Naturally, I made every effort to see that the revised (and present) city charter which was the outgrowth of the work of this commission, contained suitable provisions respecting franchises for private utilities. I wrote, and had incorporated into the new charter, a provision authorizing a referendum on any franchise which might be granted a private utility. Shortly after the adoption of this charter, by vote of the people, the franchise of Stone and Webster to serve industrial customers expired and the city council refused to renew it. At that time the private company was only serving something like 30 customers in the city, and it surrendered these to the city. I recall that one big mill, which had a 10-year power contract with the private company, cut over to the city lines about this time, and saved \$1,200 a month on its power bill, or \$14,400 per year. One of the officers of the company told me this was more than the taxes they paid on their big plant. So much for that angle.

Proponents of the idea of the city generating its own power were successful in having the issue presented to the people in the November election in 1908. When this issue was squarely presented to the people of Tacoma for their vote, the News and the Ledger opened fire on the proposal, which was supported by the Tacoma Times (Scripps). As a youngster, I participated in this fight, making many speeches which, fortunately, have not been preserved, since they were examples of immaturity which would not have been of much use to students of oratory. What they lacked in polish and persuasiveness, they probably made up in vigor. At that time I saved every statement appearing in the Tacoma papers, and I have enshrined these in huge scrap books.

One of the arguments was that if the city built the Nisqually, 32,000-horsepower plant, it would prove to be a white elephant and the city would be glad to sell it for 50 cents on the dollar in a few years. Every friend of the Nisqually project was assailed in the papers as an enemy of decency and good government, and it was the bitterness of the attack, and the unfairness of the arguments, that there and then tied me to the power fight. Many of the articles opposing the project assailed the patriotism of those promoting it. A great number of the men who were fighting for this little Nisqually plant

were sons of Union veterans, who had offered their lives in the struggle to preserve the Union, and it seemed to me a lousy and vicious argument to assail men of this type, especially since the arguments were in behalf of a private company whose only concern was to gouge all the profit it could out of the people. As a side light—and I would not care to be quoted on it, although you can make such use of it as you desire—you are free to call attention to the fact that I probably would never have been in the power fight if it had not been for these bitter and nasty arguments directed against the patriotism, honor, and decency of men who merely wanted to have Tacoma own its own generating system.

Tacoma built the little Nisqually plant and it was finished by 1912. Its transmission lines ran through the intervening countryside, which was dotted with many farms. These farmers figured they should have some of this cheap power that Tacoma was going to enjoy, so they came to the city council and said they wanted to form some farmer mutual power companies and build their own baby transmission lines to serve themselves, and asked for permission to put transformers on this high-tension line and to step down the current so it could be used on their farm systems. In 1911, 1 year before the Nisqually plant was finished, some of us went to the legislature of that year and secured the introduction of a bill which authorized cities owning their own power plants to sell surplus power outside their corporate limits. In the meantime, two or three communities of farmers south and east of Tacoma had organized cooperative mutual power companies, and they stood ready to buy power off the Tacoma heavy transmission lines. The Stone and Webster outfit, keenly aware of what this might mean, tried to block this bill in the legislature, but it passed.

The next session of the legislature, in 1913, witnessed a piece of manipulation which really started the State-wide power fight. A member of the house of representatives by the name of Heiny, a Tacoma lawyer, introduced a bill dealing with irrigation, and tucked away in this bill was a provision consisting of two lines which repealed a section of law, which happened to be the law allowing cities to sell surplus power outside. I talked with many members of the legislature subsequently to the passage of this irrigation act and found that all of them thought this repealer sentence had to do with irrigation law.

In the meantime, the former companies had organized, and were ready to do business, but when the Nisqually plant was finished, they found the right of Tacoma to sell off its transmission lines had been denied by repeal of the authorizing statute. Now the reason for this situation, in a legal sense, arose out of the fact that cities operate under express grants of law, and may not exercise any power unless it is specifically granted. In the absence of a specific grant of power to sell outside, the city attorney of Tacoma and the city council believed they could not lawfully put transformers on this Nisqually heavy-duty line and sell power off the line outside the corporate limits of Tacoma. So the former companies were compelled to bring their baby lines to the edge of the city limits under great expense and buy power within the corporate limits of Tacoma. It is interesting to note that at this time the private company was not serving this area at all, and would only agree to serve it in case the farmers were willing to pay up to 20 cents per kilowatt hour for current—an outrageous figure. The city of Tacoma was generous, and allowed at least one of these companies to put cross arms on the heavy transmission poles and string its wires underneath the heavy transmission cables to the city, so that it would bring its wires into the city

limits. The city, which bought material at wholesale, was willing to sell these farmer companies wire and hardware at wholesale to help them get started. Within a few years, 7 or 8 of these farmer mutual companies were organized and doing business within Pierce County, a record not duplicated anywhere in the United States. The latest of these companies, and probably the largest of them, was the Peninsula Light Co., operating on the Gig Harbor Peninsula. I organized this company and represented it for a number of years before coming to the Senate. It started business in 1925. The rates of these farm companies were fixed by mutual members at prices as low, and sometimes lower, than those prevailing in the city of Tacoma. Tacoma was proving herself to be a good neighbor to the farmers who were purchasing a lot of stuff in Tacoma.

The Stone & Webster outfit threatened to enjoin the city against selling to the Peninsula Light Co. at Gig Harbor for the reasons I have noted. I assured the representatives of the private company that I would welcome a suit of that kind, and that if they brought such a suit I intended to organize all the farmers in Pierce County and march them to Olympia in a great demonstration, to inquire of the State authorities as to who owned the State of Washington—its people, or a Boston corporation. The private company refrained from filing an injunction suit, and the city of Tacoma put in a transformer at Springfield and proceeded to sell to the Peninsula Light Co.

As I recall it, the first of the bills to again reinstate the provision of the 1911 act authorizing the sales outside was introduced in the legislature about 1915. It failed. Such a proposal again failed in 1917, in 1919, and in 1921. In 1923 I determined to make one real fight of it in the legislature, and so I filed for the legislature in what was known as the "silk stocking" district of Tacoma, and was elected by an enormous majority to the house. In the session of 1923, I introduced what was known as the "Bone bill," which authorized cities to sell surplus power outside their corporate limits. By this time, and after many speeches by me and others on the question of power, the public power forces were pretty well organized. J. D. Ross, Kenneth Harlan, a relative of the late Justice Harlan of the Supreme Court; J. C. Unger, Charles Heighton, Fred Chamberlain, and others too numerous to mention, all banded together to force the issue. The bill was whipped in the legislature. Dissatisfied with this, I rewrote the provisions of the bill and prepared an initiative measure (No. 52) on which we secured, as I recall, around 80,000 signatures. It went on the ballot and was the subject of a bitter political fight in the general election of 1924. The power companies, according to most careful observations, spent an estimated \$1,000,000 in the State fighting that bill.

In our State that became the era of the "canned editorial." All the power companies combined to fight the bill, and set up a propaganda bureau and prepared these canned editorials for the editors of weekly newspapers who were each given a full-page ad, which they could run at political rates, if they ran the editorial and the cartoon which accompanied it. I used a clipping service then, as I do now, and I recall clipping 100 editorials appearing on the same day in weekly newspapers, which were identical. Many editors told me personally that they had to eat regularly, and these full-page ads at political rates helped provide sustenance for the family of the editor and keep his youngsters in school.

The Bone bill was defeated by a 75,000 majority. In that campaign Charles Heighton accompanied me in a State-wide speaking tour with some very colorful experiences,

which I have described to you in my looser moments. Arthur Cross, prominent lawyer of Aberdeen, joined in the fight, and many more prominent Grangers in the State took part. It was this fight which lined up the Grange solidly behind public power—a position from which it has never retreated.

It is interesting to go back to the prophecy made about Tacoma's Nisqually plant. From 1914 on, Tacoma provided the cheapest light and power rates in the United States as a result of its venture into the generating business. Today it stands No. 1 in the Union.

Seattle faced this problem in the step-by-step building of the great Skagit enterprise. When that great development is finished, it will be one of the outstanding producers of the country. When these plants are paid off, they will be an enormous asset of incalculable value to the cities owning them. Tacoma has long since paid off all the bonds of the Nisqually plant, and it has been an enormous producer of revenue. It laid the financial foundation for the great Cushman development and the later development of the Nisqually River which will raise the capacity of that river to 90,000 kilowatts.

After the defeat in 1924, the public power forces did not abandon the fight, but continued it. My own personal contribution was to leave my law business in Tacoma in 1925-26 and in subsequent years, and go about the State at frequent intervals, making speeches on the power question in order to solidify public power sentiment. In 1932, when the Democrats carried the State, I decided the time had come to settle this issue, and so I rewrote the old Bone bill, and took it down to Olympia, in December of 1932. This time, and in light of the New Deal victory, I decided we should abandon the stupid subterfuge raised in the proposal to allow the sale of surplus power, and make sales of power outside a public use. Cities engaged in the power business are regarded by repeated decisions of our Supreme Court as enterprisers engaged in a private business. Since the legislature can give cities such powers as it pleases, it was my view that the legislature could authorize cities to engage in public business outside their corporate limits. This meant that if a city was exhausting its potential power, it could condemn other power sites on the basis that they were for a public use. Otherwise, they would sometime have had to cut off outside users who were merely getting surplus power.

This principle of law is well understood by any lawyer familiar with municipal corporation law. The fight in the legislature was handled by a few staunch friends of public power—in the house, largely by WARREN MAGNUSON, a young lawyer who later became prosecuting attorney of King County, and subsequently a Member of the Congress of the United States, now candidate for the post of United States Senator.

Nearly every friend of public power went to Olympia to support the then Bone bill in its new dress. With the aid of the friends of public power, this bill passed, and the power companies promptly got out a referendum on it and held up its execution until 1934, when the people adopted it by a large majority.

In the meantime, and in 1929, the Washington State Grange officials came to me and asked me to prepare a power bill which would authorize farm communities to go into the power business. Three lawyers joined in this effort, i. e., Jim Bradford, former corporation counsel of Seattle, a very brilliant and able lawyer, and a judge who subsequently became a member of the State public service commission. The three of us prepared this bill, now known as the Grange Power Law. It was submitted to the legislature in the 1929 session by an initiative to the legislature. The terms of this bill are too well known to require comment. The legislature refused to

pass it, and it went on the ballot in the general election of 1930 and was adopted and is now a law of the State. It was this bill which was amended by Paul Coughlin, Jack Cluck, Ed Henry, and others, into the form of a legal proposal now known as Referendum No. 25. Referendum No. 25 simply allows all utility districts to unite under certain conditions and acquire an entire power system.

In these early fights the Grange played a prominent part. Such old war horses as Fred Chamberlain, and the Nelson brothers, J. C. Unger, Kenneth Harlan, Arthur Cross, J. D. Ross, and many others participated. Senator Dill took part in the fight for the Bone bill in 1924, the Grange power fight of 1930, and the Bone bill fight of 1934. Senator Dill never backed away from any of these fights, but went headlong into them and the people of the State owe a debt of gratitude to him.

There was an organized body, small and determined, in Spokane, Walla Walla, and Yakima. "The Lady from Yakima"—Ina Williams, served in the legislature and poured her energies into these power fights up to the time of her unfortunate death. Ned Blythe, now postmaster at Vancouver, was another soldier. Cotterill of Kent led the fight in his section. The forces of public power were scattered, but determined. After 1932, the fight was out in the open, and many new faces and new forces have come into the picture. Public utility districts became a great factor and sent representatives to Washington to aid in securing passage of a northwest power bill, creating a new Columbia River Authority. You are familiar with the names of these energetic workers.

This, in brief, is a sketchy outline of the long power fight in the State of Washington. All the pioneers in this fight cannot be mentioned for lack of space and lapse of memory.

I helped to frame the first direct primary law of our State back in 1907. I also participated in drafting the initiative and referendum laws of the State, and in these operations Fred Chamberlain took an active part. In 1919 the progressives of the State organized what was known as the Triple Alliance, made up of railway brotherhoods, American Federation of Labor and the Grange. Lucy Case and others were very active. These pioneers laid the foundation of the democratic system of our State. Some day someone will write a history of this period. The Triple Alliance was created to bring organized political support to progressive candidates on all tickets. It was not a political party.

### No Alien Patents Sold

#### EXTENSION OF REMARKS

OF

### HON. JOHN J. COCHRAN

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 24, 1944

Mr. COCHRAN. Mr. Speaker, during the discussion of the surplus property bill, the gentleman from California [Mr. VOORHIS] offered an amendment concerning patents.

In the colloquy that followed I stated the Alien Property Custodian had already disposed of some of the patents and Mr. VOORHIS agreed he had. This morning I received a letter from the Chief of the Patents Division of the Office of the Alien Property Custodian. It shows both Mr. VOORHIS and myself were

wrong when we agreed some patents had been sold. The letter as well as part of the report referred to follows:

OFFICE OF ALIEN PROPERTY CUSTODIAN,  
Washington, August 23, 1944.

HON. JOHN J. COCHRAN,  
House of Representatives,  
Washington, D. C.

MY DEAR CONGRESSMAN: I noticed in the CONGRESSIONAL RECORD of August 22, 1944, on pages 7201 and 7202, a discussion between you and Mr. VOORHIS concerning disposition of patents by the Alien Property Custodian. I was particularly interested in your statement, with which Mr. VOORHIS agreed, that the Alien Property Custodian has "already sold a lot of patents."

I am enclosing a copy of the annual report of this Office for the period from March 11, 1942, to June 30, 1943. I call your attention particularly to the discussion of the disposition of patents beginning at the bottom of page 73 of this report and to the statement on page 74 that "no patents are sold." This was a statement of the policy of the Office of Alien Property Custodian at the time of the annual report, and it continues to be the policy of this Office. The present policy for administration of patents on a basis of licensing rather than sale by this Office was outlined in general terms shortly after the appointment of Leo T. Crowley as Custodian. On April 27, 1942, Mr. Crowley testified before the Senate Committee on Patents:

"In order to secure the maximum utilization of patents which may come into our possession, we propose to make them freely available to American industry. We cannot, at this time, state exactly the terms under which they will be available. . . . In general, however, no patents will be sold at this time." (Hearings before the Committee on Patents, U. S. Senate, 77th Cong., 2d sess., on S. 2803 and S. 2491.)

We have followed a policy of issuing non-exclusive licenses to American citizens under seized enemy patents, and have now licensed more than 8,000 patents for use by American industry. In every case, title to the patent is retained by the Custodian.

Up to this time, except in rare instances, the Custodian has not even sold the stock of corporations which hold patents. One corporation which we sold has a few patents. Another American company, of which we sold 50 percent of the stock, owned certain patents, which, however, were already exclusively licensed to the American owner of the other 50 percent of the stock. The only disposition of patents actually vested by the Alien Property Custodian has been the transfer to an American individual of certain patents formerly owned by French nationals which he had a valid and outstanding option to buy, and the purchase price of which he paid to the Custodian.

I am sure that your statement in the Record was based on a misunderstanding of the facts, and I wish to give you a correct statement.

Sincerely yours,

HOWLAND H. SARGEANT,  
Chief, Division of Patent Administration.

The treatment of patents by the Custodian differs markedly from the policies adopted with respect to other types of vested properties. The objectives to be accomplished, however, are the same. In the case of patents, as with other productive resources, the program adopted is designed to make the most effective utilization of these resources during the period of war and in the post-war economy within our system of private enterprise. The program is designed to bring into industrial use as quickly as possible those inventions and processes covered by vested patents and patent applications which

**Tacoma and the Power Fight**  

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**EXTENSION OF REMARKS**  
**OF**  
**HON. HENRY M. JACKSON**  
**OF WASHINGTON**

**IN THE HOUSE OF REPRESENTATIVES**

*Thursday, August 24, 1944*

Mr. JACKSON. Mr. Speaker, the following article by Senator HOMER T. BONE is an excellent history of the public power fight in the State of Washington. Senator BONE points out the invaluable aid rendered by my colleague, Congressman MAGNUSON, in this long struggle:

**TACOMA AND THE POWER FIGHT**  
**(By Senator HOMER T. BONE)**

Up to 1908 Tacoma had for many years—in fact, practically from the beginning—in 1889 owned the city distribution system. It did not produce its own power, but bought power from the Baker outfit which had built and

owned the Snoqualmie Falls hydro development. Subsequently the Puget Sound Power & Light Co. bought out the Baker-Snoqualmie plant. For several years prior to 1908 there had been agitation in Tacoma for the city to build its own generating plant. Stone and Webster interests fought this proposal bitterly, and the two leading papers in the city of Tacoma, the News and the Ledger, owned by Sam Perkins, were the most bitter enemies of this proposal. George Wright had been mayor of Tacoma about this time and was very active in promoting the building of a municipal generating plant on the Nisqually River, about 35 miles east of Tacoma. Many prominent citizens joined with Mayor Wright in urging this. Some of these men were prominent in the Tacoma Chamber of Commerce, which was badly split on the issue. Tacoma had never given Stone and Webster interests a franchise to serve domestic customers in Tacoma, and the city at all times maintained a monopoly of the domestic and commercial power load, the latter covering store lighting and the like. The private company, however, did have a franchise to serve industrial customers within the city limits.

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The next session of the legislature, in 1913, witnessed a piece of manipulation which really started the State-wide power fight. A member of the house of representatives by the name of Heinly, a Tacoma lawyer, introduced a bill dealing with irrigation, and tucked away in this bill was a provision consisting of two lines which repealed a section of law, which happened to be the law allowing cities to sell surplus power outside. I talked with many members of the legislature subsequently to the passage of this irrigation act and found that all of them thought this repealer sentence had to do with irrigation law.

In the meantime, the former companies had organized, and were ready to do business, but when the Nisqually plant was finished, they found the right of Tacoma to sell off its transmission lines had been denied by repeal of the authorizing statute. Now the reason for this situation, in a legal sense, arose out of the fact that cities operate under express grants of law, and may not exercise any power unless it is specifically granted. In the absence of a specific grant of power to sell outside, the city attorney of Tacoma and the city council believed they could not lawfully put transformers on this Nisqually heavy-duty line and sell power off the line outside the corporate limits of Tacoma. So the former companies were compelled to bring their baby lines to the edge of the city limits under great expense and buy power within the corporate limits of Tacoma. It is interesting to note that at this time the private company was not serving this area at all, and would only agree to serve it in case the farmers were willing to pay up to 20 cents per kilowatt hour for current—an outrageous figure. The city of Tacoma was generous, and allowed at least one of these companies to put cross arms on the heavy transmission poles and string its wires underneath the heavy transmission cables to the city, so that it would bring its wires into the city

limits. The city, which bought material at wholesale, was willing to sell these farmer companies wire and hardware at wholesale to help them get started. Within a few years, 7 or 8 of these farmer mutual companies were organized and doing business within Pierce County, a record not duplicated anywhere in the United States. The latest of these companies, and probably the largest of them, was the Peninsula Light Co., operating on the Gig Harbor Peninsula. I organized this company and represented it for a number of years before coming to the Senate. It started business in 1925. The rates of these farm companies were fixed by mutual members at prices as low, and sometimes lower, than those prevailing in the city of Tacoma. Tacoma was proving herself to be a good neighbor to the farmers who were purchasing a lot of stuff in Tacoma.

The Stone & Webster outfit threatened to enjoin the city against selling to the Peninsula Light Co. at Gig Harbor for the reasons I have noted. I assured the representatives of the private company that I would welcome a suit of that kind, and that if they brought such a suit I intended to organize all the farmers in Pierce County and march them to Olympia in a great demonstration, to inquire of the State authorities as to who owned the State of Washington—its people, or a Boston corporation. The private company refrained from filing an injunction suit, and the city of Tacoma put in a transformer at Springfield and proceeded to sell to the Peninsula Light Co.

As I recall it, the first of the bills to again reinstate the provision of the 1911 act authorizing the sales outside was introduced in the legislature about 1915. It failed. Such a proposal again failed in 1917, in 1919, and in 1921. In 1923 I determined to make one real fight of it in the legislature, and so I filed for the legislature in what was known as the "silk stocking" district of Tacoma, and was elected by an enormous majority to the house. In the session of 1923, I introduced what was known as the "Bone bill," which authorized cities to sell surplus power outside their corporate limits. By this time, and after many speeches by me and others on the question of power, the public power forces were pretty well organized. J. D. Ross, Kenneth Harlan, a relative of the late Justice Harlan of the Supreme Court; J. C. Unger, Charles Heighton, Fred Chamberlain, and others too numerous to mention, all banded together to force the issue. The bill was whipped in the legislature. Dissatisfied with this, I rewrote the provisions of the bill and prepared an initiative measure (No. 52) on which we secured, as I recall, around 80,000 signatures. It went on the ballot and was the subject of a bitter political fight in the general election of 1924. The power companies, according to most careful observations, spent an estimated \$1,000,000 in the State fighting that bill.

In our State that became the era of the "canned editorial." All the power companies combined to fight the bill, and set up a propaganda bureau and prepared these canned editorials for the editors of weekly newspapers who were each given a full-page ad, which they could run at political rates, if they ran the editorial and the cartoon which accompanied it. I used a clipping service then, as I do now, and I recall clipping 100 editorials appearing on the same day in weekly newspapers, which were identical. Many editors told me personally that they had to eat regularly, and these full-page ads at political rates helped provide sustenance for the family of the editor and keep his youngsters in school.

The Bone bill was defeated by a 75,000 majority. In that campaign Charles Heighton accompanied me in a State-wide speaking tour with some very colorful experiences,

which I have described to you in my looser moments. Arthur Cross, prominent lawyer of Aberdeen, joined in the fight, and many more prominent Grangers in the State took part. It was this fight which lined up the Grange solidly behind public power—a position from which it has never retreated.

It is interesting to go back to the prophecy made about Tacoma's Nisqually plant. From 1914 on, Tacoma provided the cheapest light and power rates in the United States as a result of its venture into the generating business. Today it stands No. 1 in the Union.

Seattle faced this problem in the step-by-step building of the great Skagit enterprise. When that great development is finished, it will be one of the outstanding producers of the country. When these plants are paid off, they will be an enormous asset of incalculable value to the cities owning them. Tacoma has long since paid off all the bonds of the Nisqually plant, and it has been an enormous producer of revenue. It laid the financial foundation for the great Cushman development and the later development of the Nisqually River which will raise the capacity of that river to 90,000 kilowatts.

After the defeat in 1924, the public power forces did not abandon the fight, but continued it. My own personal contribution was to leave my law business in Tacoma in 1925-26 and in subsequent years, and go about the State at frequent intervals, making speeches on the power question in order to solidify public power sentiment. In 1932, when the Democrats carried the State, I decided the time had come to settle this issue, and so I rewrote the old Bone bill, and took it down to Olympia, in December of 1932. This time, and in light of the New Deal victory, I decided we should abandon the stupid subterfuge raised in the proposal to allow the sale of surplus power, and make sales of power outside a public use. Cities engaged in the power business are regarded by repeated decisions of our Supreme Court as enterprisers engaged in a private business. Since the legislature can give cities such powers as it pleases, it was my view that the legislature could authorize cities to engage in public business outside their corporate limits. This meant that if a city was exhausting its potential power, it could condemn other power sites on the basis that they were for a public use. Otherwise, they would sometime have had to cut off outside users who were merely getting surplus power.

This principle of law is well understood by any lawyer familiar with municipal corporation law. The fight in the legislature was handled by a few staunch friends of public power—in the house, largely by WARREN MAGNUSON, a young lawyer who later became prosecuting attorney of King County, and subsequently a Member of the Congress of the United States, now candidate for the post of United States Senator.

Nearly every friend of public power went to Olympia to support the then Bone bill in its new dress. With the aid of the friends of public power, this bill passed, and the power companies promptly got out a referendum on it and held up its execution until 1934, when the people adopted it by a large majority.

In the meantime, and in 1929, the Washington State Grange officials came to me and asked me to prepare a power bill which would authorize farm communities to go into the power business. Three lawyers joined in this effort, i. e., Jim Bradford, former corporation counsel of Seattle, a very brilliant and able lawyer, and a judge who subsequently became a member of the State public service commission. The three of us prepared this

bill, now known as the Grange Power Law. It was submitted to the legislature in the 1929 session by an initiative to the legislature. The terms of this bill are too well known to require comment. The legislature refused to

pass it, and it went on the ballot in the general election of 1930 and was adopted and is now a law of the State. It was this bill which was amended by Paul Coughlin, Jack Cluck, Ed Henry, and others, into the form of a legal proposal now known as Referendum No. 25. Referendum No. 25 simply allows all utility districts to unite under certain conditions and acquire an entire power system.

In these early fights the Grange played a prominent part. Such old war horses as Fred Chamberlain, and the Nelson brothers, J. C. Unger, Kenneth Harlan, Arthur Cross, J. D. Ross, and many others participated. Senator Dill took part in the fight for the Bone bill in 1924, the Grange power fight of 1930, and the Bone bill fight of 1934. Senator Dill never backed away from any of these fights, but went headlong into them and the people of the State owe a debt of gratitude to him.

There was an organized body, small and determined, in Spokane, Walla Walla, and Yakima. "The Lady from Yakima"—Ina Williams, served in the legislature and poured her energies into these power fights up to the time of her unfortunate death. Ned Blythe, now postmaster at Vancouver, was another soldier. Cotterill of Kent led the fight in his section. The forces of public power were scattered, but determined. After 1932, the fight was out in the open, and many new faces and new forces have come into the picture. Public utility districts became a great factor and sent representatives to Washington to aid in securing passage of a northwest power bill, creating a new Columbia River Authority. You are familiar with the names of these energetic workers.

THE NAMES OF THESE PIONEERS WERE  
This, in brief, is a sketchy outline of the long power fight in the State of Washington. All the pioneers in this fight cannot be mentioned for lack of space and lapse of memory.

I helped to frame the first direct primary law of our State back in 1907. I also participated in drafting the initiative and referendum laws of the State, and in these operations Fred Chamberlain took an active part. In 1919 the progressives of the State organized what was known as the Triple Alliance, made up of railway brotherhoods, American Federation of Labor and the Grange. Lucy Case and others were very active. These pioneers laid the foundation of the democratic system of our State. Some day someone will write a history of this period. The Triple Alliance was created to bring organized political support to progressive candidates on all tickets. It was not a political party.

Thorne interview.

July 1, 1926, about 10 A. M. Thorne called me up and asked me to come down to his office to have a talk with him. I went down and he said he wanted to talk over a matter that was not exactly political. That he was "wondering" if some way not be arrived at whereby this power fight might not be "adjusted" ( so to speak) by coming to an agreement with the power people relative to future fights. That they did not want to have this battle go on all the time. That he was interested in my future--wanted me to achieve success in a financial way---that the future was in my hands to help myself---that I was the outstanding man in the public ownership fight--that I was the leader so to speak of the public ownership movement in the state and that if I would take the initiative in suggesting some sort of a movement to stop the fight all would be well. Did not say that I could make a piece of money but hinted at it in a vague sort of way--said that he was not suggesting that I take money to quit, but that (intimation) I could make connections that would be profitable for me. Asked if I would "meet" with the power people and have a conference with them. Asked who I would be willing to meet and talk things over with. I told him that I knew Brockett better than any of them--that I was personally fond of Brockett and would be willing to "talk to him". I asked him if he was aware that Aberdeen had just voted two million for a power plant and he said he was not. I told him that it was formerly the law that cities could sell power outside and that when I introduced the Bone bill in the legislature the power people had yelled as tho I had introduced a bill to make women common property. That they yelled "Bolshevism" and that I resented this howl about what appeared eminently fair to me. He said that he could not discuss the merits of the matter but wanted me to talk over things as he had suggested that I do with Pierce/during the power fight in 1924. That no fight was on now and that I did not betray anyone now. I mentioned Gig Harbor and asked him if they intended to enjoin the city and that I intended to go into another fight if they did. He did not know anything about this phase of the situation. (NOTE---I refused to talk to Pierce during the 1924 fight altho Thorne asked me to do it--told him I could not talk to the power people when I was fighting them)

I left Thorne's office with the agreement that I would "talk" to Brockett. I think that I "got his goat" in a way by saying that I would keep sealed lips as to what was said in this conference. He came back bu saying that it was not a case of "sealed lips" but "just a business matter". Did not seem to like my suggestion dou tless because it implied a disposition on my part to regard it as a case of trying to "pull me off" by possible bribery.

The power crowd are BADLY frightened. They would not keep at Thorne (knowing my regard for the man) unless the situation was dark for them. The Aberdeen fight evidently has "put the fat into the fire" and something must be done to stem this tide toward public ownership. This is the background of this matter. It follows <sup>closely</sup> on my interview with Mayor Tennant and other councilmen ---Walters, Silver, Davison, et al, relative to the Gig Harbor situation and my threat to start another power fight.

What shall I do? Shall I "see" Brockett and listen to another proposal to accept money and quit the fight. Of what avail--all this struggle to achieve the thing nearest my heart--the winning of the battle for the people---if I quit now. Their offer of \$7500 in the street car matter was an insult. How cheap they think men are. The S.O.B's. I ~~if~~ <sup>mistrust</sup> Tennant and Walters. The scum. God give me strength to carry on. I would rather put over this power fight than be Governor.

The Gig Harbor mess is a hard nut for them. Dam them. They have met up with a different situation than enjoining Ross at Renton. The Gig Harbor fight means another million for them to spend. Dam them. How can Justice win with this gang in the saddle?

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*7/3/26 - Thorne phoned this morning - Brockett will be here in about a week and will see me.*

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Tuesday July 13th, 1926

During the morning Norwood Brockett called over the long distance and told me that he would come over and asked what hour would best suit. I told him of the Port Com meeting at 2 P.M. and arranged for him to call after or about 4 P. M. When I came back about 4 or 4.30 P. M. he was waiting. Went into private office and sat down and started to talk to me. Began by saying that I had said to him in former interview (at Tacoma Hotel) that if he ever had any work that did not require me to quit my fight for public ownership etc., I would be glad to take it on. " Now I have a piece of work that I want you to do that is not connected with your fight and will not tie your hands" "I want a man to help me with my "public relations" work---to get about the state and find out the people hate Stone Webster and also to look after some bus work. There is a reason why we are disliked and I want to know why. You can help. I would want the greater portion of your time at a good salary. I know that you are making money and that we must pay well. " Etc.,

After palavering around I told him that I could not take on such work---that it would forever tie my hands and make me shut my mouth. He said that no one would know it. I told him that ~~he would~~ he would recall the Bellingham story about Bone being "found out" by the electricians as having worked for Stone Webster. He said that this made him mad---that the old man (Lenard) did not send it out but knew of its going out to be used at Bellingham by Lebel and others. That Lebel went to Seifert with the story and Seifert run it. I told him that this made me mad as hell---that I could be ~~disbarred~~ ~~disbarred~~ for revealing my clients secrets and that he could not expect me to put my head into another noose. That when I was done I would be DONE and not have anything to say..

The Gig Harbor matter came up. Wanted to know if his outfit would sell at wholesale if that would satisfy me. I told him I did not care how the people over there got their current so long as they distributed it themselves. He suggested that they buy these lines. I did not ~~warm~~ warm up on this matter save to tell him that this was the last place Tacoma could serve and that they were taking on a fight over a small matter---that the cost of another fight would offset the profits from Gig Harbor a thousand years. He admitted this but talked of "principle". I asked him

if he thought that this "principle" was a complete monopoly for the power companies. He said he believed in "competition" and I asked him how this was to be obtained if there was none. When he left, he agreed to see me in a few days and tell me of the determination on the Gig Harbor situation. Don't want another power fight in the legislature. Asked who the people disliked. I told him of being at a meeting of a number of prominent men where Doran and Whiting and Aston were discussed. He asked if "poor old Wooding was criticised". Told him that I would hesitate to tell what was said about Doran--that it was too hot to tell to a gentlemen. That Aston was also regarded as a fixer and regarded with contempt. That he was regarded as a mighty smooth piece of legal machinery.

(I hope to God I have spiked Doran's gun and get him fired). I told him that Doran was universally despised by most men with whom I came in contact--that he was a drawback to the company.

Brockett started out his conversation by telling me that I was the "uncrowned King of the municipal ownership forces---of the enemies of Stone Webster". That something ought to be done and it seemed to him that it could be done, to end this warfare and get "together" on some common ground. That ~~there~~<sup>there</sup> was "room for both the cities and the private companies". He asked me if I did not believe that there was room for both ---that there should be competition. I admitted that I believed in competition. But I told him that his people were ~~being~~ trying to kill off all competition. And this was what sent me on the warpath.

He said that if there was another power fight he would never hire a job lot of men like in the last one. He mentioned the Benidetti incident as nearly getting him into trouble and the class of men hired as willing to do anything. I asked him if Beeler was with him and he said "no". I told him that I thought that Beeler had "gone over" to him in that fight. Admitted that Beneditt was his man. Said the ~~best~~<sup>only</sup> thing he regretted was his speech about my radicalism and the story about my having been their attorney. I asked him how he expected me to ever do any work for them with the experience of the Bellingham story from Leonard's office staring me in the face. That would kill any chance of my ever having anything to do with them again. Seemed to get under his hide. It was their mistake.

Sunday June 13, 1926

At home in the afternoon about 2:30 P.M. George ~~K~~ Vanderveer called me over the phone- -wanted to come out to "talk over a matter of business" with me. Blanche and Manny at Mort Millers where I afterward went for dinner about 3:30 P. M.

Vanderveer came out alone. Said he was attempting to sell the TR&P to city for a price (bed-rock) of \$3,600,000----that it had a rate value of \$6,700,000. Was willing to cut his commission one third- with me----another man in on it. Also that I would be "taken care of on the side to a still greater extent. Wanted me to express myself then on the matter but was willing that I should "mull it over in my mind" and let him know later on. I to help put the sale over. I told him that I would "think it over" and he asked me( right at the outset) to keep it in strict confidence, which I agreed to do.

Wanted me to come out and see Sullivan (Dick) as he called him- Harvard man-- Irishman- - quite a philosopher, he said. I told him I had a dinner engagement and could not go then but would see him later.



# EXHIBIT 81

respective governing bodies of any such city or town and of any such public utility district desiring to cooperate in the joint ownership, maintenance and operation of electric utility properties pursuant to the authority contained in RCW 35.92.280 through 35.92.310, shall by mutual agreement provide for such joint ownership, maintenance and operation. Such agreement shall prescribe the rights and property interest which the parties thereto shall have in such electric utility properties, which property interest may be either divided or undivided and shall further provide for the rights of the parties thereto in the ownership and disposition of the power and energy produced by such electric utility properties, and for the operation and management thereof.

**35.92.300** ————**Financing.** Any city or town and any public utility district cooperating under the provisions of RCW 35.92.280 through 35.92.310 may, without an election or other proceedings under any existing law, contribute money and property, both real and personal, to any joint undertaking pursuant hereto, and may issue and sell revenue bonds to pay its respective share of the costs of acquisition and construction of such electric utility properties. Such bonds shall be issued under the provisions of applicable laws authorizing the issuance of revenue bonds for the acquisition and construction of electric public utility properties by cities, towns and public utility districts, as the case may be.

**35.92.310** ————**Authority granted is additional power.** The authority and power granted by RCW 35.92.280 through 35.92.310 is an additional grant of power to cities, towns, and public utility districts to acquire and operate electric public utilities, and the provisions hereof shall be construed liberally to effectuate the authority herein conferred, and no restriction or limitation prescribed in any other law shall prohibit the cities, towns and public utility districts of this state from exercising the authority herein conferred: *Provided*, That nothing in RCW 35.92.280 through 35.92.310 shall authorize any public utility district or city cooperating under the provisions of RCW 35.92.280 through 35.92.310 to condemn any property owned or operated by any privately owned utility.

## Chapter 35.94

### SALE OR LEASE OF MUNICIPAL UTILITIES

**35.94.010** **Authority to sell or let.** 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.

**35.94.020 Procedure.** The legislative authority of the city, if it deems it advisable to lease or sell such works, plant, or system, or any part thereof, shall adopt a resolution stating whether it desires to lease or sell. If it desires to lease, the resolution shall state the general terms and conditions of the 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 clerk, or other proper official, to publish the resolution not less than once a week for four weeks in the official newspaper of the city if there is one, or if not, then in any newspaper published in the city, or if there is none, then in any newspaper published in the county in which the city is located, together with a notice calling for sealed bids to be filed with the clerk or other proper official not later than a certain time, accompanied by a certified check payable to the order of the city, 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 is accepted and he fails to comply therewith within the time hereinafter specified, the check or deposit shall be forfeited to the city. If bids for a lease are 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 are called for, the bids shall state the price offered. The legislative authority of the city may reject any or all bids and accept any bid which it deems best. At the first meeting of the legislative authority of the city held after the expiration of the time fixed for receiving bids, or at some later meeting, 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 the declaration. If the resolution is adopted it shall be necessary, in order that such bid be accepted, to enact an ordinance accepting it and directing the execution of a lease or conveyance by the mayor and city clerk or other proper official. Such 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.

**35.94.030 Execution of lease or conveyance.** Upon the taking effect of the ordinance the mayor and the city clerk or other proper official shall execute, in the name and on behalf of the city, the lease or conveyance directed thereby. The lessee or grantee shall accept and execute the instrument within ten days after notice of

its execution by the city or forfeit to the city, the amount of the check or deposit accompanying his bid: *Provided*, That if litigation in good faith is instituted within ten days to determine the rights of the parties, no forfeiture shall take place unless the lessee or grantee fails for five days after the termination of the litigation in favor of the city to accept and execute the lease or conveyance.

## Chapter 35.98

### CONSTRUCTION

**35.98.010 Continuation of existing law.** The provisions of this title insofar as they are substantially the same as statutory provisions repealed by this chapter, and relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments.

**35.98.020 Title, chapter, section headings not part of law.** Title headings, chapter headings, and section or subsection headings, as used in this title do not constitute any part of the law.

**35.98.030 Invalidity of part of title not to affect remainder.** If any provision, section, or chapter of this title or its application to any person or circumstance is held invalid, the remainder of the provision, section, chapter, or title, or the application thereof to other persons or circumstances is not affected.

**35.98.040 Repeals and saving.** The following acts or parts of acts are repealed:

- (1) Chapter 56, Laws of 1963;
- (2) Chapter 57, Laws of 1963;
- (3) Chapter 72, Laws of 1963;
- (4) Chapter 115, Laws of 1963;
- (5) Chapter 119, Laws of 1963;
- (6) Section 1, chapter 127, Laws of 1963;
- (7) Chapter 130, Laws of 1963;
- (8) Chapter 131, Laws of 1963;
- (9) Chapter 155, Laws of 1963;
- (10) Chapter 170, Laws of 1963;
- (11) Chapter 184, Laws of 1963;
- (12) Chapter 191, Laws of 1963;
- (13) Sections 12, 13, 14, 15, and 16, chapter 200, Laws of 1963;
- (14) Chapter 222, Laws of 1963;
- (15) Chapter 231, Laws of 1963;
- (16) Chapter 33, Laws of 1961;
- (17) Chapter 46, Laws of 1961;
- (18) Chapter 51, Laws of 1961;

Exceptions.

Limited to  
one motion.

making the affidavit has been given notice, and before the Judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident Judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: *And provided further*, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such Judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: *And provided, further*, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this act.

Passed the House March 12, 1941.

Passed the Senate March 12, 1941.

Approved by the Governor March 21, 1941.

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## CHAPTER 149.

[H. B. 205.]

### CODE COMMITTEE.

AN ACT to make uniform and perpetual the citations of laws of this state for all compilations and codifications thereof and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

Code Com-  
mittee  
created.

SECTION 1. The State Law Librarian, the Law Librarian of the University of Washington, and the Executive Secretary of the Judicial Council are

hereby created a Committee to perform the duties prescribed in this act.

SEC. 2. The said Committee shall, after collaboration with the publishers of the existing codes, determine upon and adopt a complete recompilation of the laws of this state in force of a general and permanent nature, and shall adopt a uniform and perpetual system for the numbering of the sections thereof.

Duties.

To compile uniform system.

SEC. 3. Hereafter the Secretary of State shall certify only the codes or compilations published with the section numbering adopted by the Committee.

Certificate of Secretary of State.

The code or codes, when so certified by the Secretary of State, shall be deemed and held to be official, as heretofore, and shall be prima facie evidence of the laws contained therein.

SEC. 4. The Legislature shall amend or repeal laws by code numbers. Laws amended shall refer to code numbers, and germane matter shall be incorporated in existing laws to prevent conflict and obey constitutional mandate.

Repeals and amendments by number.

SEC. 5. This act is necessary for the immediate preservation of the public peace, health and safety and the support of the state government and its existing public institutions and shall take effect immediately.

Effective immediately.

Passed the House February 13, 1941.

Passed the Senate March 5, 1941.

Approved by the Governor March 21, 1941.

Treasurer  
to handle  
funds.

of the County Treasurer of the county in which any Rural County Library District is created under this act to receive and disburse all district revenues and to collect all taxes levied under this act.

Public  
corporation.

A rural County Library District shall be a public corporation with such powers as are necessary to carry out its functions and for taxation purposes shall have the power vested in municipal corporations for such purposes.

Effective  
immediately.

SEC. 2. This act is necessary for the immediate support of the state government and the existing public institutions of the state and shall take effect immediately.

Passed the House February 27, 1943.

Passed the Senate March 9, 1943.

Approved by the Governor March 22, 1943.

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## CHAPTER 252.

[ S. B. 47. ]

### CODIFICATION OF STATUTES RELATING TO COUNTIES.

AN ACT relating to the codification of constitutional and statutory provisions relating to counties and county officers, and to the statutory law of the state in general; providing for the continuous revision and codification of statutes of a general and permanent nature; amending section 5, chapter 149, Laws of 1941; and further amending chapter 149, Laws of 1941 (sections 152-36 to 152-39, Rem. Supp. 1941), by adding thereto three (3) new sections to be known as sections 6, 7 and 8; making appropriation and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

Amendments.

SECTION 1. Section 5, chapter 149, Laws of 1941, is amended to read as follows:

Continuing  
committee.

Section 5. The Committee shall be a continuing Code Committee with full power of revision and codification of the laws above referred to, and shall

have the power and duty to assign code numbers to such general laws as shall hereafter be passed at any legislative session; and the said Committee shall certify to the Secretary of State the numbers given to the sections which the Committee has determined shall be incorporated in such code.

Assign code numbers.

SEC. 2. Chapter 149, Laws of 1941 (sections 152-36 to 152-39, Rem. Supp. 1941), is amended by adding thereto a new section to be known as section 6 and to read as follows:

Amendments.

Section 6. The said Committee shall have authority to employ and fix the compensation of an experienced attorney to make continuous studies of the statutes for the purpose of revising and simplifying the same, reconciling conflicting provisions, and eliminating obsolete statutes. The Committee shall also have authority to provide adequate clerical assistance and supplies, and to incur expenses incident to the work of said Committee. The duties to be performed under this paragraph shall be subject to the direction and supervision of the Committee. All vouchers for payments or expenditures of the Committee of every kind shall be approved by the Committee or by such member or members thereof as the Committee shall designate.

Committee to employ attorney.

Clerks and supplies.

Approve vouchers.

SEC. 3. Chapter 149, Laws of 1941 (sections 152-36 to 152-39, Rem. Supp. 1941), is amended by adding thereto a new section to be known as section 7 and to read as follows:

Amendments.

Section 7. The Committee shall not adopt any numbering system unless the owner thereof, whether the said system be patented or otherwise, shall first have filed in the office of the Secretary of State a written agreement, running to the State of Washington, and enforceable by any interested person, to the effect that said numbering system, if adopted, shall be available to, and may be used without charge or compensation, by any person who may at any

Agreement for free use.

time hereafter elect to publish the laws of this state, either in whole or in part.

Amendment  
by adding  
new section.

SEC. 4. Chapter 149, Laws of 1941 (sections 152-36 to 152-39, Rem. Supp. 1941), is amended by adding thereto a new section to be known as section 8 and to read as follows:

Collaboration  
by request.

Section 8. If requested by the Committee, any department or official of the government of the State of Washington shall collaborate with the Committee in the revision and recompilation of the laws relating to or affecting such department official.

Collaborate  
on county  
code.

SEC. 5. The said Committee as part of its activities in collaboration with a committee of county officials (to be appointed by the Governor for that purpose, the number of which shall be at the discretion of the Governor, and the services of whom on such Committee are hereby declared to be official county business) shall cause to be prepared a compilation of all the constitutional and statutory provisions with respect to counties and county officers together with recommendations as to any revisions, amendments and additions which in the judgment of the Committee should be made to existing statutory provisions with respect to counties and county officers. Said constitutional provisions together with the statutory provisions in substance and form as recommended by said Committee shall be submitted to the 1945 legislature in such form that the legislature upon adoption thereof may cause the same to be printed in pamphlet form for the use of various county officials.

Appropriation.

SEC. 6. There is hereby appropriated out of any money in the general fund not otherwise appropriated the sum of forty thousand dollars (\$40,000) or so much thereof as may be necessary, to be used in carrying out the provisions of this act.

Effective  
immediately.

SEC. 7. This act is necessary for the immediate preservation of the public peace, health and safety, and the support of the state government and its ex-

## CHAPTER 233.

[ H. B. 276. ]

## CODE COMMISSION.

AN ACT relating to the compilation and codification of the statutory laws of the state, amending section 5, chapter 149, Laws of 1941, as amended by section 1, chapter 252, Laws of 1943, amending section 5, chapter 252, Laws of 1943, making an appropriation, and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. Section 5, chapter 149, Laws of 1941, as amended by section 1, chapter 252, Laws of 1943 (section 152-40, Remington's Revised Statutes, 1943 Supplement, also Pierce's Perpetual Code 430-9), is amended to read as follows: Amendment.

Section 5. The Committee shall be a continuing Code Committee with full power of codification of the laws above referred to, and shall have the power and duty to assign code numbers to such general laws as shall hereafter be passed at any legislative session; and the said Committee shall certify to the Secretary of State the numbers given to the sections which the Committee has determined shall be incorporated in such code. In addition, the Committee shall propose and submit to the Legislature changes and revisions of the above referred to laws, and shall submit by mail at least ninety (90) days prior to the opening of the 1947 legislative session, a copy of the proposed code and a copy of all such proposed changes and revisions to each and every judge of the Supreme Court and the Superior Courts of the State of Washington, to each member of the Legislature elected for the 1947 session, to the State Bar Association and to the various local bar associations of every county or city in the State of Washington, and to the various prosecuting attorneys of the State of Washington. Continuing code committee.

Recommendations.

Copies of proposals distributed.

LAWS

OF

WASHINGTON

1917

STATE OF WASHINGTON  
PRINTED BILLS  
OF THE  
LEGISLATURE  
FIFTEENTH SESSION  
HOUSE

1917

# House Bill No. 337

STATE OF WASHINGTON, FIFTEENTH REGULAR SESSION.

Read first time February 16, 1917, ordered printed, and referred to Committee on Public Utilities.

## AN ACT

Authorizing cities and towns to lease or sell any municipally-owned water works, gas works, electric light and power plants, steam plants, street railway plants and lines, telegraph and telephone lines and plants and any other municipally-owned public utility, or public utility system similar or dissimilar in character.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. 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.

Sec. 2. 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

## CHAPTER 137.

[H. B. 237.]

### SALE OR LEASE OF PUBLIC UTILITIES OWNED BY CITIES OR TOWNS.

AN ACT authorizing cities and towns to lease or sell any municipally-owned water works, gas works, electric light and power plants, steam plants, street railway plants and lines, telegraph and telephone lines and plants and any other municipally-owned public utility, or public utility system similar or dissimilar in character.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. 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.

Authority  
granted.

SEC. 2. 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

Resolutions  
proposing  
sale or lease.

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

the execution of a lease or conveyance by the mayor and city clerk or other proper official. Such ordinance shall not take effect until it shall have been submitted to the voters of such city or town 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 shall have approved such ordinance. If approved it shall take effect as soon as the result of such vote be proclaimed by the mayor. If it be so submitted and fail to receive the approval of a majority of the voters voting thereon, it shall be rejected and annulled. It shall be the duty of the mayor to proclaim such vote as soon as it shall be properly certified. [L. '17, p. 573, § 2.]

**§ 9514. Execution of Lease or Conveyance—Acceptance.**

Upon the taking effect of any such ordinance the mayor and the city clerk or other proper official shall execute, in the name and on behalf of the city or town, the lease or conveyance directed by such ordinance. The lessee or grantee shall accept and execute the same within ten days after notice of its execution by the city or town or forfeit to the city or town the amount of the check or special deposit accompanying the bid of such lessee or grantee: Provided, that if litigation in good faith be instituted within such ten days to determine the rights of the parties, no forfeiture shall take place unless such lessee or grantee fail for five days after the termination of such litigation in favor of the city or town to accept and execute such lease or conveyance. [L. '17, p. 575, § 3.]

CHAPTER XXXI.

LOCAL IMPROVEMENT BONDS.

**§ 9515. [8018.] Bonds for Local Improvements Authorized.**

Whenever any city shall have power and authority vested in it by its charter or by any law of the state to order or cause the whole or any part of the streets, lanes, alleys, squares or public places of such city to be graded, regraded, planked, replanked, graveled, regraveled, piled, repiled, paved, repaved, macadamized, remacadamized, capped, recapped or to order or cause sidewalks, sewers, manholes, culverts, curbs, gutters, water-mains, or crosswalks to be constructed or to order or cause to be made any local improvements whatever, and to levy and collect assessments upon the property benefited thereby or abutting, adjoining, contiguous or approximate thereto, to defray the whole or any portion of the cost and expense of any such improvement, the proper authorities of such city may, in their discretion, provide for the payment of the cost and expense of such improvement by bonds of the district which shall include the property liable to assessment for the payment of the cost and expense of such improvement according to the charter of such city, issued to the contractor, or by the proceeds of such bonds to be issued and sold as hereinafter provided. [L. '99, p. 234, § 1.]

It was considered that this chapter supersedes L. '93, p. 231, §§ 1—5, except § 3, Bal. Code, §§ 1185—1189, as regards street improvement bonds, and except as expressly applied in later enactments: See *infra*, §§ 9529—9531 and notes.

See, also, note to § 9522.

Bonds for public utilities: See *supra*, § 9490, and notes.

Cited in 25 Wash. 300; 97 Wash. 196.

December 1, 1946

Chapter 252, Laws of 1943, as amended by Chapter 233, Laws of 1945, provides that the Code Committee shall propose and submit to the legislature changes and revisions of the general and permanent laws of the state and shall supply each legislator, judge and bar association with a copy thereof.

The revision work is completed and it was hoped that all this material could be sent out as soon as the November election disclosed who were to become the legislators but our inability to get paper for the 300 sets has necessitated an unavoidable delay. However, in order to give the maximum time, preceding the next legislative session, for examination of the work done it has been decided to make two volumes and to now send out Volume 2, which is already completed. Volume 1 will contain Titles 1-45 inclusive and Volume 2 contains Titles 46-91 inclusive.

Along with Volume 2 are enclosed reviser's notes covering the titles contained therein. The first column of figures indicates the section numbers of the proposed code. The second column of figures indicates the section or sections of Remington's Revised Statutes from which each new code section is derived. **The third column contains the catch-line of each section as set forth in the revision itself, together with the reviser's explanation in parenthesis of the major changes made in the course of revision.** There is also enclosed in the front of Volume 2 a complete list of titles covering both volumes.

Volume 1 will be sent out just as soon as it can be run off, assembled and bound.

Respectfully submitted,

CODE REVISION & RECOMPILATION  
COMMITTEE

**REVISED  
CODE  
OF  
WASHINGTON**

**TITLES 46-END**

**1946**

**REVISER'S NOTES**  
**FOR**  
**VOLUME 2**

---

**Revised Code of Washington**

ONLY  
MOVE  
1

P U B L I C   S E R V I C E  
T I T L E   8 0  
P U B L I C   U T I L I T I E S

Chapter	
80.01	Regulations - General.
80.02	Securities.
80.03	Transfers of property.
80.04	Affiliated interests.
80.05	Investigation of public service companies.
80.06	Regulatory fees.
80.07	Gas, electrical and water companies.
80.08	Electric franchises and rights-of-way.
80.09	Telephone and telegraph companies.
80.10	Municipal utilities.
80.11	Municipal street railway bonds.
80.12	Sale or lease of municipal utilities.

PREFATORY NOTE - By chapter 267, Laws of 1945, the department of public service was divided into two independent departments, viz: The department of public utilities and the department of transportation. It has therefore been necessary to segregate the body of public service law into two titles, one covering public utility companies and the other transportation and allied companies.

The public service law contained a number of statutes of general application. As to these it has been necessary to a great extent to duplicate the two titles. Reference is made particularly to chapters 2, 3, 4 and 5 of each title. Many sections of the public service law were of specific application to particular types of companies. As to these the task of segregation has been simple. A third category consisted of sections containing intermingled provisions applicable to one or more companies of both types. As to these we faced the difficult task of re-writing, in order to cull out of a section that relating to utilities and that relating to transportation and set out the rewritten sections in their proper titles.

CHAPTER 80.01  
REGULATIONS - GENERAL

Sections		
80.01.01	10344pt	Definitions. (Rewritten and superfluous language deleted.)
80.01.02	10413pt	Oaths, subpoenas - Compelling attendance of witness.
80.01.03	10413pt	Number of witnesses may be limited.
80.01.04	10414pt	Witness fees and mileage. (Section 10414 divided into three sections and first part placed last in sequence.)
80.01.05	10414pt	Protection against self-incrimination.
80.01.06	10414pt	Depositions - Service of process.
80.01.07	10415	Access to books and records.
80.01.08	10416pt	Annual reports. (Portions relating to transportation companies deleted.)
80.01.09	10416pt	Forms of records to be prescribed.
80.01.10	10421	Production of out-of-state books and records.
80.01.11	10422	Complaints - Hearings. (Considerable redundant verbiage deleted.)
80.01.12	10423	Hearings, order, record. (Separated into paragraphs.)
80.01.13	10424	Suspension of tariff changes. (Proviso omitted. Seven months limitation for common carriers deleted.)
80.01.14	10425	Order requiring joint action.
80.01.15	10426	Remunerative rates cannot be changed without approval.
80.01.16	10427	Rules and regulations. (Transportation matters deleted.)

9488-5)    Obsolete.  
 9492    )  
 9493    )  
 9493-1)  
 9494    )

9500        Superfluous  
 9501        Repeal and saving clause.  
 9502        Superseded by 80.10.17 to 80.10.21. See 186 Wash. 378  
 9503)        Obsolete.  
 9504)

\* \* \*

CHAPTER 80.11  
 MUNICIPAL STREET RAILWAY BONDS

Sections		
80.11.01	9488-4	Street railway refunding bonds.
80.11.02	9488-6	Cities may borrow to fund or refund obligations. (Rewritten for brevity.)
80.11.03	9488-7	Issuance of bonds.
80.11.04	9488-7	Form of bonds. (Validating provision omitted.)
80.11.05	9488-7	Rights of bondholder.
80.11.06	9488-8	Funding and refunding bonds may be refunded.
80.11.07	9488-9	Covenants of bonds.
80.11.08	9488-10	Commission created - Powers.
80.11.09	9488-11	Construction of chapter.
80.11.10	9511-1	Extension of time of payment.
80.11.11	9511-2	Consent of bondholders.
80.11.12	9511-3	Effect on validity of bonds.

\* \* \*

CHAPTER 80.12  
 SALE OR LEASE OF MUNICIPAL UTILITIES

Sections		
80.12.01	9512	Authority to sell or let. (Rewritten for brevity.)
80.12.02	9513	Procedure.
80.12.03	9514	Execution of lease or conveyance.

OMITTED SECTIONS

9505)  
 9506)  
 9507)  
 9508)  
 9509)  
 9510)  
 9511)

All of these sections are superseded by Secs. 80.12.01, 80.12.02 and 80.12.03.

80.11.12 A contract of extension shall not lessen or impair the validity of any bonds of an issue for which the time of payment shall be extended in whole or in part, except as to the date of payment as specified in the contract.

CHAPTER 80.12  
SALE OR LEASE OF MUNICIPAL UTILITIES

Sections

- 80.12.01 Authority to sell or let.
- 80.12.02 Procedure.
- 80.12.03 Execution of lease or conveyance.

80.12.01 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.

80.12.02 The legislative authority of the city, if it deems it advisable to lease or sell such works, plant, or system, or any part thereof, shall adopt a resolution stating whether it desires to lease or sell. If it desires to lease, the resolution shall state the general terms and conditions of the 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 clerk, or other proper official, to publish the resolution not less than once a week for four weeks in the official newspaper of the city if there is one, or if not, then in any newspaper published in the city, or if there is none, then in any newspaper published in the county in which the city is located, together with a notice calling for sealed bids to be filed with the clerk or other proper official not later than a certain time, accompanied by a certified check payable to the order of the city, 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 is accepted and he fails to comply therewith within the time hereinafter specified, the check or deposit shall be forfeited to the city. If bids for a lease are 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 are called for, the bids shall state the price offered. The legislative authority of the city may reject any or all bids and accept any bid which it deems best. At the first meeting of the legislative authority of the city held after the expiration of the time fixed for receiving bids, or at some later meeting, 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 the declaration. If the resolution is adopted it shall be necessary, in order that such bid be accepted, to enact an ordinance accepting it and directing the execution of a lease or conveyance by the mayor and city clerk or other proper official. Such 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.

80.12.03 Upon the taking effect of the ordinance the mayor and the city clerk or other proper official shall execute, in the name and on behalf of the city, the lease or conveyance directed thereby. The lessee or grantee shall

REVISED CODE

OF

WASHINGTON

VOLUME 6

TITLES

79 - 91

1951  
edition

FOR REFERENCE ONLY  
PLEASE DO NOT REMOVE  
FROM THIS ROOM

DEPARTMENT OF TRANSPORTATION, ETC. § 1000-1

DEPARTMENT OF TRANSPORTATION AND  
DEPARTMENT OF PUBLIC UTILITIES

§ 1000-114, makes this section and Sec. 1000-115, applicable to  
for review of the Department's orders, applicable to  
of the motor vehicle act, with the result that  
to relief against the department's public utility orders  
also must stand, unless responsibility for such orders  
are unreasonable. *Tractors & Public Utilities* 1000-114  
251, 145 P.2d 423

Departments—Designation, appointment and removal  
of vacancies.  
of Texas—Department of Transportation  
of personnel.  
of Public Utilities—Department of Transportation  
ment of personnel.  
and regulations.  
on—Duty to regulate transportation  
Duty—Appointment of assistants  
of Director of Public Utilities by Director of  
Duty to regulate utility companies—other duties  
of assistants  
—Transfer of duties to Department of Public  
of department.  
equipment and business of Department, or  
of existing statutes regulating public  
utilities.  
of existing statutes regulating public  
utilities.

vacancies. There are hereby  
ate government which shall be  
artment of Transportation and  
ia. The chief executive officer  
on shall be designated the  
chief executive officer of the  
be designated the Director of  
er shall be appointed by the  
Senate, and shall hold office  
the Senate be not in session  
they occur while the Senate  
make a temporary appoint-  
ion, when he shall present  
ations for the office to the  
ative April 3, 1943.]

## Chapter 80.48

## SALE OR LEASE OF MUNICIPAL UTILITIES

## Sections

- 80.48.010 Authority to sell or let.  
 80.48.020 Procedure.  
 80.48.030 Execution of lease or conveyance.

**80.48.010 Authority to sell or let.** 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. [1917 c 137 § 1; RRS § 9512.]

**80.48.020 Procedure.** The legislative authority of the city, if it deems it advisable to lease or sell such works, plant, or system, or any part thereof, shall adopt a resolution stating whether it desires to lease or sell. If it desires to lease, the resolution shall state the general terms and conditions of the 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 clerk, or other proper official, to publish the resolution not less than once a week for four weeks in the official newspaper of the city if there is one, or if not, then in any newspaper published in the city, or if there is none, then in any newspaper published in the county in which the city is located, together with a notice calling for sealed bids to be filed with the clerk or other proper official not later than a certain time, accompanied by a certified check payable to the order of the city, 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 is accepted and he fails to comply therewith within the time hereinafter specified, the check or deposit shall be forfeited to the city. If bids for a lease are 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 are called for, the bids shall state the price offered. The legislative authority of the city may reject any or all bids and accept any bid which it deems best. At the first meeting of the legislative authority of the city held after the expiration of the time fixed for receiving bids, or at some later meeting, 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 the declaration. If the resolution is adopted it shall be necessary, in order that such bid be accepted, to enact an ordinance accepting it and directing the execution of a lease or conveyance by the mayor and city clerk or other proper

61 TRANSPORTATION  
 62 TAXES - EXCISE  
 TAXES - INHERI-  
 TANCE & GIFT  
 M TAXES - PROPRI-



# EXHIBIT 82

From: Mitchell Shook  
Sent: Friday, October 11, 2019 11:35 AM  
To: Tacoma City Council,  
Subject: "Stop The Surplus" Click! is not Surplus~! FW: Resolution  
Declaring Certain City Property Surplus

Good Morning Council Members,

Is there any truth to a silly rumor, that City Council is considering a "Surplus" resolution, to skirt the law and sell-off Click! Network?

Click! Network is not "Surplus." You cannot "privatize" it like that. It's so crazy!

Please see attached, a typical "Surplus Resolution," from Duvall, WA. A good example of how Washington State law works.

Cities can NOT simply sell ***municipal utility*** property without a vote of the people. [RCW 35.94.020](#)

Unless, City Council declares the utility property "surplus," a vote of the people is required.

If the utility property is *declared "surplus"*, then Council must holding a "***public hearing***," pass a "***surplus resolution***" and then a "***bidding***" process is required.

This is usually done for things that are actually "Surplus," like old desks, chairs or outdated computers, *see* the attached Duvall surplus resolution for example.

"Surplus" is stuff that no longer **serves its intended purpose**. (*see* the nice hay rake and weed-wacker there, in Duvall!).

Otherwise the law requires a "vote of the people" to dump such property.

Click! is not "surplus." It is a state of the art Fiber Optic Gigabit Municipal Broadband System, bringing broadband to our community.

Cities across America can only dream about having such a system.

Selling or Leasing Click! is different than leasing Cheney Stadium, (Mayor Woodards' example for why it is OK to lease/sell Click!).

A Baseball stadium is not a "utility property," it is a luxury. Ticket and hot dogs prices don't need City Council regulation.

Click!'s system is an **essential** municipal utility property. The public needs low broadband rates, and oversight of those rate by City Council.

Don't toss Click! Network to the wolves.

Preserve City Council's oversight of rates! Protect our municipal broadband system from privatization.

Click! is now profitable, with over \$4 Million positive cash flow this year. Those profits keep electric rates lower for everyone.

Click!'s Gigabit Fiber service is now operating and has been expanding for over a year now.

I have offered to pay for an upgrade, to make Gigabit available everywhere on Click!

Let your ISP partners get back to work. Advanced Stream can easily add 10K more customers.

Public broadband networks belong to the people. The people have a right to vote over "you" selling or leasing "our" Click!.

Save Click!. Keep our broadband rates low. Let's bring Gigabit to all of our community!

Please vote to "Stop The Surplus."  
Thanks,

Mitch  
Mitchell Shook  
CEO  
Advanced Stream  
Tacoma, WA

From: Alana McCoy [alana.mccoy@duvallwa.gov](mailto:alana.mccoy@duvallwa.gov)

Sent: Friday, October 11, 2019 8:10 AM

To: [mshook@advancedstream.com](mailto:mshook@advancedstream.com)

Subject: RE: Resolution Declaring Certain City Property Surplus

Hi Mitch,

Attached is the surplus resolution.

Thank you,  
Alana McCoy  
Project Manager  
City of Duvall

**CITY OF DUVALL  
WASHINGTON**

**RESOLUTION NO. 19-17**

---

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY  
OF DUVALL, WASHINGTON, DECLARING CERTAIN  
CITY PROPERTY SURPLUS**

WHEREAS, the City from time to time has assets that become surplus to its needs; and

WHEREAS, the City has utility related items requiring disposal and per RCW 35.94.040 the City shall host a public hearing prior to disposal of the utility items; and

WHEREAS, the City Council has the authority to dispose of surplus property pursuant to RCW 35A.11.010;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF DUVALL,  
WASHINGTON, DO RESOLVE AS FOLLOWS:

Section 1. Surplus of Certain City Property. The City Council hereby declares that this property, listed in the attached Exhibit "A", is surplus to the needs of the City and disposal thereof will be for the common benefit.

Section 2. Disposal Method. The property listed in the attached Exhibit "A" may be disposed of to the general public by means of direct sales, sealed bid, trade-in, or auction, as determined to be in the best interests of the City by the Public Works Director. Property that is deemed of no value will be recycled or disposed of responsibly.

1<sup>st</sup> PASSED BY THE CITY COUNCIL AT A REGULAR MEETING THEREOF ON THE  
DAY OF October, 2019.

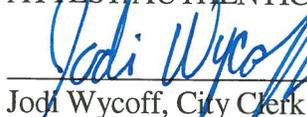
CITY OF DUVALL

  
Mayor Amy Ockerlander

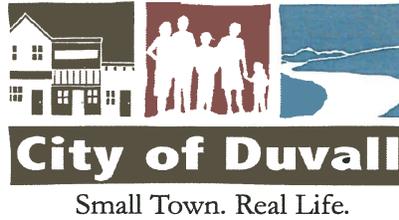
Approved as to form:

  
Rachel Turpin, City Attorney

ATTEST/AUTHENTICATED:

  
Jodi Wycoff, City Clerk

## Exhibit "A"



**Date:** September 9, 2019

**Re:** Itemized Surplus List for City Council Approval

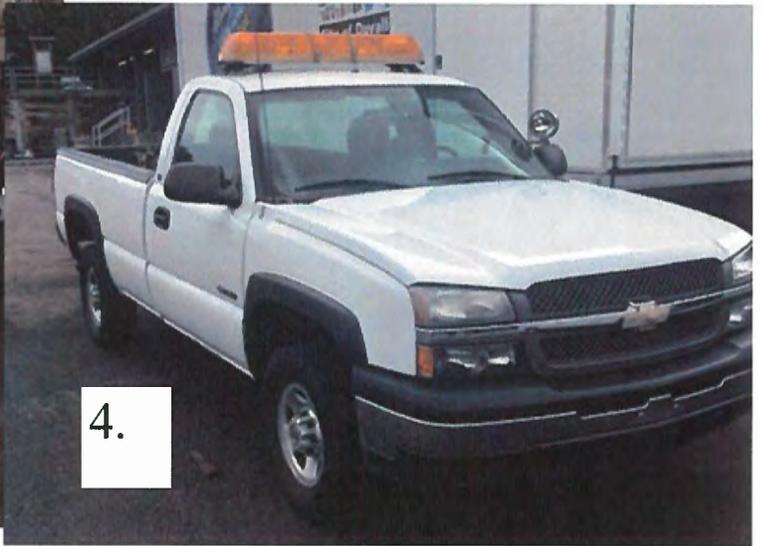
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1. 2011, Dodge Charger, VIN#2B3CL1CT0BH554297.
  - Miles: 103,414
2. 2012, Dodge Charger, VIN#2C3CDXAT0CH240334.
  - Miles: 107,848
3. 1996 Chevy Pickup, VIN#1GCEC14WXTZ129848.
  - Miles: 70,898
4. 2004 Chevy Pickup, VIN#1GCGC24U24Z199486.
  - Miles: 111,659
5. One (1) wood laminate bookcase with doors.
6. One (1) 30" x 40" and one (1) 18" x 24" White Board.
7. Keyboard drawer, desk pencil drawer.
8. Three (3) Plantronics wireless headset with misc. parts and pieces.
9. One (1) ViewSonic projector with case.
10. A set of Logitech computer speakers.
11. One (1) Toshiba 32" television.
12. One (1) Coby DVD player.
13. Miscellaneous electrical cords.
14. One (1) metal key box.
15. Eleven (11) hard drives wiped clean.
16. Two (2) Compaq ProLiant ML370 Computers.

## **Exhibit "A"**

### **Itemized Surplus List for City Council Approval, continued.**

17. One (1) Foundry Networks Fast Iron 800 Computer.
18. Three (3) Computer desk monitors.
19. One (1) BB Battery pack HR9-12.
20. One (1) Desktop tower.
21. One (1) drafting table.
22. One (1) six-foot-long wood grain office desk with drawers.
23. One (1) HP printer.
24. One (1) Stihl weed eater, gas powered. Needs repairs.
25. One (1) MAT Compressor 1.5 125.
26. One (1) Eight-foot metal bike rack.
27. One (1) antique hay rake stored at the WWTP since 2001.
28. Two (2) 24' aluminum stadium bench seats with footings.
29. One (1) Fellowes Power Shredder.





# EXHIBIT 83

## Welcome to Click! Network, a division of Tacoma Power.

Tacoma Power was created by the local community more than 100 years ago to meet their needs for electricity. It was their belief that public ownership and local control resulted in higher quality services. Click! Network shares that same belief, which is why when Tacoma Power originally planned to build a fiber-optic network to control its substations, we made the decision to expand the network so that we could offer a wider range of telecommunications services that would benefit our customers and the communities we serve.

Today, Click! Network offers local residents and businesses more choices than ever for cable TV, high-speed Internet, and broadband services. And by doing so, we're creating new options for existing area businesses and attracting new businesses to our community.

Thank you for taking the time to visit the Click! Network Web site. If you have any questions, please [click here](#) or call us at (253) 502-8900. Our staff will be happy to assist you.

Sincerely,  
Cyndi Wikstrom  
General Manager,  
Click! Network

# About Us

## Community Partners and Sponsorships

## Community Partners and Sponsorships

Annie Wright School

[www.aw.org](http://www.aw.org)

Boys and Girls Club

[www.bg-clubs.com](http://www.bg-clubs.com)

City of University Place

[www.ci.university-place.wa.us](http://www.ci.university-place.wa.us)

Exit 133

[www.exit133.com](http://www.exit133.com)

Go Local Tacoma

[www.gocalatatoma.com](http://www.gocalatatoma.com)

Humane Society

[www.thehumanesociety.org](http://www.thehumanesociety.org)

Museum of Glass

[www.museumofglass.org](http://www.museumofglass.org)

Northwest Sinfonietta

[www.nwsinfonietta.com](http://www.nwsinfonietta.com)

Safe Streets Campaign

[www.safest.org](http://www.safest.org)

School of the Arts Partners

[www.tsotapartners.org](http://www.tsotapartners.org)

South Sound Magazine

[www.southsoundmag.com](http://www.southsoundmag.com)

Tacoma Arts Commission

[www.tacomaculture.org](http://www.tacomaculture.org)

Tacoma Farmers Market

[www.tacomafarmersmarket.com](http://www.tacomafarmersmarket.com)

Tacoma Little Theater

[www.tacomalittletheatre.com](http://www.tacomalittletheatre.com)

Tacoma Rainiers

[www.tacomarainiers.com](http://www.tacomarainiers.com)

The Grand Cinema

[www.grandcinema.com](http://www.grandcinema.com)

Washington State History Museum

[www.wshs.org](http://www.wshs.org)

## Welcome to Click! Network, a division of Tacoma Power.

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Sincerely,

Cyndi Wikstrom

General Manager,

Click! Network

**CLICK! NETWORK**  
T A C O M A P O W E R

# About Us

[Press Releases](#) | [Construction Update](#) | [Project History](#) | [FAQ's](#)

## Welcome to Click! Network

Click! Network is provided by Tacoma Power. Tacoma Power was created by citizens more than 100 years ago to meet community needs for electricity. They believed that public ownership and local control resulted in higher quality services. Click! Network evolved through similar foresight. Tacoma Power originally planned to build a fiber-optic network to control its substations. Further review indicated that expanding the network and offering a wide range of telecommunications services would benefit our customers and our community.

Click! Network offers residents and businesses in the city limits of Tacoma, WA more choices for cable TV, high-speed Internet and broadband services. It creates new options for existing Tacoma area businesses and attracts new businesses to our community. We think the possibilities for the network are just beginning to emerge.

Thank you for choosing to visit the Click! Network website. If you have any questions, please click on **Contact**. Our staff will be happy to assist you.

Sincerely,

Dana Toulson  
General Manager,  
Click! Network

Steven Klein  
Superintendent,  
Tacoma Power



**CLICK! NETWORK**  
T A C O H A P O W E R

### ***Business Advantage***

- **Our Network**
- **Service Area**
- **TV Advantage**
- **Music Advantage**
- **Internet Access Services**
- **Transport Services**
- **Ad Advantage**

## **Click! Business Advantage - Transport Services**

### **Local, Private-Line Services**

Our [loop transport services](#) are designed for businesses needing point-to-point connectivity to transfer large data files, teleconferencing capabilities, the ability to connect remote locations to a central office or any other business uses demanding a fast download of information. All services utilize Click! Network's fully redundant, fiber optic network, ensuring reliability of service delivery.

Click! can support all types of traffic and will work with you on connecting to equipment at your location or co-location. Our installation time frames exceed the industry standards. We guarantee pace setting installation intervals of 15 days for businesses in buildings wired to the Click! Network and 30 days for businesses not currently wired to the network. To schedule a complimentary needs analysis or site survey call our Business Accounts Division at 253-502-8900.



# CLICK! NETWORK

## T A C O M A P O W E R

CABLE TV • DIGITAL VIDEO RECORDER • VIDEO ON DEMAND • HIGH-SPEED INTERNET



[Cable Television](#)



[High-Speed Internet](#)



[Business Advantage](#)

Screen Shot of <https://web.archive.org/web/19990125094238/http://www.click-network.com/>

# CLICK! NETWORK

## T A C O M A P O W E R

### Welcome to Click! Network

Click! Network is provided by Tacoma Power. Tacoma Power was created by citizens more than 100 years ago to meet community needs for electricity. They believed that public ownership and local control result in higher quality services. Click! Network evolved through similar foresight. Tacoma Power originally planned to build a fiber-optic network to control its substations. Further review indicated that expanding the network and offering a wide range of telecommunications services would benefit our customers and our community.

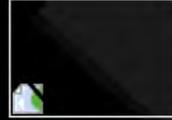
Click! Network offers the greater Tacoma, Washington, area more choices for cable TV, Internet and broadband services. It creates new options for existing Tacoma area businesses and attracts new businesses to our community. We think the possibilities for the network are just beginning to emerge.

Thank you for choosing to visit the Click! Network. If you have any questions, please click on Contact. Our staff will be happy to assist you.

Sincerely,



Debra L. Stewart  
General Manager,  
Click! Network



Steven Klein  
Superintendent,  
Tacoma Power

Home

Welcome

What's New

Instruction Update

Press Releases

Project History

FAQs

# EXHIBIT 84

Honorable Susan K. Serko  
Hearing Date: March 30, 2018  
Hearing Time: 9:00 am

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

EDWARD E. (TED) COATES; MICHAEL  
CROWLEY; MARK BUBENIK and  
MARGARET BUBENIK d/b/a Steele  
Manor Apartments; THOMAS H.  
OLDFIELD; and INDUSTRIAL  
CUSTOMERS OF NORTHWEST  
UTILITIES, an Oregon nonprofit  
corporation,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No.: 17-2-08907-4

[PROPOSED]  
CR 54(B) FINDINGS AND ENTRY  
OF JUDGMENT ON THE CLAIMS  
REGARDING THE APPLICATION  
OF RES JUDICATA, COLLATERAL  
ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER

**CLERK'S ACTION REQUIRED**

THIS COURT having entered an order on March 2, 2018 entitled "Order Granting  
Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motion to  
Strike" (hereinafter, the "Order") and the Defendant, the City of Tacoma (the "City"),  
having moved at a hearing on March 30, 2018 for the Court to make findings and a

CR 54(B) FINDINGS AND ENTRY OF  
JUDGMENT ON THE CLAIMS REGARDING THE  
APPLICATION OF RES JUDICATA,  
COLLATERAL ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER - 1

501130898 v3

K&L GATES LLP  
925 FOURTH AVENUE SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 judgment in compliance with Civil Rule 54(b) so as to permit the immediate appeal of the  
2 Order; now therefore,

3 CIVIL RULE 54(B) FINDINGS

4 In compliance with Civil Rule 54(b), the Court hereby rules that there is no just  
5 reason for delay in entry of the Order as a final and appealable Judgment on the following  
6 claims and rulings: (1) the City's affirmative defenses of res judicata and collateral  
7 estoppel and the Court's ruling that they should be rejected as a matter of law; (2) the  
8 Plaintiff's claim that the relationship between Click! Network ("Click") and Tacoma  
9 Power is governed and limited by RCW 43.09.210; (3) the Plaintiff's claim that the  
10 relationship between Click and Tacoma Power is governed and limited by Tacoma City  
11 Charter § 4.5; and (4) the Court's ruling that "Tacoma Power electric utility revenues and  
12 funds may not lawfully be used to pay for Click! Network expenses or capital  
13 improvements that are attributable or properly allocable to commercial  
14 telecommunications service rather than electric utility service."

15 The Court hereby makes the following findings in support of the ruling that there  
16 is no just reason for delay in entry of the Order as a final and appealable Judgment on said  
17 claims and rulings. These findings are based upon the Declaration of Kari L. Vander  
18 Stoep In Support of Civil Rule 54(b) Findings and Order, as well as the prior filings and  
19 proceedings in this matter, and are as follows:

20 1. With the entry of the Order regarding the City's affirmative defenses and  
21 the applicability of RCW 43.09.210 and Tacoma City Charter § 4.5, crucial legal issues  
22 have been decided in the case. A reversal on one or more of these issues would be  
23 dispositive and would save the Court and the parties from having to use extensive  
24 resources to resolve the remaining issues in the case. That is, if the appellate court

25 CR 54(B) FINDINGS AND ENTRY OF  
JUDGMENT ON THE CLAIMS REGARDING THE  
APPLICATION OF RES JUDICATA,  
COLLATERAL ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER - 2

501130898 v3

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925 FOURTH AVENUE SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 determines that res judicata or collateral estoppel applies, the Plaintiffs have no case and  
2 the matter will be dismissed. Likewise, if the appellate court determines that RCW  
3 43.09.210 and Tacoma City Charter § 4.5 do not apply to the relationship between  
4 Tacoma Power and Click, that would likely lead to the dismissal of the case or at least a  
5 significant change in the relevant remaining issues or claims.

6 2. The legality of the City's funding of Click is a matter of great public  
7 interest and concern to all of the taxpayers and electric ratepayers of the City. If it is  
8 determined on appeal that Click's funding is not legal, then the City will need to deal with  
9 how and whether to fund and operate Click going forward. The City will also have to  
10 determine how to pay for any past expenditures that are determined to be unlawful, which  
11 Plaintiffs estimate at over \$21 million.

12 3. With the potential imposition of interest, the City is faced with having to  
13 pay many thousands of dollars more in interest if it has to wait until all of the remaining  
14 claims and issues in the case are decided before being permitted to appeal the crucial  
15 claims regarding res judicata, collateral estoppel, and the applicability of RCW 43.09.210  
16 and Tacoma City Charter § 4.5.

17 4. There are likely to be disputed issues in determining the proper allocation  
18 of expenses and revenues between Click and Tacoma Power over several years.  
19 Resolution of these issues will involve considerable discovery time and trial/hearing time.

20 5. Finally, it is unlikely that the need for an appeal would be mooted by future  
21 developments in the Superior Court. The Order sets up a trial or further motion practice to  
22 determine a damages figure from zero up to or beyond the \$21 million Plaintiffs reference  
23 in their Complaint. If the damages are relatively small, Plaintiffs will have an incentive to  
24 appeal, and if the damages are large, the City will have an incentive to appeal. In either

25 CR 54(B) FINDINGS AND ENTRY OF  
JUDGMENT ON THE CLAIMS REGARDING THE  
APPLICATION OF RES JUDICATA,  
COLLATERAL ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER - 3

501130898 v3

1 case it is likely that the dispositive issues in the Order will be appealed regardless of  
2 future developments in the Superior Court.

3 6. Any one of the five preceding reasons is a compelling ground for this Court  
4 to enter the Civil Rule 54(b) findings. In combination, they constitute overwhelming  
5 grounds for it to do so.

6 7. Because the resolution of these issues has important implications for the  
7 remainder of the case, there is good cause to stay enforcement of this Judgment and to  
8 delay further proceedings in this Court pending the outcome of the appeal.

9 8. Given the magnitude of the issues in dispute and the ultimate outcome's  
10 effect on the City, Tacoma Power, and Click customers, the Court should also stay  
11 enforcement of the judgment on its Order until the City's appeal has run its course. If the  
12 City were forced to promptly shut down Click, there would be an immediate negative  
13 impact on Click's customer base, which includes elderly, low-income, governmental, and  
14 student users who would suddenly be without service. In addition, Click would lose all of  
15 its customers, employees, and goodwill, all of which have significant value and play an  
16 important role in the request for information, proposals, or qualifications process the City  
17 is currently undertaking to find a third party partner for future operation of Click. Even if  
18 the Order were later reversed after the conclusion of all proceedings in this Court, much of  
19 Click's value will be irrevocably lost.

20 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND  
21 DECREED that there is no just reason for delay in regard to the entry of the March 2,  
22 2018 Order as a final and appealable Judgment regarding the claims, determinations, and  
23 rulings set forth above in the Findings section of this order. The effect of this order is that  
24 the Order and those claims are immediately appealable upon the entry of this order.

25 CR 54(B) FINDINGS AND ENTRY OF  
JUDGMENT ON THE CLAIMS REGARDING THE  
APPLICATION OF RES JUDICATA,  
COLLATERAL ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER - 4

501130898 v3

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In addition,

- The enforcement of the instant Judgment is stayed pending the outcome of the City's appeal of this Judgment; and
- Any continued litigation in this court is stayed pending the outcome of an the City' appeal of this Judgment.

OR

- A new trial date will be entered for this case of no earlier than January 1, 2019.

SO ORDERED this \_\_\_ day of March, 2018.

---

Honorable Susan K. Serko  
PIERCE COUNTY SUPERIOR COURT JUDGE

Presented by:

K&L GATES LLP

By



Mark S. Filipini, WSBA #32501

Kari L. Vander Stoep, WSBA #35923

Attorneys for Defendant City of Tacoma

CR 54(B) FINDINGS AND ENTRY OF  
JUDGMENT ON THE CLAIMS REGARDING THE  
APPLICATION OF RES JUDICATA,  
COLLATERAL ESTOPPEL, RCW 43.09.210, AND  
TACOMA CITY CHARTER - 5

501130898 v3

K&L GATES LLP  
925 FOURTH AVENUE SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

# EXHIBIT 85



**SUBSTITUTE  
ORDINANCE NO. 26141**

1 AN ORDINANCE amending the Light Division biennial budget for 1997/1998 by  
2 adding thereto and authorizing the appropriation of the sum of  
3 \$69,411,000, which includes a construction contingency, or so much  
4 thereof as may be necessary for the Light Division's  
Telecommunications Project and declaring a fiscal emergency to allow  
this amendment.

5 BE IT ORDAINED BY THE CITY OF TACOMA:

6 Section 1. That the biennial budget for the Light Division for the years  
7 1997/1998 be and the same is hereby amended by adding thereto and authorizing  
8 the appropriation of the sum of \$69,411,000, which includes a 5% construction  
9 contingency, or so much thereof as may be necessary to design, build, and  
10 operate the Telecommunications Project.  
11

12 Section 2. That at the time the 1997/1998 biennial budget for the Light  
13 Division was approved and adopted, the Telecommunications Project was not  
14 sufficiently developed to include in the budget authorization. Since that time the  
15 Project was approved to proceed and permanent Project funding is now  
16 necessary. Therefore, pursuant to RCW 35.34.150, this situation is declared to  
17 create a fiscal emergency necessitating this additional budget authorization in the  
18 estimated amount of \$69,411,000, which includes a 5% construction contingency.  
19

20 Section 3. That the City Council reserves its legislative and other authority  
21 as appropriate to determine the conditions under which the Telecommunications  
22 Project will be implemented and operated, including but not limited to modification  
23 of the Business Plan for the Telecommunications Project and such other action as  
24 deemed necessary or desirable in the judgment of the City Council, and that  
25  
26



1 nothing in this ordinance shall in any way be construed to authorize the incurring  
2 of general indebtedness by the City in respect to the Telecommunications Project.

3 Passed OCT 28 1997

4  
5 *Rick Rumbolt*

6 Attest: City Clerk

7  
8 *R. E. Hale*  
9 Mayor

10 Approved as to form and legality:

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*John Jenkins*  
City Attorney

# REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:

Ordinance #:

Resolution #:

6553
26141

1. Date:

Requesting Department/Division/Program	Sponsored By	Phone/Extension
2. <b>Tacoma Public Utilities/Light Division</b>	Steven J. Klein	502-8203
Contact Person (for questions):		Phone/Extension
3. Steven J. Klein, Light Superintendent		502-8203

4. Preparation of an Ordinance is requested for the City Council meeting of Tuesday, September 30, 1997.

5. Summary Title/Recommendation: (A concise sentence, as it will appear on the Council Agenda)

Additional appropriation of \$66,758,641 to the Department of Public Utilities Light Division 1997/1998 budget appropriation.

6. Background Information/General Discussion: (Why is this request necessary? Are there legal requirements? What are the viable alternatives? Who has been involved in the process?)

To administer, construct and operate a telecommunications system for the Department of Public Utilities Light Division.

At the time the Light Division's current biennial budget was adopted by the Public Utility Board and City Council, the telecommunications project was not sufficiently developed to include in the budget authorization. Now that the construction plan has been refined and firm construction bids received, it is necessary to amend the Light Division's budget to provide the necessary authorization to expend funds to build the telecommunications infrastructure.

7. Financial Impact: (Future impact on the budget.)

Additional appropriation of \$66,758,641 to the Department of Public Utilities Light Division 1997/1998 budget appropriation.

8. List all material available as backup information for the request and indicate where filed:

Source Documents/Backup Material	Location of Document
Letter to the Public Utility Board and City Council from Mark Crisson, dated September 19, 1997	Attached
Resolution U- 9311 1997/98 Preliminary Budget, Light Division Telecommunication Section	On File with Clerk of the Board Attached

9. Funding Source: (Enter amount of funding from each source)

Fund Number & Name:	Telecommunications Project Fund (4717)	City \$40,000,000
	Light Division's Current Fund (4700)	City \$20,814,235
	Projected Sales Revenues	<u>\$ 5,944,406</u>
	<b>Total Amount</b>	<b>\$66,758,641</b>

If an expenditure, is it budgeted?  Yes  No      Where? Org #      Acct #

 10. Department Director/Utility Division Approval	Approved as to Availability of Funds  Director of Finance	 City Manager/Director Utilities Approval
---	---	--

ord-telecomm

68

**1997/1998 PRELIMINARY BUDGET**

**CITY OF TACOMA**

**TACOMA PUBLIC UTILITIES**

**LIGHT DIVISION**

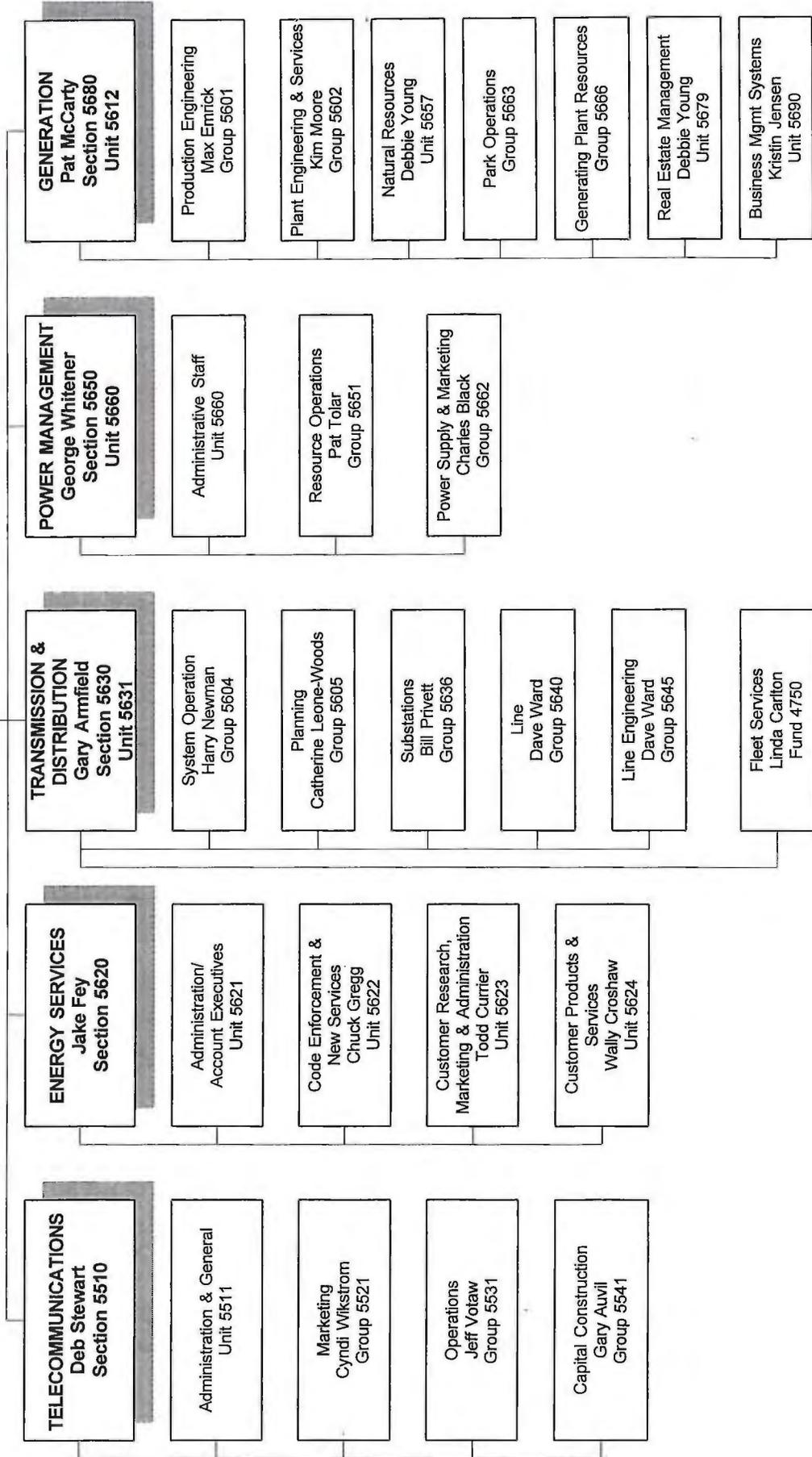
**TELECOMMUNICATIONS SECTION**

**DRAFT**

# LIGHT DIVISION 1997/1998 BUDGET HIERARCHY

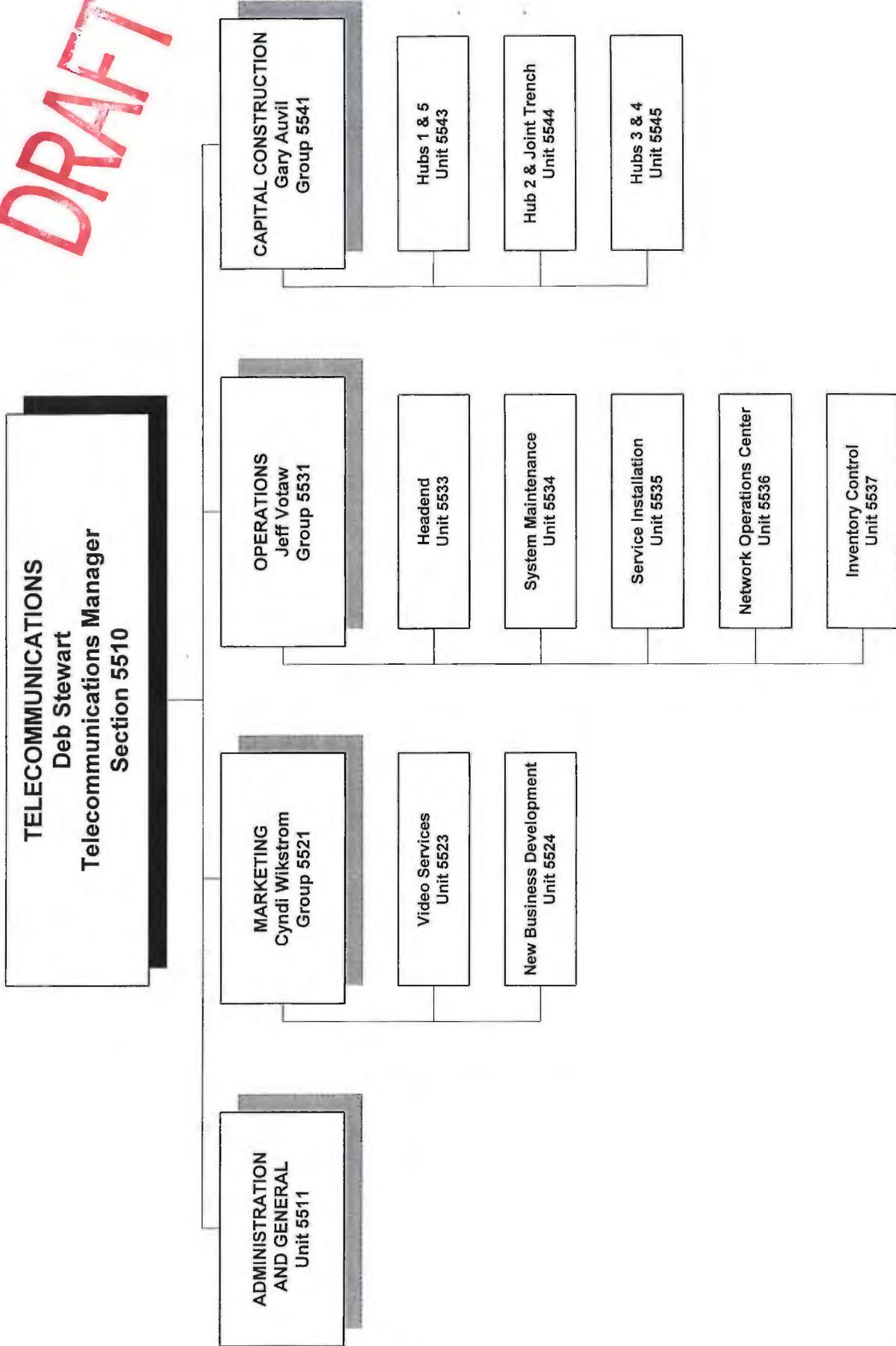
**DRAFT**

**SUPERINTENDENT'S OFFICE**  
 Steve Klein  
 Deputy Director  
 Section 5609 Units 5610/5611



# TELECOMMUNICATIONS 1997/1998 BUDGET HIERARCHY

**DRAFT**



**DEPARTMENT**  
Public Utilities - Light Division  
Telecommunications Section

**ITEM**  
Revenue

DRAFT

<b>Budget Biennium Appropriation 1997/1998</b>
--

**REVENUE SUMMARY**

Retail Sales	5,944,406
<b>Total Operating Revenue</b>	<b>\$5,944,406</b>
Appropriation from Current Fund	20,814,235
Appropriation from Telecommunications Project Fund	40,000,000
<b>Total Revenue &amp; Available Funds</b>	<b>\$66,758,641</b>

<b>Budget Biennium Appropriation 1997/1998</b>
--

**REVENUE DETAIL**

Retail Sales	
CATV - Residential	2,468,758
PPV - Residential	68,303
Shopping Channel - Residential	12,550
CATV Late Fee - Residential	5,689
Advertising - Commercial	31,375
Magazine Resale - Residential	13,732
Telephony and Data Transmission - Commercial	426,000
Pole Replacement & SCADA Reimbursement	1,375,000
Data Transmission - Residential	513,829
Light Division Revenues	1,029,170
<b>Total Retail Sales</b>	<b>\$5,944,406</b>
Other Available Funds	
Appropriation from Current Fund	20,814,235
Appropriation from Telecommunications Project Fund	40,000,000
Anticipated Additional Revenue	
<b>Total Revenue &amp; Available Funds</b>	<b>\$66,758,641</b>

<b>DEPARTMENT</b>	<b>DIVISION</b>	<b>ITEM</b>
<b>Public Utilities</b>	<b>Light</b>	<b>Capital Outlay</b>

**CAPITAL OUTLAY DETAIL**

<b>BUDGET 1997/1998</b>
-----------------------------

PROJECT DESCRIPTION

**TELECOMMUNICATIONS**

Headend Construction	370,000
Hub 1 Construction (Includes tower and hub building)	19,793,000
Hub 3 Construction (Includes hub building)	15,437,000
Design/Engineering	1,165,300
Fiber SONET	1,400,000
SONET Electronics	4,800,000
Make Ready	6,000,000
Test Equipment	655,000
Headend Equipment	3,000,000
Construction Equipment	40,600
Tools/Safety Equipment	108,900
Uniforms	14,100
Communications System	81,100
Addressable Boxes/Equipment	2,411,500
Fleet Purchases	2,099,200
Business Materials and Supplies	100,000
Office Equipment	228,050
Facilities	77,600
Billing System	335,500
Capitalized Labor	5,459,217
New Build Support Materials	924,511
New Build Miscellaneous Overhead	1,168,874
Product Acquisition	441,169
Additions and Betterments	307,020
Incurred June through September 1997	341,000
<b>TOTAL CAPITAL OUTLAY</b>	<b>\$66,758,641</b>

**DRAFT**

75

<b>DEPARTMENT</b> Public Utilities - Light Division Telecommunications Section	<b>ITEM</b> Taxes
--	----------------------

**Budget  
 Biennium  
 Appropriation  
 1997/1998**

DRAFT

**SUMMARY**

City of Tacoma	212,415
State of Washington	113,288
Other	52,008
INET	669,425
Subtotal	\$1,047,136

<b>Total Taxes</b>	<b>\$1,047,136</b>
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**Budget  
 Biennium  
 Appropriation  
 1997/1998**

**DETAIL**

Gross Earnings Tax/Tacoma 6%	212,415
WA State B & O Tax 3.2%	113,288
Other (Franchise Fee 2%)	52,008
INET	669,425
Subtotal	\$1,047,136

<b>Total Taxes</b>	<b>\$1,047,136</b>
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19-Sep-97

<b>FUND</b> 4700 <b>SECTION 5510</b>	<b>DIVISION</b> Light Telecommunications	<b>ITEM</b> Personnel Costs Position Requirements
--	--	---

Positions Budget 1996	Positions Budget 1997	Positions Budget 1998	Budget 1996	Budget 1997	Budget 1998
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Code No.	Classification Title						
TE101	Telecom Section Manager	-	1.00	1.00	-	33,810	105,656
TE102	Telecom Operations Manager	-	2.00	2.00	-	53,812	168,164
TE103	Telecom Headend Manager	-	1.00	1.00	-	26,250	82,042
TE104	Telecom Community Rel Manager	-	1.00	1.00	-	20,433	63,800
TE105	Telecom Marketing Manager	-	1.00	1.00	-	23,833	59,767
TE106	Telecom Bus Ops Manager	-	1.00	1.00	-	18,533	57,850
TE107	Telecom Bus Ops Coord	-	3.00	3.00	-	31,992	148,625
TE108	Telecom Bus Sys Coord	-	1.00	1.00	-	8,750	54,300
TE109	Telecom Customer Care Rep A	-	1.00	3.00	-	1,817	62,094
TE110	Telecom Customer Care Rep B	-	6.00	10.00	-	19,992	266,668
TE111	Telecom Customer Care Rep C	-	1.00	5.00	-	2,675	150,567
TE112	Telecom Technician A	-	-	6.00	-	-	149,849
TE113	Telecom Technician B	-	3.00	12.00	-	21,201	413,249
TE114	Telecom Technician C	-	7.00	20.00	-	63,466	848,754
TE115	Telecom Technician D	-	4.00	4.00	-	40,134	250,026
TE116	Telecom Supervisor A	-	1.00	1.00	-	8,100	50,267
TE117	Telecom Supervisor B	-	4.00	5.00	-	58,266	288,808
TE118	Special/Contract Specialist	-	1.00	1.00	-	16,000	65,600
TE119	Telecom Svcs Support Spec A	-	1.00	2.00	-	10,800	60,445
TE120	Telecom Svcs Support Spec B	-	1.00	1.00	-	13,233	40,700
TE121	Telecom New Business Dev Mgr	-	1.00	1.00	-	9,267	56,950
<b>Permanent Positions Total</b>		-	<b>42.00</b>	<b>82.00</b>	-	<b>\$482,364</b>	<b>\$3,444,181</b>
Subtotal		-	42.00	82.00	-	482,364	3,444,181
Overtime		-	-	-	-	40,000	300,000
Employee Benefits and Taxes		-	-	-	-	132,510	1,060,162
<b>Total</b>			<b>42.00</b>	<b>82.00</b>		<b>\$654,874</b>	<b>\$4,804,343</b>

27



MEMORANDUM

To: Rick Rosenblatt, City Clerk  
From: Mark L. Bubenik, Chief Assistant City Attorney  
Date: September 25, 1997  
Subject: Requests for Council Agenda

A handwritten signature in blue ink, likely belonging to Mark L. Bubenik, positioned over the 'From' line of the memorandum.

Please place the following proposed resolution(s)/ordinance(s) on the agenda for the October 14, 1997 Council meeting:

- U-9310 Authorize award of contracts for construction of the Light Division Telecommunications System
- U-9311 Authorize approval to amend the Light Division's budget by approximately \$66,758,000 to fund the Light Division's Telecommunications System



## RESOLUTION NO. U-9311

1  
2  
3 WHEREAS at the time the Light Division's current biennial budget was  
4 adopted, the Telecommunications Project was not sufficiently developed to be  
5 included in the 1997-1998 Biennial Budget authorization, and it is now  
6 appropriate that an additional appropriation of \$66,758,641 be added to the  
7 Light Division's 1997/1998 budget appropriation to pay for this Project's  
8 expenditures, and  
9

10  
11 WHEREAS a proposed ordinance has been prepared to authorize said  
12 budget increase, and a copy of the ordinance and explanatory letter by the  
13 Director of Utilities have been provided to the Board and City Council and  
14 filed with the Clerk, and it is in the best public interest to approve the same;  
15 Now, therefore,  
16

17 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

18 That the said proposed ordinance for the revised budget appropriation  
19 for the Telecommunications Project is approved, and the Council is requested  
20 to concur by enacting an ordinance in substantially the same form and content  
21 as referred to and to be approved by the City Attorney.  
22

23 That the Board also approves and authorizes an alternative budget  
24 amendment option to be enacted by the City Council that includes a  
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reasonable amount for a construction and operation expense contingency and revenue bond financing to cover the contingency amount.

Approved as for form & legality:

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Chief Assistant City Attorney

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Clerk

Adopted \_\_\_\_\_

f/res/092497-3

26141

Ordinance No. \_\_\_\_\_

First Reading of Ordinance: OCT 14 1997

OCT 21 1997

*Sub. Cont. to the meeting of 10-28-97*

Final Reading of Ordinance: OCT 28 1997

Passed: OCT 28 1997 - *Substitute*

Roll Call Vote:

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma	✓			
Mr. Crowley	✓			
Mr. De Forrest	✓			
Mr. Evans	✓			
Mr. Kirby	✓			
Dr. McGavick	✓			
Mr. Miller	✓			
Dr. Silas	✓			
Mayor Ebersole	✓			

MEMBERS	AYES	NAYS	ABSTAIN	ABSENT
Mr. Baarsma				
Mr. Crowley				
Mr. De Forrest				
Mr. Evans				
Mr. Kirby				
Dr. McGavick				
Mr. Miller				
Dr. Silas				
Mayor Ebersole				

# EXHIBIT 86



**CLICK! NETWORK**

3628 South 35th Street  
Tacoma, Washington 98409-3192

TACOMA POWER

October 19, 2015

ALSO SENT VIA E-MAIL

Chuck Prater  
Net-Venture, Inc.  
2516 Holgate Street  
Tacoma, WA 98402

Subject: Net-Venture Contract and Operations Status

Dear Chuck,

This letter is intended to memorialize Click!'s current understandings based on assurances you gave me during our meeting on October 9, 2015. I requested that meeting to address the recent changes in Net-Venture's operations related to its joint venture arrangement with Rainier Connect.

In particular, I wanted to confirm the current status of Net-Venture's operational functions as they relate to its contractual obligations under its ISP Advantage Agreement with Click!. I also wanted to clear up some apparently conflicting information Click! has received regarding those functions over the past few weeks.

As we discussed during our October 9th meeting, the relationship between Net-Venture and Rainier Connect remains unclear to Click!. Without the benefit of reviewing your Joint Operating Agreement with Rainier Connect, Click! needs additional clarity regarding which ISP is performing which operational functions and pursuant to which contract. Some, but not all, of Click!'s concerns regarding that joint venture relationship have been addressed by you and Brian via your written responses to the key operational matters our attorney outlined in his September 25, 2015 letter.

While I anticipate you and Brian will soon provide responses to the remaining identified operational matters, some of the initial responses provided created further questions that required immediate clarification. The primary purpose of our October 9th meeting was to obtain that clarification. That is, to enable me to determine if Net-Venture is still operating as an independent business entity and whether it is still capable of performing per the terms and conditions of its contract with Click!.

Because the contractual obligations found in each of Click!'s ISP Advantage Agreements are specific to the particular ISP involved, mixing performance obligations between one or more ISPs under those separate contracts is problematic. Of particular concern is the impact such mixed operations are having, or may have, on Net-Venture's compliance with certain requirements in its Agreement with Click!. For example, Net-Venture's duty to maintain an independent local point of presence, the distinction between "outsourcing" versus "consolidating" operational functions for purposes of ISP certification and

its separate and distinct contractual responsibilities (e.g. indemnification, etc.) relative to technical support and installation services offered or performed in connection with our Agreement, etc.

During our October 9th meeting, you acknowledged these concerns and assured me that Net-Venture intends to honor its continuing duties and responsibilities under our ISP Advantage Agreement. You also acknowledged that Net-Venture is required to independently perform under that Agreement and assured me that Net-Venture is currently meeting all of its contractual obligations and will continue to do so for the foreseeable future. You explained that certain prior statements and notices by Net-Venture, which appear to conflict with these assurances, were incorrect. For example, the notice to Net-Venture's customers you and Brian jointly issued in August stated, "Net-Venture is becoming Rainier Connect." You reassured me that Rainier Connect is not performing, and will not perform, any operational functions that are the separate and independent responsibility of Net-Venture per its contract with Click!

Based on your assurances and explanations on October 9th, I have re-evaluated the information you and Brian previously provided regarding joint venture activities. In reliance on these assurances, I will not consider the operational changes entailed by those activities to be breaches of Net-Venture's ISP Advantage Agreement – at least with respect to changes Click! has been informed of to date. However, please note that Click! has not waived, is not waiving, and does not intend to waive, any of its rights or remedies under that Agreement. Click! expressly reserves all such rights and remedies and is prepared to exercise them in the event of a further change in circumstances.

In the interest of accurately informing our respective customers, I encourage you and Brian to update your notice to Net-Venture's customers. It would help minimize possible customer and public confusion regarding the actual current circumstances. If Net-Venture's official address and contact information has recently changed, I also ask that you formally notify Click! of updated Notice information per Section 16.c. in our Agreement.

I believe I have accurately described the topics and substance of our meeting discussion on October 9th. If anything needs to be corrected or further clarified, please do so immediately in writing so that I may further evaluate our contractual relationship as needed. Otherwise, I and Click! will proceed in strict reliance on the facts and circumstances outlined above.

Please note it remains of vital importance to Click! that Net-Venture and Rainier Connect continue to clarify the contractual and operational status of their joint venture. Thus, I reiterate my expectation above that you and Brian will provide additional information to address the key operational matters outlined in our attorney's September 25, 2015 letter (i.e. beyond your initial email responses on October 2, 2015). I look forward to receiving your further responses as soon as possible.

Sincerely,



Tenzin Gyaltsen  
General Manager

cc: Chris Robinson, Superintendent/COO  
Ward Groves, Deputy City Attorney

# EXHIBIT 87



**King County**

**Metropolitan King County Council  
Budget and Fiscal Management Committee**

**STAFF REPORT**

<b>Agenda Item:</b>	33	<b>Name:</b>	Patrick Hamacher
<b>Proposed No.:</b>	2016-0521	<b>Date:</b>	November 1-3, 2016

**SUBJECT**

This ordinance would set the costs for a franchise application and authorize the Executive to charge reasonable compensation for use of the County's Rights of Way (ROW) by utility companies.

**SUMMARY**

Proposed Ordinance 2016-0521 would authorize the Executive to begin charging utility companies for the right to construct its facilities and to remain in the ROW. These charges would be similar to rent in that they will be assessed based upon the value of the land and the portion of the ROW occupied by the utility.

This ordinance also increases the application fee and the construction permit fee for a franchise, as well as establishes an administrative fee in the same manner prescribed by Proposed Ordinance 2016-0495. **If this ordinance moves forward, Proposed Ordinance 2016-0495 would not be needed.**

**BACKGROUND**

Revised Code of Washington (RCW) 36.55.010 authorizes the county to "grant franchises ...to use the right-of-way of county roads...for the construction and maintenance of waterworks, gas pipes, telephone, telegraph and electric lines sewers and other such facilities."

RCW 80.32.010 authorizes the County Council to grant and prescribe terms and conditions for the construction, maintenance and operation of electrical lines for the transmission of electrical power upon, over, along or across county streets and roads.

King County currently grants franchises to public and private utility companies that authorize the utility companies to use the ROW of county roads to provide utility service within King County and elsewhere. The County charges an application fee for these franchise applicants, but does not currently charge any additional compensation for the value use of the ROW. This ordinance would authorize the Executive to begin charging a fee for that valuable use of the County's ROW.



**King County**

**Facilities Management Division**

**Real Estate Services**

King County Administration Building

500 4<sup>th</sup> Ave., Room 820

Seattle, WA 98104

**206-477-9350**

www.kingcounty.gov

## Utility Right-of-Way Franchise Application Instructions

### FRANCHISE REQUIRED

A franchise approved by the King County Council is required in order to use the county rights-of-way for the construction and maintenance of waterworks, gas pipes, telephone, telegraph and electric lines, sewers, cable television, petroleum products, and other such public and private utilities. A franchise may be granted for a limited time, not to exceed 50 years.

### UTILITY FRANCHISE APPLICATION PROCESS

#### Step 1: Application

A. When is an application submitted?

An application is required for the following circumstances:

- For a new franchise or a renewal of an existing franchise;
- For a short-term extension of an existing franchise that is about to expire; or
- To transfer or otherwise modify an existing franchise

Application materials are submitted to the Clerk of the Council at the King County Courthouse, 516 Third Avenue, Room 1200, Seattle, WA 98104

B. What is submitted with an application?

- Completed application form. Fill out and sign the application form.
- Area Description. A complete and accurate description of the area of unincorporated King County in which the Utility requests access to County road rights-of-way for its facilities. A map is not sufficient without an accompanying description, in an electronic format using Microsoft Word (if available).
- Map. A map showing the proposed franchise area in unincorporated King County, in an electronic format that is GIS compatible (if available).
  - If the proposed franchise area is not fully occupied by the utility, it may submit a map indicating the location of all its facilities in the proposed franchise area, in an electronic format that is GIS compatible (if available).

Questions about the application process? Call the Real Estate Services Section at (206) 477-9350

**▲ The Third Avenue entrance to the King County Courthouse reopened Dec. 16, 2019.**



## Utility right-of-way franchise

In accordance with state law, a franchise approved by the King County Council is required in order to use County road rights-of-way for the construction and maintenance of waterworks, gas pipes, telephone, telegraph and electric lines, sewers, cable TV, petroleum product pipelines, and other such public and private utilities.

## Franchise Application - new, renewal, amendment, or transfer

- Franchise Application Instructions
- Franchise Application

## Questions about the application process?

Call the Real Estate Services Section at 206-477-9350 or email Franchise.FMD@kingcounty.gov.

## Instructions and costs

### Step 1: Application



#### A. When is an application submitted?

An application is required for the following circumstances:

- For a new franchise or a renewal of an existing franchise
- For a short-term extension of an existing franchise that is about to expire
- To transfer or otherwise modify an existing franchise

Application materials are submitted to the Clerk of the Council at the King County Courthouse, 516 Third Ave., Suite 1200, Seattle, WA 98104, or Clerk.Council@kingcounty.gov.

#### B. What is submitted with an application?

- Completed application form. Fill out and sign the application form.
- Area Description. A complete and accurate description of the area of unincorporated King County in which the Utility requests access to County road rights-of-way for its facilities. A map is not sufficient without an accompanying description, in an electronic format using Microsoft Word (if available).

# EXHIBIT 88

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation,  
Plaintiff,  
v.  
THE TAXPAYERS AND RATEPAYERS OF  
THE CITY OF TACOMA,  
Defendants.

No. 96 2 09938 0  
COMPLAINT FOR DECLARATORY  
JUDGMENT

The plaintiff, City of Tacoma, Washington ("City"), alleges the following in support of its complaint for declaratory judgment:

INTRODUCTION

1. The City plans to issue bonds in part for the purposes of constructing and operating a telecommunications system consisting of a hybrid fiber coaxial network (the "Telecommunications System"). The Telecommunications System will enhance and augment electrical utility service that the City provides to customers through the Light Division of its Department of Public Utilities. The City may utilize the Telecommunications System to provide cable television service to customers in the Light Division service area. The City may also lease Telecommunications System facilities or capacity to providers of telecommunications services.





1 and other applicable provisions of law, to construct a Telecommunications System for the purpose of  
2 furnishing electric service to customers in the Light Division service area and controlling the use,  
3 distribution and price of such service.

4 16. The City is authorized by RCW 35.41.030, 35.92.100, and 35.92.105 to finance such a  
5 Telecommunications System by the issuance of the Revenue Bonds.

6 17. The City is authorized by law, including without limitation RCW 35.22.570 and  
7 35.22.900, and *Issaquah v. TelePrompter Corp.*, 93 Wn. 2d 567 (1980), to utilize such a system for  
8 the provision of cable television service and/or to lease facilities and capacity to telecommunications  
9 providers.

10 18. The City is further authorized to provide telecommunications services by the  
11 Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 70 (1996), through the  
12 Act's preemption of any legal requirement that has the effect of preventing any entity from providing  
13 any interstate or intrastate telecommunications services.

#### 14 **REQUEST FOR RELIEF**

15 The City requests the following relief:

16 1. An order determining that this action may be maintained as a class action pursuant to  
17 CR 23(b)(2) and certifying the creation of a defendant class comprised of all ratepayers of the Light  
18 Division.

19 2. Appointment of Harold E. Nielsen, Jr., as the representative of all City taxpayers and  
20 Light Division ratepayers, except any taxpayers and ratepayers who intervene in this action.

21 3. Allowance of a reasonable attorney's fees and costs in this action to the attorney who  
22 shall represent Nielsen.

23 4. Prescription of the form of notice to be given to Taxpayers and Ratepayers of the  
24 pendency of this action and of their right to intervene, and the manner of giving such notice.

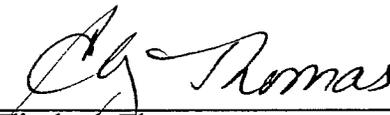
25 5. A judgment declaring that:  
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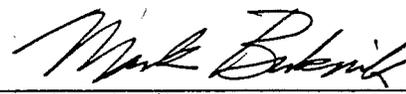
- a. The Court has jurisdiction over the subject matter and parties in this action.
- b. The Bond Ordinance was properly enacted.
- c. The City has authority under the laws of the State of Washington and the United States to utilize the Telecommunications System to provide cable television service in the Light Division service area.
- d. The City has authority under the laws of the State of Washington and the United States to lease Telecommunications System facilities and capacity to telecommunications providers.
- e. The City has authority under the laws of the State of Washington and the United States to issue the Bonds for the purposes set for in paragraphs (c) and (d) above and in the manner set forth in the Bond Ordinance.

DATED this 24<sup>th</sup> day of July, 1996.

PRESTON GATES & ELLIS

By   
Elizabeth Thomas, WSBA # 11544

CITY OF TACOMA

By   
Mark Bubenik, WSBA # 3093  
Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma



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## ORDINANCE NO. 25930

AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division, supplementing Ordinance No. 23514 and providing for the issuance and sale of the City's Electric System Revenue Bonds in the aggregate principal amount of not to exceed \$1,000,000 to provide part of the funds necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system.



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## ORDINANCE NO. 25930

AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division, supplementing Ordinance No. 23514 and providing for the issuance and sale of the City's Electric System Revenue Bonds in the aggregate principal amount of not to exceed \$1,000,000 to provide part of the funds necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system.

WHEREAS, the City of Tacoma (the "City") owns and operates an electric utility system (the "Electric System"); and

WHEREAS, the Ordinance provides that the City may create a separate system as part of the Electric System and pledge that the income of such separate system be paid into 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; and

WHEREAS, RCW 35.92.050 authorizes cities to construct and operate works and facilities for the purpose of furnishing any persons with electricity and other means of power and to regulate and control the use thereof or lease any equipment or accessories necessary and convenient for the use thereof; and

WHEREAS, the Utility Board and the Council have determined that it is in the best interest of the City that it install a telecommunications system among all of its Electric System substations in order to improve communications for automatic substation control; and

WHEREAS, the City has determined that it is prudent and economical to provide additional capacity on such telecommunications system to provide the Electric System with sufficient capacity to perform or enhance such functions as automated meter reading and billing, appliance control, and load shaping; and



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ARTICLE II  
FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT AS A  
SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM

Section 2.1. 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, contemplated by the plan adopted by Section 2.2 hereof, for the purposes set forth in Exhibit A. The City hereby covenants that all revenues received from the Telecommunications System shall be deposited into the Revenue Fund.

Section 2.2. Adoption of Plan; Estimated Cost. The City hereby specifies and adopts the plan set forth in Exhibit A for the acquisition, construction and implementation of the Telecommunications System (the "Telecommunications Project"). The City may modify details of the foregoing plan when deemed necessary or desirable in the judgment of the City. The estimated cost of the Telecommunications Project, including funds necessary for the payment of all costs of issuing the Bonds, is expected to be approximately \$40,000,000.

Section 2.3. Findings of Parity. The Council hereby finds and determines as required by Section 5.2 of the Ordinance as follows:

- A. The Bonds will be issued for financing capital improvements to the Electric System.
- B. At the time of issuance and delivery of the Bonds, there will be no deficiency in the Bond Fund and no Event of Default shall have occurred.
- C. At the time of issuance and delivery of the Bonds, there will be on file with the City Clerk the certificate of the Director of Finance required by Section 5.2(B)(1) or Section 5.2(C) of the Ordinance.



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EXHIBIT A

TELECOMMUNICATIONS PROJECT

The Telecommunications Project will include some or all of the following elements:

Infrastructure improvements

Construct a hybrid fiber coax ("HFC") telecommunications infrastructure consisting of fiber optic rings and branches connecting nodes throughout the Light Division service area. This telecommunications system will be asymmetrically two-way capable. It will interconnect all Light Division substations. Connections may also be made with Light Division customers and with other providers of telecommunications infrastructure and services. This telecommunications system will have 500 channels. It will utilize existing Light Division rights-of-way.

Functions to be performed by infrastructure improvements

Through construction of the HFC telecommunications system, the Light Division's Telecommunications System will be capable of performing some or all of the following functions:

- conventional substation communications functions
- automated meter reading (electric and water)
- automated billing (electric and water)
- automated bill payment (electric and water)
- demand side management (DSM) functions, such as automated load (*e.g.* water heater) control
- provision of information to customers that is relevant to their energy and water purchasing decisions (*e.g.* information on time-of-use or "green" power rates)
- distribution automation
- remote turn on/turn off for electric and water customers
- city government communications functions
- CATV service
- transport of signals for service providers offering telecommunications services (*e.g.* Personal Communications Service (PCS), video on demand, high speed data, as well as conventional wired and wireless telecommunications services)
- Internet access service

RETURN COPY

FILED IN COUNTY CLERK'S OFFICE

REC'D BY SUPERIOR COURT ADMINISTRATION

The Honorable Grant L. Anderson

NOV 06 1996

PIERCE COUNTY, WASHINGTON  
TED RUFF, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

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RESIDENTIAL CONSERVATION

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation,

Plaintiff,

v.

THE TAXPAYERS AND THE RATEPAYERS  
OF THE CITY OF TACOMA,

Defendants.

No. 96 2 09938 0

MEMORANDUM IN SUPPORT OF CITY  
OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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**I. INTRODUCTION**

The City of Tacoma (the "City") brought this declaratory judgment class action under RCW 7.24 and 7.25 and CR 23(B)(2) to confirm its authority to issue bonds for the purpose of constructing and operating a telecommunications system consisting of a hybrid fiber coaxial network (the "Telecommunications System"). On July 23, 1996, the Tacoma City Council adopted Ordinance No. 25930, which authorized the sale of Electric System revenue bonds (the "Revenue Bonds") in order to finance the first phase of constructing and operating the Telecommunications System. The City will utilize the Telecommunications System to enhance electric service to customers of its Light Division. The City may also utilize a portion of the Telecommunications System to provide cable television service to customers in the Light Division service area, and lease Telecommunications System facilities or capacity to providers of telecommunications services.

**II. RELIEF REQUESTED**

The City requests that the Court enter judgment declaring that:

1. The Court has jurisdiction over the subject matter and parties in this action.
2. Tacoma City Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.
3. The City has authority under the laws of the State of Washington and the United States to provide cable television service in the Light Division service area.
4. The City has authority under the laws of the State of Washington and the United States to lease telecommunications facilities and capacity to telecommunications providers.
5. The City has authority under the laws of the State of Washington and the United States to issue the Bonds for the purposes set for in paragraphs (3) and (4) above and in the manner set forth in the Bond Ordinance.

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**III. STATEMENT OF ISSUES**

1. Whether the City has authority under state law to provide cable television service.
2. Whether the City has authority under federal and state law to lease telecommunications facilities and capacity to telecommunications providers.

**IV. EVIDENCE RELIED UPON**

The City believes that the following facts are undisputed in every material respect. These facts are contained in the Declaration of Jon Athow in Support of the City's Motion for Summary Judgment ("Athow Decl.").

Plaintiff, the City of Tacoma, is a municipal corporation and a city of the first class of the State of Washington. The Defendants herein are taxpayers of the City of Tacoma and ratepayers of its electrical utility, which is known as the Light Division of the Department of Public Utilities (the "Light Division"). Harold E. Nielsen, Jr., the taxpayer and ratepayer representative, is a resident and taxpayer of the City and a customer of the Light Division. The City currently owns and operates, through its Light Division, an electric utility (the "Electric System") for the purpose of providing electricity and other energy services throughout the City and other portions of Pierce County.

The Telecommunications System will be used to improve the speed and capability of the existing real-time communications among certain Electric System substations, and to extend such real-time communications to the remaining substations. In addition, the Telecommunications System may be used to enhance such existing energy services as demand management, identification of outages, meter reading, billing and payment, and resource dispatch. The Telecommunications System may be used to perform similar functions for the City's provision of water service. The City's authority to issue the Revenue Bonds to finance the purposes discussed in this paragraph is not at issue.

1 The City may also utilize a portion of the Telecommunications System to provide cable  
2 television service to customers within the Light Division service area, and to lease facilities or  
3 capacity to providers of video-on-demand, data transport, telephony, and other telecommunications  
4 services. By providing cable television service and/or leasing facilities or capacity to  
5 telecommunications providers, the City can ensure a range of choices for consumers, provide public  
6 interest television programming, and improve the availability of competitively priced  
7 telecommunications services.

8 The City also estimates that by providing cable television service and/or leasing facilities or  
9 capacity, it could generate substantial revenue to help offset the costs of constructing and operating  
10 the Telecommunications System. Because the infrastructure for the telemetry improvements designed  
11 to meet Electric System needs represents a substantial portion of the costs of the Telecommunications  
12 System, the relative cost of these additional revenue-producing capabilities is low.<sup>1</sup>

13 The Tacoma City Council enacted Ordinance No. 25930 (the "Bond Ordinance") on July 23,  
14 1996, at a regular meeting.<sup>2</sup> The Bond Ordinance provides for the construction and operation of a  
15 Telecommunications System within the Light Division and for the issuance and sale of Electric  
16 System revenue bonds in the aggregate principal amount of \$1,000,000.

## 17 V. ARGUMENT

### 18 A. Summary Judgment Standard

19 Summary judgment is appropriate to dispose of actions or parts thereof when no genuine  
20 issues of material fact exist or when only a question of law exists. CR 56(c). "The burden is on the  
21 moving party to demonstrate that there is no issue as to a material fact." *Scott v. Pacific West*  
22 *Mountain Resort*, 119 Wn. 2d 484, 502-03 (1992). If the party seeking summary judgment  
23 successfully carries its initial burden, the burden shifts to the non-moving party to establish the

24 <sup>1</sup> Declaration of Jon Athow in Support of Motion for Summary Judgment ("Athow Decl."), ¶ 10.

25 <sup>2</sup> A true and correct copy of the Bond Ordinance is attached as Exhibit C to Mr. Athow's Declaration.

1 existence of the facts on which it has the burden of proof at trial. *Young v. Key Pharmaceuticals,*  
2 *Inc.*, 112 Wn. 2d 216, 225 (1989). The non-moving party must respond with specific facts and  
3 cannot rely on bare allegations contained in his or her pleadings. *Baldwin v. Sisters of Providence,*  
4 112 Wn. 2d 127, 132 (1989). Conclusory statements or argumentative assertions raised in affidavits  
5 are insufficient to raise an issue of fact and do not preclude summary judgment. *Grimwood v.*  
6 *University of Puget Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

7 In the instant case, there are no issues of material fact. The facts bearing on the City's  
8 authority to provide cable television service and to lease telecommunications facilities and capacity to  
9 telecommunications providers are undisputed. Only questions of law remain. The case should  
10 therefore be resolved on summary judgment.

11 **B. The City Has Authority Under Washington Statutes To Construct and Operate the**  
12 **Entire Telecommunications System and To Lease Portions of the System's Capacity or**  
13 **Facilities.**

14 1. A Charter City Has Broad Powers.

15 The Washington Constitution grants broad powers to first-class charter cities such as Tacoma.  
16 It states, "Any city containing a population of ten thousand inhabitants, or more, shall be permitted to  
17 frame a charter for its own government, consistent with and subject to the Constitution and laws of  
18 this state . . . ." Wash. Const. art XI, § 10. Under Chapter 35 RCW, a charter city has "all the  
19 powers which are conferred upon incorporated cities and towns by this title or other laws of the state,  
20 and all such powers as are usually exercised by municipal corporations of like character and degree."  
21 RCW 35.22.570. In addition to this "omnibus" grant of power, RCW 35.22.900 provides that grants  
22 of power to first-class cities must be liberally construed to carry out the objectives of chapter 35.22  
23 RCW. *See also Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn. 339,  
24 343 (1983).

25 In light of these constitutional and statutory provisions, the Washington Supreme Court has  
26 held that "the only limitation on the power of cities of the first class is that their action cannot

1 contravene any constitutional provision or any legislative enactment. . . . [A] city of the first class has  
2 as broad legislative powers as the state, except when restricted by enactments of the state legislature."  
3 *Winkenwerder v. City of Yakima*, 52 Wn. 2d 617, 622 (1958).

4 2. A City Has Even Broader Powers When It Is Operating a Utility.

5 The powers of a city under Washington law are especially broad when the city is performing a  
6 proprietary, as distinguished from a governmental, function. In *Tacoma v. Taxpayers*, 108 Wn.2d  
7 679 (1987), the Washington Supreme Court stated that while municipal authority must be narrowly  
8 construed when the function is governmental, "when the Legislature authorizes a municipality to  
9 engage in a business, it may exercise its business powers much in the same way as a private individual.  
10 . . . We have viewed the Legislature as implicitly authorizing a municipality to make all contracts, and  
11 to engage in any undertaking necessary to make its municipal electric utility system efficient and  
12 beneficial to the public." *Id.* at 694-95. *See also Hite v. Public Utility Dist. No. 2*, 112 Wn.2d 456,  
13 459 (1989) ("It is clear that in the production and sale of electricity, a municipal corporation acts in  
14 its proprietary capacity. . . . In that capacity, a municipal corporation acts as the proprietor of a  
15 business enterprise for the private advantage of the city and may exercise its business powers in much  
16 the same way as a private individual or corporation." ).<sup>3</sup>

17 In addition, the courts have recognized many instances in which public utility districts, which  
18 are municipal corporations with more limited powers than cities, may engage in activities that are  
19 incidental to their expressly authorized functions of providing electric or other utility service. *See,*  
20 *e.g., Puget Power and Light Co. v. Public Utility District No. 1 of Chelan County*, 17 Wn. App. 861  
21 (1977) (involving public utility district's provision of recreational facilities); *Snohomish County*  
22 *Public Utility District No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 8 (1978) (upholding district's

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25 <sup>3</sup> *Hite and Taxpayers* made clear that the holding in *Chemical Bank v. Washington Public Power Supply*  
26 *System*, 99 Wn.2d 772 (1983), does not detract from the broad authority that cities enjoy when acting in a proprietary  
capacity.

1 authority to lease pole attachments even though activity is “only incidental to the accomplishment of  
2 the district’s primary purpose, the distribution and sale of electricity”).

3 3. The City Has Authority Under Washington Statutes To Provide Telecommunications  
4 Services.

5 The City’s statutory powers include the authority to provide telecommunications services.  
6 First, the City, as a first class charter city having code city powers as well, has all powers not denied  
7 by law, “including operating and supplying of utilities and municipal services commonly or  
8 conveniently rendered by cities or towns.” RCW 35A.11.020. Tacoma may conveniently render  
9 telecommunications services because the Light Division has an existing citywide electric system of  
10 connections to customers' homes, because it has existing billing relationships with customers, and  
11 because it can provide services economically. Second, there is no express statutory prohibition  
12 against city provision of municipal telecommunications services. *Winkenwerder, supra*. To the  
13 contrary, the Legislature has acknowledged that cities provide communications services through  
14 enacting a statute providing for the burying of city-owned communications facilities. RCW  
15 35.96.030. Finally, the Legislature has determined that competitive markets for telecommunications  
16 services serve the public interest. RCW 80.36.300; *In re Electric Lightwave, Inc.*, 123 Wn.2d 530,  
17 538-39 (1994) (noting that “it is the state's policy to promote diversity in the supply of  
18 telecommunications services and products in telecommunications markets throughout the state”).  
19 The City’s provision of telecommunications services will make the market more competitive, thus  
20 furthering the public interest recognized by the Legislature.

21 4. Washington Case Law Recognizes the City’s Authority To Provide  
22 Telecommunications Services.

23 The Washington Supreme Court in *Issaquah v. Teleprompter Corp.*, 93 Wn. 2d 567 (1980),  
24 recognized the power of a code city under RCW 35A.11.020 to utilize its telecommunications system  
25 to provide telecommunications services, including cable television service. The Court held in  
26 *Teleprompter* that a city was authorized by statute to operate a cable television system under the

1 broad authority of RCW 35A.11.020 because there was "no general law which conflicts with the  
2 city's authority under the optional municipal code to operate such a system." *Id.* At 575. First class  
3 charter cities such as Tacoma have all the powers granted to code cities. RCW 35.22.570. Thus,  
4 under *Teleprompter* the City is clearly authorized to use its Telecommunications System to offer  
5 cable television service.

6 Tacoma's authority is not limited to the provision of cable television service.  
7 *Teleprompter* provides no basis for distinguishing cable television from other telecommunications  
8 services. The Washington Legislature views cable television as a telecommunications service. *See*,  
9 *e.g.*, RCW 80.04.010 (defining "telecommunications" as "the transmission of information by wire,  
10 radio, *optical cable*, electromagnetic, or other similar means) (emphasis added); RCW 80.36.370  
11 (exempting cable television from the Washington Utilities and Transportation Commission's  
12 regulation of telecommunications services). Thus, *Teleprompter* clarifies the authority for Tacoma to  
13 provide telecommunications services.

14 5. The City Has Authority To Lease City-Owned Telecommunications Facilities

15 The City has authority under its charter and under state law to lease excess capacity and  
16 facilities of its Telecommunications System to other telecommunications providers. Tacoma's Charter  
17 expressly permits the City to lease City property. Tacoma, Wash., Code § 9.1. Under state law, a  
18 first class city has the power to:

19 control the finances and property of the corporation, and to acquire, by purchase and  
20 otherwise, such lands and other property as may be necessary for any part of the  
21 corporate uses provided for by its charter, and to dispose of any such property as the  
interests of the corporation may, from time to time, require.

22 RCW 22.280(3). The Washington Supreme Court has upheld the authority of cities to lease  
23 municipal property to private parties as long as the lease does not interfere with public use.  
24 *Winkenwerder, supra* at 624. Cities are specifically authorized to lease surplus utility property and  
25 equipment. Ch. 35.94 RCW.

1 C. Federal Law Requires that the City Be Allowed To Provide Telecommunications  
2 Service.

3 The City's authority to provide telecommunications services must be recognized under the  
4 Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 70 (1996) (the "Act"), as a  
5 consequence of the Act's prohibition against barriers to the entry of any entity into the  
6 telecommunications market. Federal law can preempt state utility regulation. *Public Utility District*  
7 *No. 1 of Pend Oreille County v. Federal Power Commission*, 308 F.2d 318 (D.C. Cir. 1962) (holding  
8 that the Federal Power Act preempted Washington statute purporting to limit city's ability to  
9 condemn property for power plant). The *Pend Oreille* court found that preemption was required  
10 merely by implication of a federal law. Here, the case for preemption is far stronger because the Act  
11 expressly preempts state interference in the telecommunications market. Section 253 of the Act  
12 states, "No state or local statute or regulation, or other state or local legal requirement, may prohibit  
13 or have the effect of prohibiting the ability of *any entity* to provide *any* interstate or intrastate  
14 telecommunications service." Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110  
15 Stat. 70 (1996) (emphasis added). There is no language in either the statute or its legislative history  
16 exempting cities from the law's application. To the contrary, a House Committee Report states that  
17 Section 253 "is intended to remove all barriers to entry in the provision of telecommunications  
18 services." House Rep. No. 104-458. A state law precluding telecommunications services constitutes  
19 a legal requirement. Thus, any Washington law that would prohibit Tacoma from providing  
20 telecommunications service is expressly preempted by the Act.

21 In addition, the thrust of the Telecommunications Act is to encourage the availability and  
22 affordability of telecommunications services. *See, e.g.*, Section 254, requiring various mechanisms to  
23 promote universal service. Tacoma is well positioned to make telecommunications services available  
24 to the public at a competitive price, thereby furthering this federal policy.

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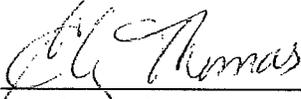
**VI. CONCLUSION**

Under its broad powers as a first-class charter city, the City has authority to use a portion of its Telecommunications System to provide cable television service and to lease a portion of its Telecommunications System facilities or capacity to other telecommunications service providers. Federal law expressly bars any requirement that would undercut this authority. Because there is no dispute over the material facts underlying its authority, the City is therefore entitled to judgment as a matter of law.

DATED this 5<sup>th</sup> day of November, 1996.

Respectfully submitted,

PRESTON GATES & ELLIS

By   
Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By   
Mark Bubenik, WSBA # 3093  
Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma

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

CITY OF TACOMA, a municipal corporation,  
Plaintiff,  
v.  
THE TAXPAYERS AND THE RATEPAYERS  
OF THE CITY OF TACOMA,  
Defendants.

No. 96-2-09938-0

DECLARATION OF JON ATHOW IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

1. My name is Jon Athow. I am over the age of eighteen, competent to testify in this matter, and make this declaration based upon my own personal knowledge. I am employed by the Light Division of the City of Tacoma. My title is Telecommunications Project Manager. My responsibilities include planning for the creation and operation of a telecommunications system for the Light Division. I have been employed by the Light Division for three years. Prior to joining the Light Division, I was a Navigator in the United States Navy and a machine vision/artificial intelligence software developer with an industrial controls manufacturing company. I received a Bachelor of Science degree in Electrical Engineering from M.I.T., the Massachusetts Institute of Technology. A copy of my current resume is attached as Exhibit A.

DECLARATION OF JON ATHOW IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT - 1

1           2.     The Light Division relies upon telecommunications facilities and services for a wide  
2 range of purposes including dispatching its generating resources, determining whether to make  
3 purchases and sales on the spot market, maintaining appropriate levels of power in its distribution  
4 system, ensuring that power is constantly and instantly available to meet customer demand, ensuring  
5 the safe operation of its transmission system, coordinating the activities of its field crews and  
6 identifying promptly any outages or other system problems. The Light Division has designed and  
7 built, and operates, limited telecommunications systems in support of these missions that include fiber  
8 optics loops, point to point microwave, telephone systems including internal T1, and mobile radio.

9           3.     Additional telecommunications facilities and services would enhance the Light  
10 Division's ability to provide highly reliable, cost-effective and convenient electric service to its  
11 customers. A sophisticated telecommunications system would enable many operation improvements,  
12 including:

- 13           •     Distribution Automation, to monitor and control system components such as  
14                 transformers, switches, and capacitors, to provide dynamic load control and  
15                 Voltage/VAR control, and to support increased reliability
- 16           •     Transmission and Distribution Availability and monitoring for posting to other service  
17                 providers
- 18           •     Outage handling, including improved outage locating abilities and the reduction of  
19                 outages through fault detection, fault isolation, and predictive maintenance
- 20           •     Automated meter reading
- 21           •     Data exchange with utility field personnel and vendors
- 22           •     Substation monitoring as a means of determining substation upgrades or deferrals
- 23           •     Dispatch of third-party generation

24           4.     A sophisticated telecommunications system would also enable many service  
25 improvements, including:

- 1 • Aggregated Customer Billing for customers with multiple locations
- 2 • Market pricing/availability, including the provision of competitive energy market
- 3 options
- 4 • Interactive utility customer service communication
- 5 • Remote connect and disconnect
- 6 • Data networking with commercial/industrial customers to facilitate electrical system
- 7 response to customer real-time process requirements
- 8 • Power quality monitoring
- 9 • Customer usage management via two-way communication permitting the customer
- 10 and utility to manage electricity consumption via time of use pricing, real-time pricing,
- 11 or direct load control
- 12 • Interactive communications for demand-side management and load management
- 13 through flexible pricing
- 14 • Provision of energy usage information to customers
- 15 • Automated bill payment

16 5. The expectations of today's electrical customers have grown enormously. Customers  
17 today demand options in their power supplies, have little tolerance for even momentary outages or  
18 power quality problems, and have come to expect high levels of customer service.

19 6. An advanced telecommunications system not only is a key element in meeting the  
20 expectations of today's energy customers, but also is being designed to meet the needs of tomorrow's  
21 energy customers.

22 7. The Light Division has carefully analyzed what telecommunications facilities it would  
23 need in order to meet the current and anticipated needs of the electric system. It retained SRI  
24 International as a consultant to evaluate and report on options. With SRI International, the Light  
25 Division reviewed the existing telecommunications infrastructure, emerging telecommunications  
26

1 options, and ways to meet Light Division needs. A copy of SRI International's Telecommunications  
2 Strategy Assessment - Final Report Summary is attached as Exhibit B. The Summary was received  
3 by the City but does not necessarily represent the position of the City.

4 8. The Light Division determined that a broadband, two-way system based on fiber  
5 optics in conjunction with other technologies would be the best long-term approach for meeting its  
6 needs.

7 9. The Light Division has also evaluated the possibility of designing a system that is  
8 capable of carrying other telecommunications services, including cable television service, as well as  
9 meeting Electric System needs.

10 10. The telecommunications infrastructure designed to meet current and future Electric  
11 System needs represents a substantial portion of the costs of this more capable Telecommunications  
12 System.

13 11. By providing cable television service and/or leasing facilities or capacity to  
14 telecommunications providers, the Light Division can ensure a range of choices for consumers,  
15 provide more educational and other public interest television programming, and improve the  
16 availability of competitively priced telecommunications services. Such services could be provided  
17 efficiently because of the lower cost of capital and the fact that the Light Division already has a drop  
18 to every home.

19 12. Regardless of whether the Light Division's new communications system were designed  
20 to allow for the provision of cable television service, it would have excess, or spare, capacity until the  
21 time when anticipated future electric system needs are fully realized.

22 13. In order to defray costs and encourage the provision of advanced telecommunications  
23 services to its customers, the Light Division would lease facilities or transport would be made  
24 available on a competitively neutral, non-discriminatory basis.

25  
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**DECLARATION OF JON ATHOW IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT - 4**

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CERTIFICATE OF DELIVERY

On this day I delivered a true and accurate copy of the document to which this certificate is affixed to Puget Sound Courier for delivery to the attorneys of record for plaintiff-defendant. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated 12/3/96 at Tacoma, Washington

Jennifer Watson

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation,

Plaintiff,

v.

THE TAXPAYERS AND RATEPAYERS OF THE CITY OF TACOMA,

Defendants.

NO. 96-2-09938-0

DEFENDANTS' RESPONSIVE MEMORANDUM IN OPPOSITION TO CITY OF TACOMA'S MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants, The Taxpayers and The Ratepayers of the City of Tacoma, by and through their attorneys of record, Thompson, Krilich, La Porte, Tucci & West, P.S., and submit their Responsive Memorandum in Opposition to The City of Tacoma's Motion for Summary Judgment. This response is supported by the records and files herein and the Affidavit of Heidi E. Imhof and Defendants' Motion to Strike the Declaration of Jon Athow.

Plaintiff's Motion for Summary Judgment should be denied because the Plaintiff's have failed to meet their burden, as many issues of material fact exist.

The City of Tacoma has based their entire motion on the Declaration of Jon Athow who is not an authorized spokesperson for either the City of Tacoma or the City Light Division. Further, Mr. Athow's Declaration is wrought with conclusory statements, argumentative

COPY

1 assertions, hearsay, speculation, and inadmissible opinion testimony. The City further asserts  
2 that it's authority to issue revenue bonds to finance the project which is the subject of this  
3 lawsuit is not at issue. The City's authority to proceed with this project is the subject of this  
4 lawsuit and it's authority to issue revenue bonds is the essence of the project itself. Summary  
5 judgment is not proper in this case.  
6

7 Not only is summary judgment improper, but this declaratory action is untimely. The  
8 City has asked for a declaratory judgment granting the City authority to proceed with a project  
9 that has not even been put to paper. There is no business plan or proposal for the  
10 telecommunications project. (Deposition of Steve Klein, Page 11, Line 20 - Page 12, Line 5).  
11 The City has no financial plan for the project. (Deposition of Steve Klein, Page 12, Lines 8-  
12 14). Any estimate on the cost would be speculation. (Deposition of Jon Athow, Page 18, Lines  
13 5-8). In addition, the City admitted that it was a definite possibility that some of the funds  
14 could come from general obligation bonds. (Deposition of Steve Klein, Page 15, Lines 7-10  
15 and Page 16, Lines 2-4).  
16

17 The City has filed a Complaint for Declaratory Judgment and has asked this court for  
18 a judgment declaring that:  
19

- 20 1) This court has jurisdiction over the subject matter and the parties in this action;
- 21 2) The City properly enacted the \$1,000,000.00 bond ordinance to pay for the  
22 telecommunications project;
- 23 3) The City has authority to provide cable television service in the Light Division  
24 service area;  
25



1                   1. Bond Ordinance No. 25930 was improperly enacted.

2                   Under the Tacoma City Charter, Article IV, Section 4.2, provides in relevant part that:

3                   The City may purchase, acquire, or construct any public utility  
4                   system, or part thereof, or make any additions and betterments  
5                   thereto or extensions thereof, without submitting the proposition  
6                   to the voters, provided no general indebtedness is incurred by  
7                   the City. **If such indebtedness is to be incurred, approval by  
8                   the electors, in the manner provided by state law, shall be  
9                   required.**

10                   (Emphasis added).

11                   In this case, although there is no feasibility plan, no business plan, and no financial plan,  
12                   the spokesperson for Tacoma City Light admitted that some of the funds necessary for the  
13                   telecommunications project could come from general obligation bonds. (Deposition of Steve  
14                   Klein, Page 15, Lines 7-10, Page 16, Lines 2-4).

15                   Under the Tacoma City Charter, the City Council does not have authority to enact an  
16                   ordinance for an undefined project which could and probably will submit the ratepayers and  
17                   taxpayers to debt without voter approval.

18                   The City has not specifically defined how the new telecommunication system would be  
19                   an addition and betterment or an extension of the current public utilities system. In order to  
20                   issue any bond either by ordinance or by voter approval, public utilities must meet the  
21                   aforementioned threshold burden. As set forth in the Plaintiff's Answers to Defendants' First  
22                   Set of Interrogatories and the depositions of Mr. Athow and Mr. Klein, there is no plan for the  
23                   new telecommunication system.

1 The fact of the matter is, this new telecommunications system project is in its conceptual  
2 stages and a summary judgment is inappropriate at this time. In fact, the declaratory action  
3 brought by the City is most probably untimely, because there is no plan or system to evaluate  
4 the City's authority therein.  
5

6 **2. The City has no telecommunications system from which to determine any**  
7 **authority.**

8 The City has asked this court to declare that it generally has the authority to provide  
9 cable television services to its ratepayers and to lease the telecommunication facilities to any  
10 other telecommunication provider of the City's choice. The City has yet to define its  
11 hypothetical telecommunication system and the public utility employees presumably in charge  
12 of defining the project have no definite idea what the telecommunication system would entail.  
13 The Superintendent of City Light states that the project is still in its conceptual stages and  
14 nothing has been fully defined. (Deposition of Steve Klein, Page 16, Lines 6-10).  
15

16 It became quite apparent through discovery, that no one in the public utilities department  
17 had any definite answer with regard to Tacoma City Light's telecommunications project. Steve  
18 Klein, the Superintendent of Tacoma City Light assigned Jon Athow as telecommunications  
19 project manager, to examine all issues from marketing to technology.  
20

21 (Deposition of Steve Klein, Page 18, Lines 19-21). Mr. Athow, as the project manager, did not  
22 even know if his business plan would include a marketing plan. (Deposition of Jon Athow,  
23 Page 51, Lines 16-17). Clearly Mr. Athow has no appreciation for the business management  
24 or operations of City Light's hypothetical telecommunications project.  
25

1 Mr. Athow himself has no idea how much the telecommunications project is going to  
2 cost. (Deposition of Jon Athow, Page 18, Lines 5-8). Mr. Athow speculated that the project  
3 could cost \$40,000,000.00, but he adopted that hearsay figure from an independent consulting  
4 firm. (Deposition of Jon Athow, Page 19, Lines 3-9). It is unclear to the Defendants how an  
5 independent consulting firm could have come up with a cost figure for a project that has yet to  
6 be defined.

8 Beginning on Page 8, Line 7 of the Plaintiff's Memorandum in Support of City of  
9 Tacoma's Motion for Summary Judgment, the City states that "Tacoma may conveniently render  
10 telecommunication services". Part of the basis for the City's assertion is that the City can  
11 provide telecommunication services economically. The City has submitted absolutely no proof  
12 that the City of Tacoma can conveniently render telecommunication services or that those  
13 services would be economical. There is no plan, there is no budget, and there is no projection  
14 for what these services could cost the ratepayer. (Deposition of Jon Athow, Page 8, Lines 6-12,  
15 Page 18, Lines 5-8; Deposition of Mark Peace, Page 19, Line 25, and Page 20, Lines 1-22;  
16 Deposition of Steven Klein, Page 12, Lines 17-25).

18 The uncertainty and lack of information by Tacoma City Light was further emphasized  
19 in a December 2, 1996 newspaper article in the Tacoma News Tribune. In the article, council  
20 member Baarsma was quoted as stating that the public utilities has already made a proposal to  
21 the council and that the project would be built in 6-9 months after a contract was in place.  
22 According to the defendants' discovery, there is no proposal, no budget, no projections of  
23

1 ratepayer costs and no contract discussions. (Plaintiff's Answers to Defendants' Request for  
2 Production Nos. 2, 3 and 4).

3  
4 The City has not met their burden of showing that no issues of material fact exist  
5 regarding their authority to utilize a telecommunications system to provide cable t.v. service or  
6 to lease the capacity to a telecommunication provider of their choice. There has been no  
7 telecommunication system defined by the City and it would therefore be inappropriate for this  
8 court to state that the City has authority to proceed into the unknown. There is clearly an issue  
9 of material fact regarding the City's definition of the telecommunication system project.  
10 Namely, there is no project plan at this time.

11  
12 The City asserts that the powers of a city when performing in a proprietary function are  
13 especially broad. As cited by the Plaintiffs, Washington law authorizes a municipality to engage  
14 in business when the undertaking is "necessary to make its municipal electric utility system  
15 efficient and beneficial to the public." Tacoma vs. Taxpayers, 108 Wn. 2d 679, 694-95 (1987).  
16 Washington law clearly did not authorize a municipality to engage in uninformed business  
17 decisions and particularly engaging in a new business venture without any plan, feasibility study  
18 or financial plan.

19  
20 The cases cited by the Plaintiff on Page 7 of its Memorandum are distinguishable from  
21 this case. In the four cases cited by the Plaintiff, Tacoma vs. Taxpayers, Height vs. Public  
22 Utility Dist. No. 2, Puget Power & Light Co. vs. Public Utility Dist. No. 1, and Public Utility  
23 District No. 1 vs. Broadview Television Co., the courts all considered activities that the  
24 municipality engaged in for the benefit of the public or the ratepayers. In this case, the Plaintiff  
25

1 has fallen far short of showing that this new improved telecommunication system would in fact  
2 benefit the ratepayers. The City doesn't even know the full extent its new improved  
3 telecommunication system and therefore it would be improbable that they could determine how  
4 it would benefit the ratepayers. There is presently no plan or system to evaluate whether it will  
5 benefit the ratepayers.  
6

7 The City's summary judgment motion should be denied because the City does not  
8 presently have a telecommunication system that could provide cable television to its ratepayers  
9 nor does the City have a telecommunication system that can be leased to other  
10 telecommunication providers. Summary judgment is improper in this case and most probably  
11 this declaratory judgment action is improper at this time. The City must first show that the new  
12 telecommunication system is a necessary addition and betterment or extension of the current  
13 public utilities system.  
14

15 **3. The City has no authority to issue bonds for a project that has not been**  
16 **specifically defined.**  
17

18 As set forth above in Section 1, the Tacoma City Charter has it's own set of checks and  
19 balances. The City cannot place the ratepayers and taxpayers into debt without voter approval.  
20 The City has not done the legwork to define the telecommunication system project in order to  
21 determine that the ratepayers and taxpayers would not be subject to indebtedness as a result of  
22 this project. The City does not have authority under the Tacoma City Ordinance to issue bonds  
23 under the current set of facts and the City's Motion for Summary Judgment should be denied.  
24

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## CONCLUSION

In response to a summary judgment motion, the opposing party does not need to submit affidavits or responding materials unless the moveant meets its burden. Hash vs. Children's Orthopaedic Hospital & Medical Ctr., 110 Wn. 2d 9912, 757 P.2d 507 (1988). However, if the non-moving party submits affidavits, the court generally will be more lenient in examing the affidavits presented by the non-moveant. Public Utility Dist. No. 1 vs. WPPSS, 104 Wn. 2d 353, 705 P.2d 1195 (1985).

In ruling on a motion for summary judgment, the court must consider all of the material evidence and all inferences must be made in light most favorable to the non-moving party and, if reasonable minds might reach different conclusions, the summary judgment motion should be denied. Scott vs. Pacific West Mountain Resort, 119 Wn. 2d 484, 834 P.2d 6 (1992), Atlantic Mutual Ins. Co. vs. Roffey, Inc., 73 Wash. App. 858 (1994).

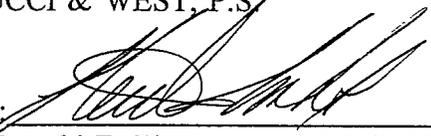
The City has prematurely brought this declaratory action with the court requesting preliminary authority to use a portion of its hypothetical telecommunication system to provide cable television service and to lease a portion of its facilities to other telecommunication service providers. At this point, the telecommunication system has not been planned and it is therefore unknown whether the system would even have the capacity to provide cable television services as well as the capacity to lease facilities to other telecommunication service providers. It certainly may be prudent to determine whether the City has authority to provide the aforementioned services however, the City's first and only obligation is to the ratepayers of its

1 electric utility and to engage only in undertakings necessary to make the electric utility system  
2 efficient and beneficial to the ratepayers.

3  
4 The City has yet to show that the new telecommunication system idea is an addition and  
5 betterment or an extension of the current public utility system. The City cannot meet this  
6 burden by conclusory statements and speculation. The Plaintiff's Motion for Summary  
7 Judgment should be denied.

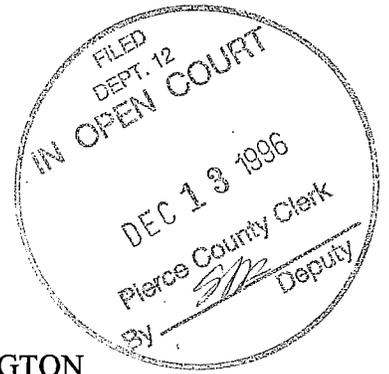
8 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of December, 1996.

9  
10 THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.

11  
12 By: 

13 Ronald E. Thompson, WSB #4005  
14 Heidi E. Imhof, WSB #23083  
15 Attorneys for Defendants  
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The Honorable Grant L. Anderson



IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. )  
 )  
 ) THE TAXPAYERS AND RATEPAYERS OF )  
 ) THE CITY OF TACOMA, )  
 )  
 ) Defendants. )

No. 96 2 09938 0

ORDER GRANTING CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

This matter came on this day for hearing before the undersigned upon the City of Tacoma's ("City's") Motion for Summary Judgment. Plaintiff City of Tacoma appeared through its counsel, Elizabeth Thomas. Defendants Taxpayers and Ratepayers of the City of Tacoma appeared through their counsel, Ronald E. Thompson.

Counsel for the parties have drawn the Court's attention to the following documents: Summons, Complaint for Declaratory Judgment; Acceptance of Service; City of Tacoma's Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment; Declaration of Jon Athow in Support of Motion for Summary Judgment; Defendants' Responsive Memorandum in Opposition to City of Tacoma's Motion for Summary Judgment; and City of Tacoma's Reply Brief.

Based on these documents, the Court finds that there is no genuine issue as to any material fact and that the facts set forth in the Declaration of Jon Athow are true.

ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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Having considered the documents identified by the parties, the arguments of counsel and the record herein, the Court concludes that the following order should be entered.

- 1. The Court has jurisdiction over the subject matter and parties in this action.
- 2. Tacoma City Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.
- 3. The City has authority under the laws of the State of Washington and the United States to provide cable television service in the Light Division service area.
- 4. The City has authority under the laws of the State of Washington and the United States to lease telecommunications facilities and capacity to telecommunications providers.
- 5. ~~The City has authority under the laws of the State of Washington and the United States to issue the Bonds for the purposes set for in paragraphs (3) and (4) above and in the manner set forth in the Bond Ordinance.~~

DONE IN OPEN COURT this 13 day of December, 1996.

**GRANT L. ANDERSON**

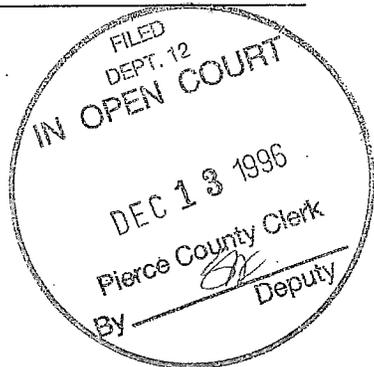
JUDGE

Presented by:  
PRESTON GATES & ELLIS

By LSI  
Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By LSI  
Mark Bubenik, WSBA # 3093  
Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma



ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2

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SUPERIOR COURT  
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Honorable Grant L. Anderson

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THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. INC., P.S.

FILED  
IN COUNTY CLERK'S OFFICE

A.M. APR 14 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON

FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )  
Plaintiff, )

No. 96 2 09938 0

v.

MEMORANDUM IN SUPPORT OF CITY  
OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

THE TAXPAYERS AND THE RATEPAYERS )  
OF THE CITY OF TACOMA, )  
Defendants. )

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~~THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. INC., P.S.~~

## I. INTRODUCTION

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

On December 13, 1996, this Court ruled on four of the City's five requested declarations. The Court held that (1) the Court has jurisdiction over the subject matter and parties in this action; (2) Tacoma Ordinance No. 25930 (the "Bond Ordinance"), which provides for the issuance and sale of Electric System revenue bonds in the aggregate principal amount of \$1,000,000 (the "Bonds") in order to finance the first phase of constructing and operating the Telecommunications System, was properly enacted; (3) the City has authority under the laws of the State of Washington and the United

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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1 States to provide cable television service in the service area of the Light Division of the City's  
2 Department of Public Utilities (the "Light Division"); and (4) the City has authority under the laws of  
3 the State of Washington and the United States to lease telecommunications facilities and capacity to  
4 telecommunications providers. See Order Granting City of Tacoma's Motion for Summary Judgment  
5 dated December 13, 1996 (the "Order").

6 Only one issue remains: Whether the City has authority to issue revenue bonds to finance the  
7 first phase of construction and operation of the Telecommunications System. The City is entitled to  
8 summary judgment on this final issue. Issuing the bonds is a legislative act subject to review only for  
9 such deficiencies as fraud, bad faith, or ultra vires actions. Through the Order, the Court has already  
10 determined that construction and operation of the Telecommunications System is not ultra vires. No  
11 facts relation to fraud, bad faith, etc. have bee alleged.

## 12 **II. RELIEF REQUESTED**

13 The City requests that the Court enter judgment declaring that:

- 14 1. The City has authority under the laws of the State of Washington to issue revenue  
15 bonds for the purposes of financing a telecommunications system to provide cable  
16 television service in the Light Division Service area and lease telecommunications  
17 facilities and capacity to telecommunications providers.

## 18 **III. STATEMENT OF ISSUE**

- 19 1. Whether the City may issue revenue bonds under the properly enacted Bond  
20 Ordinance for the purposes of providing cable television service and leasing telecommunications  
21 facilities and capacity pursuant to the authority confirmed by this Court's previous Order.

## 22 **IV. EVIDENCE RELIED UPON**

23 The City believes that the following facts are undisputed in every material respect. These  
24 facts are contained in the Declaration of Jon Athow in Support of Motion for Summary Judgment,  
25  
26

1 dated November 5, 1996 ("First Athow Decl.") and the Second Declaration of Jon Athow in Support  
2 of Motion for Summary Judgment dated April 11, 1997 ("Second Athow Decl.").

3 Plaintiff, the City of Tacoma, is a municipal corporation and a city of the first class of the  
4 State of Washington. The Defendants are taxpayers of the City and ratepayers of its electrical utility,  
5 the Light Division. Harold E. Nielsen, Jr., the taxpayer and ratepayer representative, is a resident and  
6 taxpayer of the City and a customer of the Light Division. The City currently owns and operates,  
7 through its Light Division, an electric utility (the "Electric System") for the purpose of providing  
8 electricity and other energy services throughout the City and other portions of Pierce County.

9 On July 23, 1996, the Tacoma City Council adopted Ordinance No. 25930 (the "Bond  
10 Ordinance"). The Bond Ordinance provides for the issuance and sale of Electric System revenue  
11 bonds in the aggregate principal amount of \$1,000,000 (the "Bonds") in order to finance the first  
12 phase of constructing and operating the Telecommunications System. The Telecommunications  
13 System will be used to improve the speed and capability of the existing real-time communications  
14 among certain Electric System substations, and to extend such real-time communications to the  
15 remaining substations. In addition, the Telecommunications System may be used to enhance such  
16 existing energy services as demand management, identification of outages, meter reading, billing and  
17 payment, and resource dispatch. The Telecommunications System may be used to perform similar  
18 functions for the City's provision of water service.

19 The City may also utilize a portion of the Telecommunications System to provide cable  
20 television service to customers within the Light Division service area, and to lease facilities or  
21 capacity to providers of video-on-demand, data transport, telephony, and other telecommunications  
22 services. This Court's previous Order determined that the City has the authority to engage in these  
23 activities, and that the Bond Ordinance was properly enacted.

24 The Light Division, with the assistance of numerous experts, has prepared a comprehensive  
25 Telecommunications Study. The City has recently adopted resolutions approving this Study and  
26

1 authorizing the Light Division to proceed with implementation. See Exhibits A, B, and C to Second  
2 Athow Decl. (Public Utility Board Resolution No. Substitute U-9258; City Council Substitute  
3 Resolution No. 33668; and Public Utility Board Amended Substitute Resolution No. U-9258.) The  
4 City Council acted unanimously after substantial public participation.

5 The Telecommunications Study incorporates a comprehensive business plan outlining the  
6 proposed services, operations, organizational structure and finances of the Telecommunications  
7 System. See Exhibit D to Second Athow Decl. (Telecommunications Study notebook), eleventh  
8 through sixteenth tabs. The chief concern raised by defendants' opposition on the previous summary  
9 judgment motion was the absence of such a plan. That objection has now been fully met.

## 10 V. ARGUMENT

### 11 A. Summary Judgment Standard

12 Summary judgment is appropriate to resolve actions or parts thereof when no genuine issues  
13 of material fact exist or when only a question of law exists. CR 56(c). "The burden is on the moving  
14 party to demonstrate that there is no issue as to a material fact." *Scott v. Pacific West Mountain*  
15 *Resort*, 119 Wn. 2d 484, 502-03 (1992). If the party seeking summary judgment successfully carries  
16 its initial burden, the burden shifts to the non-moving party to establish the existence of the facts on  
17 which it has the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225  
18 (1989). The non-moving party must respond with specific facts and cannot rely on bare allegations.  
19 *Baldwin v. Sisters of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory statements or  
20 argumentative assertions are insufficient to raise an issue of fact. *Grimwood v. University of Puget*  
21 *Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

1 In the instant case, there are no issues of material fact relating to the City's authority to issue  
2 bonds. The City's authority to provide cable television service and to lease telecommunications  
3 facilities and capacity to telecommunications providers has already been confirmed. Only questions of  
4 law remain. The case should therefore be resolved on summary judgment.

5 **B. The City's Plans for the Telecommunications System Are Not Subject to Judicial**  
6 **Review in the Absence of Bad Faith, Fraud or Ultra Vires Actions.**

7 Judicial review of the legislative actions of Washington municipalities is extremely limited.  
8 The leading case on the question of judicial review of municipal legislative actions is *Blade v. La*  
9 *Conner*, 167 Wn. 403 (1932). In *Blade*, as in the instant case, a taxpayer sought to enjoin a town  
10 from issuing bonds for purposes of a utility project. *Blade* involved the acquisition of a water plant.  
11 In considering whether the town had authority to issue the bonds. The court declined to consider  
12 whether the plant could supply an adequate amount of water. As the court explained, "It is well  
13 settled that a court of equity will not review the action of the legislative authority of a municipality as  
14 to such matters as rest within its discretion unless fraud or bad faith are shown, or unless the action  
15 taken is clearly ultra vires." *Id.* at 407.

16  
17 In *City of Bremerton v. Kitsap County Sewer District*, 71 Wn. 2d 689 (1967), the court  
18 refused to consider claims remarkably similar to the defendant's suggestion here that proposed utility  
19 facilities may not be needed. *Bremerton* involved a sewer district's claim that installation of municipal  
20 water mains was illegal because there was no need for such mains. *Id.* at 704. Citing *Blade*, the  
21 court stated that its role was to determine only whether the city had authority to regulate and control  
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1 the use, distribution and price of its water service. *Id.*<sup>1</sup> Because this Court has already confirmed  
2 Tacoma's authority to develop the Telecommunications System no further inquiry is warranted.

3 The sole question on this motion for summary judgment is whether the City has authority to  
4 issue bonds to finance an activity that is indisputably within its municipal powers: construction and  
5 operation of the Telecommunications System. Thus, no claim of ultra vires action can be sustained.  
6 Moreover, there has been no showing of bad faith or fraud. The City's actions are entitled to a  
7 presumption of good faith a defendants have the burden of proving otherwise. *Blade*, 167 Wash. At  
8 408. Therefore the Court must defer to the City's judgment on the desirability of constructing and  
9 operating the Telecommunications System and the means of doing so.  
10

11 **C. The City Has Authority Under Washington Statute To Issue Bonds for the**  
12 **Telecommunications System.**

13 Washington first-class cities may issue bonds for *any* lawful corporate purpose, RCW  
14 35.22.280(4). This Court has already determined that construction and operation of the  
15 Telecommunications System is a lawful corporate purpose of the City. *See Order*. Thus, the City  
16 may issue the Bonds to finance construction and operation of the Telecommunications System.  
17 Accordingly, this Court must find that the City has the authority to issue the Bonds for the purpose of  
18 financing construction and operation of the Telecommunications System.

19 **VI. CONCLUSION**

20 As this Court has determined, the City has authority to provide cable television service in the  
21 Light Division service area; and to lease telecommunications facilities and capacity to  
22

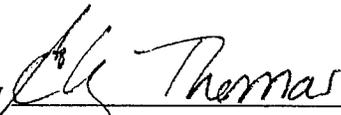
23 <sup>1</sup> *Accord Rowan v. Convention Center*, 78 Wn. App. 322, 329 (1995) (if municipal corporation's  
24 actions come within purpose and object of enabling statute and no express limitations apply, court  
25 leaves choice of means used in operating corporation to discretion of municipal authorities, and  
26 judicial review is limited to whether action is arbitrary, capricious or unreasonable); *Public Util. Dist.  
No. 1 v. City of Newport*, 38 Wn. 2d 221, 226 (1951) (desirability of city's operation of electrical  
distribution system that duplicated system of public utility district was "a problem for the  
legislature—not the courts.").

1 telecommunications providers. Thus development of the Telecommunications System is a lawful  
2 corporate purpose of the municipality. The only remaining issue is whether the City may issue  
3 revenue bonds to construct the Telecommunications System. Because the City may issue bonds for  
4 any lawful municipal purpose, it may issue bonds to finance the Telecommunications System. The  
5 Defendants have not alleged bad faith or fraud on the part of the City. The City is entitled to  
6 judgment as a matter of law that it has authority to issue bonds for the purpose of financing  
7 construction and operation of the Telecommunications System.

8 DATED this 11th day of April, 1997.

9  
10 Respectfully submitted,

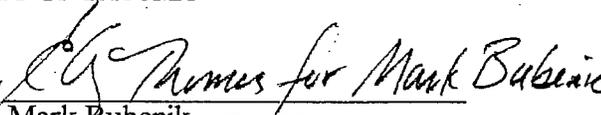
11 PRESTON GATES & ELLIS

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13 By 

Elizabeth Thomas, WSBA # 11544

Laura A. Rosenwald, WSBA # 25722

14  
15 CITY OF TACOMA

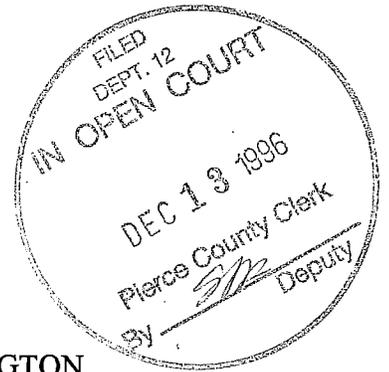
16  
17 By 

Mark Bubenik, WSBA #3093

Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma

The Honorable Grant L. Anderson



IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )  
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No. 96 2 09938 0

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ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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Having considered the documents identified by the parties, the arguments of counsel and the record herein, the Court concludes that the following order should be entered.

1. The Court has jurisdiction over the subject matter and parties in this action.
2. Tacoma City Ordinance No. 25930 (the "Bond Ordinance") was properly enacted.
3. The City has authority under the laws of the State of Washington and the United States to provide cable television service in the Light Division service area.
4. The City has authority under the laws of the State of Washington and the United States to lease telecommunications facilities and capacity to telecommunications providers.
5. ~~The City has authority under the laws of the State of Washington and the United States to issue the Bonds for the purposes set for in paragraphs (3) and (4) above and in the manner set forth in the Bond Ordinance.~~

DONE IN OPEN COURT this 13 day of December, 1996.

**GRANT L. ANDERSON**

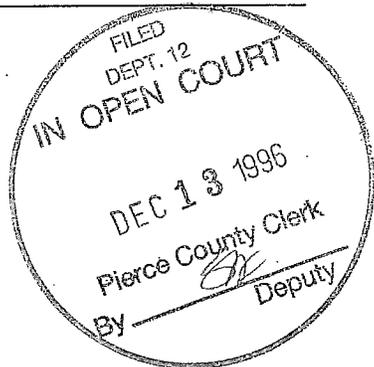
JUDGE

Presented by:  
PRESTON GATES & ELLIS

By LSI  
Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By LSI  
Mark Bubenik, WSBA # 3093  
Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma



ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2

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SUPERIOR COURT  
ADMINISTRATION

Honorable Grant L. Anderson

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APR 14 1997

THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. INC., P.S.

FILED  
IN COUNTY CLERK'S OFFICE

A.M. APR 14 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON

FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE TAXPAYERS AND THE RATEPAYERS )  
 OF THE CITY OF TACOMA, )  
 )  
 Defendants. )

No. 96 2 09938 0

MEMORANDUM IN SUPPORT OF CITY  
OF TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

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~~APR 14 1997~~

~~THOMPSON, KRILICH, LAPORTE  
TACOMA, WASH. INC., P.S.~~

## I. INTRODUCTION

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

On December 13, 1996, this Court ruled on four of the City's five requested declarations. The Court held that (1) the Court has jurisdiction over the subject matter and parties in this action; (2) Tacoma Ordinance No. 25930 (the "Bond Ordinance"), which provides for the issuance and sale of Electric System revenue bonds in the aggregate principal amount of \$1,000,000 (the "Bonds") in order to finance the first phase of constructing and operating the Telecommunications System, was properly enacted; (3) the City has authority under the laws of the State of Washington and the United

MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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PRESTON GATES & ELLIS LLP  
5000 COLUMBIA CENTER  
701 FIFTH AVENUE  
SEATTLE, WASHINGTON 98104-7078  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 States to provide cable television service in the service area of the Light Division of the City's  
2 Department of Public Utilities (the "Light Division"); and (4) the City has authority under the laws of  
3 the State of Washington and the United States to lease telecommunications facilities and capacity to  
4 telecommunications providers. See Order Granting City of Tacoma's Motion for Summary Judgment  
5 dated December 13, 1996 (the "Order").

6 Only one issue remains: Whether the City has authority to issue revenue bonds to finance the  
7 first phase of construction and operation of the Telecommunications System. The City is entitled to  
8 summary judgment on this final issue. Issuing the bonds is a legislative act subject to review only for  
9 such deficiencies as fraud, bad faith, or ultra vires actions. Through the Order, the Court has already  
10 determined that construction and operation of the Telecommunications System is not ultra vires. No  
11 facts relation to fraud, bad faith, etc. have bee alleged.

## 12 II. RELIEF REQUESTED

13 The City requests that the Court enter judgment declaring that:

- 14 1. The City has authority under the laws of the State of Washington to issue revenue  
15 bonds for the purposes of financing a telecommunications system to provide cable  
16 television service in the Light Division Service area and lease telecommunications  
17 facilities and capacity to telecommunications providers.

## 18 III. STATEMENT OF ISSUE

- 19 1. Whether the City may issue revenue bonds under the properly enacted Bond  
20 Ordinance for the purposes of providing cable television service and leasing telecommunications  
21 facilities and capacity pursuant to the authority confirmed by this Court's previous Order.

## 22 IV. EVIDENCE RELIED UPON

23 The City believes that the following facts are undisputed in every material respect. These  
24 facts are contained in the Declaration of Jon Athow in Support of Motion for Summary Judgment,  
25  
26

1 dated November 5, 1996 ("First Athow Decl.") and the Second Declaration of Jon Athow in Support  
2 of Motion for Summary Judgment dated April 11, 1997 ("Second Athow Decl.").

3 Plaintiff, the City of Tacoma, is a municipal corporation and a city of the first class of the  
4 State of Washington. The Defendants are taxpayers of the City and ratepayers of its electrical utility,  
5 the Light Division. Harold E. Nielsen, Jr., the taxpayer and ratepayer representative, is a resident and  
6 taxpayer of the City and a customer of the Light Division. The City currently owns and operates,  
7 through its Light Division, an electric utility (the "Electric System") for the purpose of providing  
8 electricity and other energy services throughout the City and other portions of Pierce County.

9 On July 23, 1996, the Tacoma City Council adopted Ordinance No. 25930 (the "Bond  
10 Ordinance"). The Bond Ordinance provides for the issuance and sale of Electric System revenue  
11 bonds in the aggregate principal amount of \$1,000,000 (the "Bonds") in order to finance the first  
12 phase of constructing and operating the Telecommunications System. The Telecommunications  
13 System will be used to improve the speed and capability of the existing real-time communications  
14 among certain Electric System substations, and to extend such real-time communications to the  
15 remaining substations. In addition, the Telecommunications System may be used to enhance such  
16 existing energy services as demand management, identification of outages, meter reading, billing and  
17 payment, and resource dispatch. The Telecommunications System may be used to perform similar  
18 functions for the City's provision of water service.

19 The City may also utilize a portion of the Telecommunications System to provide cable  
20 television service to customers within the Light Division service area, and to lease facilities or  
21 capacity to providers of video-on-demand, data transport, telephony, and other telecommunications  
22 services. This Court's previous Order determined that the City has the authority to engage in these  
23 activities, and that the Bond Ordinance was properly enacted.

24 The Light Division, with the assistance of numerous experts, has prepared a comprehensive  
25 Telecommunications Study. The City has recently adopted resolutions approving this Study and  
26

1 authorizing the Light Division to proceed with implementation. See Exhibits A, B, and C to Second  
2 Athow Decl. (Public Utility Board Resolution No. Substitute U-9258; City Council Substitute  
3 Resolution No. 33668; and Public Utility Board Amended Substitute Resolution No. U-9258.) The  
4 City Council acted unanimously after substantial public participation.

5 The Telecommunications Study incorporates a comprehensive business plan outlining the  
6 proposed services, operations, organizational structure and finances of the Telecommunications  
7 System. See Exhibit D to Second Athow Decl. (Telecommunications Study notebook), eleventh  
8 through sixteenth tabs. The chief concern raised by defendants' opposition on the previous summary  
9 judgment motion was the absence of such a plan. That objection has now been fully met.

## 10 V. ARGUMENT

### 11 A. Summary Judgment Standard

12 Summary judgment is appropriate to resolve actions or parts thereof when no genuine issues  
13 of material fact exist or when only a question of law exists. CR 56(c). "The burden is on the moving  
14 party to demonstrate that there is no issue as to a material fact." *Scott v. Pacific West Mountain*  
15 *Resort*, 119 Wn. 2d 484, 502-03 (1992). If the party seeking summary judgment successfully carries  
16 its initial burden, the burden shifts to the non-moving party to establish the existence of the facts on  
17 which it has the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225  
18 (1989). The non-moving party must respond with specific facts and cannot rely on bare allegations.  
19 *Baldwin v. Sisters of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory statements or  
20 argumentative assertions are insufficient to raise an issue of fact. *Grimwood v. University of Puget*  
21 *Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

1 In the instant case, there are no issues of material fact relating to the City's authority to issue  
2 bonds. The City's authority to provide cable television service and to lease telecommunications  
3 facilities and capacity to telecommunications providers has already been confirmed. Only questions of  
4 law remain. The case should therefore be resolved on summary judgment.

5 **B. The City's Plans for the Telecommunications System Are Not Subject to Judicial**  
6 **Review in the Absence of Bad Faith, Fraud or Ultra Vires Actions.**

7 Judicial review of the legislative actions of Washington municipalities is extremely limited.  
8 The leading case on the question of judicial review of municipal legislative actions is *Blade v. La*  
9 *Conner*, 167 Wn. 403 (1932). In *Blade*, as in the instant case, a taxpayer sought to enjoin a town  
10 from issuing bonds for purposes of a utility project. *Blade* involved the acquisition of a water plant.  
11 In considering whether the town had authority to issue the bonds. The court declined to consider  
12 whether the plant could supply an adequate amount of water. As the court explained, "It is well  
13 settled that a court of equity will not review the action of the legislative authority of a municipality as  
14 to such matters as rest within its discretion unless fraud or bad faith are shown, or unless the action  
15 taken is clearly ultra vires." *Id.* at 407.

16  
17 In *City of Bremerton v. Kitsap County Sewer District*, 71 Wn. 2d 689 (1967), the court  
18 refused to consider claims remarkably similar to the defendant's suggestion here that proposed utility  
19 facilities may not be needed. *Bremerton* involved a sewer district's claim that installation of municipal  
20 water mains was illegal because there was no need for such mains. *Id.* at 704. Citing *Blade*, the  
21 court stated that its role was to determine only whether the city had authority to regulate and control  
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1 the use, distribution and price of its water service. *Id.*<sup>1</sup> Because this Court has already confirmed  
2 Tacoma's authority to develop the Telecommunications System no further inquiry is warranted.

3 The sole question on this motion for summary judgment is whether the City has authority to  
4 issue bonds to finance an activity that is indisputably within its municipal powers: construction and  
5 operation of the Telecommunications System. Thus, no claim of ultra vires action can be sustained.  
6 Moreover, there has been no showing of bad faith or fraud. The City's actions are entitled to a  
7 presumption of good faith a defendants have the burden of proving otherwise. *Blade*, 167 Wash. At  
8 408. Therefore the Court must defer to the City's judgment on the desirability of constructing and  
9 operating the Telecommunications System and the means of doing so.  
10

11 **C. The City Has Authority Under Washington Statute To Issue Bonds for the**  
12 **Telecommunications System.**

13 Washington first-class cities may issue bonds for *any* lawful corporate purpose, RCW  
14 35.22.280(4). This Court has already determined that construction and operation of the  
15 Telecommunications System is a lawful corporate purpose of the City. *See Order*. Thus, the City  
16 may issue the Bonds to finance construction and operation of the Telecommunications System.  
17 Accordingly, this Court must find that the City has the authority to issue the Bonds for the purpose of  
18 financing construction and operation of the Telecommunications System.

19 **VI. CONCLUSION**

20 As this Court has determined, the City has authority to provide cable television service in the  
21 Light Division service area; and to lease telecommunications facilities and capacity to  
22

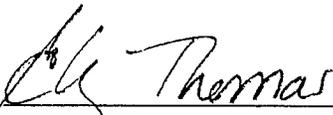
23 <sup>1</sup> *Accord Rowan v. Convention Center*, 78 Wn. App. 322, 329 (1995) (if municipal corporation's  
24 actions come within purpose and object of enabling statute and no express limitations apply, court  
25 leaves choice of means used in operating corporation to discretion of municipal authorities, and  
26 judicial review is limited to whether action is arbitrary, capricious or unreasonable); *Public Util. Dist.*  
*No. 1 v. City of Newport*, 38 Wn. 2d 221, 226 (1951) (desirability of city's operation of electrical  
distribution system that duplicated system of public utility district was "a problem for the  
legislature—not the courts.").

1 telecommunications providers. Thus development of the Telecommunications System is a lawful  
2 corporate purpose of the municipality. The only remaining issue is whether the City may issue  
3 revenue bonds to construct the Telecommunications System. Because the City may issue bonds for  
4 any lawful municipal purpose, it may issue bonds to finance the Telecommunications System. The  
5 Defendants have not alleged bad faith or fraud on the part of the City. The City is entitled to  
6 judgment as a matter of law that it has authority to issue bonds for the purpose of financing  
7 construction and operation of the Telecommunications System.

8 DATED this 11th day of April, 1997.

9  
10 Respectfully submitted,

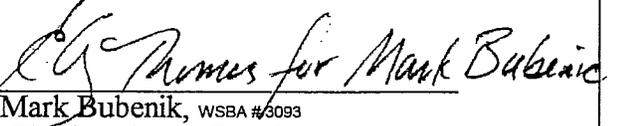
11 PRESTON GATES & ELLIS

12  
13 By 

14 Elizabeth Thomas, WSBA # 11544

Laura A. Rosenwald, WSBA # 25722

15 CITY OF TACOMA

16  
17 By 

18 Mark Bubenik, WSBA #3093

Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma

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MEMORANDUM IN SUPPORT OF CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 7

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The Honorable Grant L. Anderson

SUPERIOR COURT  
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APR 14 1997

A.M. APR 14 1997 P.M.

THOMPSON, KRILICH, LAPORTE  
ATTORNEYS AT LAW

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CITY OF TACOMA, a municipal corporation,

Plaintiff,

v.

THE TAXPAYERS AND THE RATEPAYERS  
OF THE CITY OF TACOMA,

Defendants.

No. 96-2-09938-0

SECOND DECLARATION OF JON  
ATHOW IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

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~~APR 14 1997~~

~~THOMPSON, KRILICH, LAPORTE  
ATTORNEYS AT LAW~~

1. My name is Jon Athow. I am over the age of eighteen, competent to testify in this matter, and make this declaration based upon my own personal knowledge. I am employed by the Light Division of the City of Tacoma. My title is Telecommunications Project Manager. My responsibilities include planning for the creation and operation of a telecommunications system for the Light Division. I have been employed by the Light Division for three years.

2. The City of Tacoma, through its Light Division, is considering constructing and operating telecommunications facilities and services to enhance the Light Division's ability to provide highly reliable, cost-effective and convenient electric service to its customers. Such a system would also be capable of carrying other telecommunications services, including cable television service.

SECOND DECLARATION OF JON ATHOW IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT - 1

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# RESOLUTION NO.

SUBSTITUTE  
U-9258

1  
2  
3 WHEREAS the City of Tacoma, Department of Public Utilities,  
4 Light Division desires to: (1) develop a state-of-the-art fiber optic  
5 technology to support enhanced electric system control, reliability and  
6 efficiency; (2) develop capability to meet the expanding  
7 telecommunications requirements in an evolving competitive electric  
8 market, the most critical of which is real-time, two-way interactive  
9 communications with individual energy consumers, (3) create greater  
10 revenue diversification through new business lines (i.e. internet transport,  
11 cable TV, etc.), (4) enhance traditional products and service, and (5)  
12 maximize return on Light Division assets, and

13 WHEREAS these desired capabilities can be provided with a broad  
14 band telecommunications system for all of the Light Division's service area,  
15 and

16 WHEREAS a broad band telecommunications system will have  
17 available capacity for future Light Division needs and will also have the  
18 capacity to provide Telecommunications services for data transport, high  
19 speed internet access, full cable television service, and other uses, and

20 WHEREAS the Light Division has retained consultants to review  
21 and analyze the feasibility of a broad band telecommunications systems for  
22 the Light Division's service area, and a business plan has been prepared  
23 for this purpose (copies are on file with the Clerk), and

24 WHEREAS the cost of constructing, installing and commencing to  
25 operate a broad band telecommunications system will be approximately  
26 \$65 million dollars, but the benefits to the Light Division, the City and the  
27 Light Division customers are projected to exceed and justify the initial cost,  
28 and  
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WHEREAS the City Council and Public Utility Board will continue to be involved in the future decision-making on this proposal including construction contracts, and debt financing approvals, quarterly reviews on the project direction during the startup period, approval of agreements for use of City rights-of-way for telecommunications purposes which agreements will (to the extent required by law) treat the Light Division substantially similar to other franchises that the City grants for similar businesses, and

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

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

That the Board hereby approves the Light Division's proposal including the Business Plan for a broad band telecommunications system, and the Board recommends that the City Council approve a resolution to authorize the Light Division to proceed to implement said proposal for a broad band telecommunications system, and the Board recommends that the City Council continue to be involved in the major policy decisions including construction contracts, debt financings, the public rights-of-way use agreements for telecommunications and quarterly reviews.

Approved as to form & legality:

Ross Singleton  
Acting Chairman

Mark Bubenik  
Chief Assistant City Attorney

W. J. Barker  
Acting Secretary

Lydia Stevenson  
Clerk

Adopted 3/26/97



SUBSTITUTE

**RESOLUTION NO. 33668**

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WHEREAS the City of Tacoma, Department of Public Utilities, Light Division desires to: (1) develop a state-of-the art fiber optic system to support enhanced electric system control, reliability and efficiency; (2) develop capability to meet the expanding telecommunications requirements in an evolving competitive electric market, the most critical of which is real-time, two-way interactive communications with individual energy consumers, (3) create greater revenue diversification through new business lines (i.e. internet transport, cable TV, etc.), (4) enhance traditional products and services, and (5) maximize return on Light Division assets, and

WHEREAS these desired capabilities can be provided with a broad band telecommunications system for all of the Light Division's service area, and

WHEREAS a broad band telecommunications system will have available capacity for future City Light Division needs and will also have the capacity to provide telecommunications services for data transport, high speed internet access, full cable television service, and other uses, and

WHEREAS the Light Division has retained consultants to review and analyze the feasibility of a broad band telecommunications system for the Light Division's service area, and a business plan has been prepared for this purpose (copies are on file with the Clerk), and

WHEREAS the cost of constructing, installing and commencing to operate a broad band telecommunications system will be approximately \$65 million dollars, but the benefits to the Light Division, the City and the Light Division customers are projected to exceed and justify the initial cost, and

**EXHIBIT B**



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WHEREAS the City Council and Public Utility Board will continue to be involved in the future decision-making on this proposal including construction contracts and debt financing approvals, quarterly reviews on-the project direction during the startup period, approval of agreements for use of City rights-of-way for telecommunications purposes which agreements will (to the extent required by law or City Council) treat the Light Division substantially similar to other franchises that the City grants for similar businesses, and

WHEREAS the City Council hereby finds and determines that the Light Division's proposal for a broad band telecommunications system is in the best interests of the City, will serve a public purpose, and should be approved and implemented; Now, therefore,

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:**

That the Council hereby finds and determines that the City Light Division's broad band telecommunications proposal is in the best interests of the City, 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 Utilities, Light Division is hereby authorized to proceed to implement said proposal for a broad band telecommunications system, and

That the proposed broad band telecommunications system shall be owned, operated and controlled by the City of Tacoma Department of Public Utilities Light Division with the Public Utility Board providing oversight and approval of business and third party agreements, as appropriate under the City Charter, Tacoma Municipal Code and other applicable laws, and the City Council shall continue to be involved in the major policy decisions including



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construction contracts, rate setting policies, debt financings, the public rights-of-way use for telecommunications agreements and quarterly reviews.

Adopted \_\_\_\_\_

Mayor

Attest: City Clerk

Approved as to form & legality:

\_\_\_\_\_  
Chief Assistant City Attorney

Requested by Public Utility  
Board Resolution No. U-9258

599c



AMENDED  
SUBSTITUTE  
U-9258

## RESOLUTION NO.

1  
2 WHEREAS the City of Tacoma, Department of Public Utilities,  
3 Light Division desires to: (1) develop a state-of-the-art fiber optic system  
4 to support enhanced electric system control, reliability and efficiency;  
5 (2) develop capability to meet the expanding telecommunications  
6 requirements in an evolving competitive electric market, the most critical of  
7 which is real-time, two-way interactive communications with individual  
8 energy consumers, (3) create greater revenue diversification through new  
9 business lines (i.e. internet transport, cable TV, etc.), (4) enhance  
10 traditional products and service, and (5) maximize return on Light Division  
11 assets, and

12 WHEREAS these desired capabilities can be provided with a broad  
13 band telecommunications system for all of the Light Division's service area,  
14 and

15 WHEREAS a broad band telecommunications system will have  
16 available capacity for future Light Division needs and will also have the  
17 capacity to provide Telecommunications services for data transport, high  
18 speed internet access, full cable television service, and other uses, and

19 WHEREAS the Light Division has retained consultants to review  
20 and analyze the feasibility of a broad band telecommunications systems for  
21 the Light Division's service area, and a business plan has been prepared  
22 for this purpose (copies are on file with the Clerk), and

23 WHEREAS the cost of constructing, installing and commencing to  
24 operate a broad band telecommunications system will be approximately  
25 \$65 million dollars, but the benefits to the Light Division, the City and the  
26 Light Division customers are projected to exceed and justify the initial cost,  
27 and

28 EXHIBIT C



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WHEREAS the City Council and Public Utility Board will continue to be involved in the future decision-making on this proposal including construction contracts, and debt financing approvals, quarterly reviews on the project direction during the startup period, approval of agreements for use of City rights-of-way for telecommunications purposes which agreements will (to the extent required by law or City Council) treat the Light Division substantially similar to other franchises that the City grants for similar businesses, and

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

BE IT RESOLVED BY THE PUBLIC UTILITY BOARD OF THE CITY OF TACOMA:

That the Board hereby approves the Light Division's proposal including the Business Plan for a broad band telecommunications system, and the Board recommends that the City Council approve a resolution to authorize the Light Division to proceed to implement said proposal for a broad band telecommunications system, and the Board recommends that the City Council continue to be involved in the major policy decisions including construction contracts, rate setting policies, debt financings, the public rights-of-way use agreements for telecommunications and quarterly reviews.

Approved as to form & legality:  
  
G. S. Karavitis  
Assistant City Attorney

Daryl Hedman  
Chairman  
Bil Moss  
Secretary

Lydia Stevenson  
Clerk  
500d(a)

Adopted April 9, 1997

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APR 29 1997

Preston Gates & Ellis LLP

The Honorable Grant L. Anderson

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CITY OF TACOMA, a municipal  
corporation,

Plaintiff,

v.

THE TAXPAYERS AND THE  
RATEPAYERS OF THE CITY OF  
TACOMA,

Defendants.

NO. 96-2-09938-0

**DEFENDANT'S RESPONSIVE  
MEMORANDUM IN OPPOSITION  
TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT**

**Hearing Date: May 9, 1997**

**COMES NOW** the defendants, The Taxpayers and the Ratepayers of the City of Tacoma, by and through their attorneys of record, Heidi Imhof and Ronald E. Thompson, of the law offices of Thompson, Krilich, La Porte, Tucci & West, P.S., and submit their responsive memorandum in opposition to the City of Tacoma's Motion for Summary Judgment.

This response is supported by the records and files herein, the declaration of W. Cary Deaton, CPA, the declaration of Thomas G. Pagano, CPA, CVA, Declaration of Heidi Imhof authenticating excerpts from the April 8, 1997 City Council meeting and Article IV, Section 4.2 of the Tacoma City Charter and Verbatim Report of Proceedings dated December 13, 1996.

DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 1

heil136051Response.sj

THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.  
ATTORNEYS AT LAW  
524 TACOMA AVE. SO.  
TACOMA, WASHINGTON 98402-5416

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1 Plaintiff's motion for summary judgment should be denied because the plaintiffs have  
2 failed to meet their burden by demonstrating that there is no issue of material fact regarding  
3 the City's authority to issue bonds to finance the proposed telecommunications system  
4 project.

5 The City of Tacoma has based their entire motion on the simple proposition that  
6 because the Court has determined that the City has the authority to venture into the  
7 telecommunications area in the general sense, that it thereby may issue bonds to finance  
8 the construction and operation of their telecommunications project. What the City has failed  
9 to recognize is that the Tacoma City Charter places specific restrictions on the issuance of  
10 bonds and the financing of projects. Article IV, Section 4.2 of the Tacoma City Charter,  
11 requires that expenditures that are utilized for an addition to or betterment of any public utility  
12 must be submitted to a vote of the electorate when a general indebtedness may be incurred.  
13 (Declaration of Imhof regarding excerpts from Tacoma City Charter)  
14

15 The City has submitted nothing but a generalized financial plan with no degree of  
16 certainty whatsoever. Upon analysis by qualified experts in the field, W. Cary Deaton, CPA,  
17 and Tom Pagano, CPA, CVA, it was determined that the City's estimate of debt service on  
18 the revenue bonds based on today's interest rate are more than \$10,000,000 below true  
19 projections. In addition, the profits are overstated by \$154,468,000 over the 20 year  
20 projections. (Declaration of Pagano) In addition, the City had made absolutely no provisions  
21 for the payment of interest or the return of Tacoma City Light's initial \$30,000,000.00  
22 contribution to the project.  
23  
24

25 At the April 8, 1997 City Council meeting, Mr. Steve Klein, City Light Superintendent,

26  
DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 2

heil13605\Response.sj

THOMPSON, KRILICH, LA PORTE,  
TUCCI & WEST, P.S.  
ATTORNEYS AT LAW  
524 TACOMA AVE. SO.  
TACOMA, WASHINGTON 98402 5416

1 stated that the money that the City was investing in this project was being done to obtain the  
2 highest yield or return on investment for the ratepayers and taxpayers. However, the  
3 financial plan does not allow for any return on investment. Further, Mr. Klein stated that the  
4 money was being invested into the telecommunications system instead of buying down debt.  
5 (Declaration of Imhof excerpting April 8, 1997 City Council meeting) Isn't this another way  
6 of saying they are borrowing from Peter to pay Paul? The City is not paying down debt that  
7 would otherwise be done but for the funds being transferred to the telecommunications  
8 project. The City is still burdened with the cost of debt that could have been reduced or  
9 eliminated, but for the telecommunications project.  
10

11 Also, completely absent from Tacoma City Light's plan is an analysis of the risks to  
12 the taxpayers and ratepayers of Tacoma. It is the expert opinion of Mr. Pagano and Mr.  
13 Deaton that the business plan is based on invalid assumptions and cannot be supported  
14 under the AICPA guidelines or current events in the industry. The proposal represents a  
15 great financial risk and will cause a general indebtedness to the taxpayers and ratepayers  
16 of Tacoma that could only be paid by increasing the rates charged to the ratepayers for  
17 utilities or borrowing from the general fund.  
18

19 If the City were allowed to issue bonds to finance this project, they would be acting  
20 ultra virus. Under the Tacoma City Charter, the expenditure of funds and issuance of bonds  
21 in the cases like these must go to a vote of the people. When the proposed "revenue"  
22 bonds cannot be paid off with the revenues from non-utility services such as cable television  
23 and telephony services, the ratepayers and taxpayers in the city of Tacoma will have to pay  
24 the tab. They will pay the tab by paying increased utility rates or borrowing from the general  
25

26 DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 3

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fund.

1 Tacoma City Light's telecommunications project has many of the same characteristics  
2 as the WPPSS nuclear power plan construction project. In WPPSS, the plans to construct  
3 the nuclear power plants and the power needs did not proceed as projected and the  
4 revenues bonds could not be paid off. Similarly in this case, if the telecommunication project  
5 does not proceed exactly as projected by Tacoma City Light, the bond debt will not be able  
6 to be serviced with the revenues from the telecommunication project and the ratepayers and  
7 taxpayers would be burdened with that debt. The risk of debt is just too high for the City to  
8 be entering into this project without voter approval.  
9

10 The municipal bond issue is extremely important. The credit rating of cable  
11 companies is normally substandard and risky, and the city of Tacoma has not even  
12 considered the affect of a lower credit rating for their municipal bonds. (Declaration of W.  
13 Cary Deaton) The City of Tacoma has been proceeding full speed ahead with this project  
14 with a blind eye towards the legality of issuing bonds on this project. Mr. Steve Klein, City  
15 Light Superintendent, still doesn't know how much the project will cost or where exactly the  
16 money is coming from or what it is being spent on. (Excerpts from City Council meeting  
17 dated 4/8/97)  
18

19 If and when this telecommunications system is finished, only 3% of the revenues to  
20 pay for the system will come from utility services. This project cannot be paid for without  
21 cable television and internet services. Yet, on page three (3) of the City's own motion they  
22 state only that they "may . . . provide cable television service."  
23

24 Even with providing cable television services, the City's financial plan is seriously  
25

26 DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 4

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1 flawed in its income projections to the tune of an overstatement of \$154,468,000 in the 20  
2 year plan. (Declaration of W. Cary Deaton) In addition, the debt service payments  
3 contemplated on the revenue bonds are at least \$10,000,000 short. (Declaration of W. Cary  
4 Deaton) The City's projections ignore current trends with regard to technology, regulations  
5 and competition. This is not a classroom exercise, this is reality and the fact of the matter  
6 is that this telecommunications project will backfire and the ratepayers will be stuck with the  
7 debt if the City is allowed to issue bonds based on their "dreamland" financial plan. Although  
8 the City Council voted to enter into the telecommunications project, they did so with  
9 reservation about the financing.  
10

11 The Court has already determined that the City has the authority to generally enter  
12 into the field of telecommunications, but it does not necessarily follow that the City has  
13 authority to issue revenue bonds for the project. To issue revenue bonds there must be a  
14 degree of certainty that those revenues will be received to service the bond debt. In this  
15 case, there is absolutely no degree of certainty that there will be enough revenue to service  
16 the bonds. That certainty is not present. This court has not and cannot determine on  
17 summary judgment that the City has authority to issue bonds when they will, in all likelihood,  
18 generally in debt the ratepayers and taxpayers of Tacoma. The bond issuance must go to  
19 a vote of the people. The Tacoma City Charter, Article IV, § 4.2 provides for such a vote  
20 and the charter should be followed. If the charter provisions are not followed, the City would  
21 be exceeding its authority to issue the revenue bonds; the City would be acting ultra vires.  
22 Based on the Declaration of W. Cary Deaton, CPA, the Declaration of Thomas G. Pagano,  
23 CPA, CVA, the Tacoma City Charter, and the excerpts from the April 8, 1997 City Council  
24  
25  
26

DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 5

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meeting, the plaintiff's motion for summary judgment should be denied.

I.

**SUMMARY JUDGMENT LAW**

In ruling on a motion for summary judgment the court's function is to determine whether a genuine issue of material fact exists, not to resolve factual issues on their merits. Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963). The summary judgment procedure may not be used to try an issue of fact. Thomas v. C.J. Montag & Sons, Inc., 54 Wn.2d 20, 337 P.2d 1052 (1959).

In ruling on a motion for summary judgment, the court must consider all of the material evidence and all inferences from the evidence most favorably to the non-moving part and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992); Wood v. Seattle, 57 Wn.2d 469, 358 P.2d 140 (1960). A corollary to this principle is that even though evidentiary facts are not in dispute, if different inferences or conclusions may be drawn from them as to ultimate facts such as intent, knowledge, good faith, or negligence, summary judgment is not warranted. Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960); Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 682 P.2d 960 (1984).

Washington Civil Procedure Deskbook, Volume III, Chapter 56.6(6)(a), pages 56-23-24, F. Ross Boundy and Diana V. Blakney (Wash. St. Bar Assoc. 1992).

The non moving party is not required to submit responsive pleadings. "A genuine issue as to the credibility of the movant's evidence requires denial of a motion for summary judgment." Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963); Gingrich v. Unigard Security Insurance, 57 Wn. App. 424, 788 P.2d 1096 (1990). Courts have also denied summary judgment "when complicated questions or important public issues are to be resolved. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2739 (2d ed. 1983)." Washington Civil Procedure Deskbook, Volume III, § 56.6(5)(b), page 56-22.

DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 6

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1 On review, appellate courts have been reluctant to sustain an entry of summary  
2 judgment where there is a potential for factual dispute or significant disputed inferences from  
3 those facts.

4 In this case, not only do we have a factual dispute regarding the financial forecasts  
5 and projections in the City of Tacoma's telecommunications plan, but there is also a dispute  
6 as to the validity of the business financial plan itself with respect to its noncompliance with  
7 the generally accepted accounting procedures published by the American Institute of  
8 Certified Public Accountants for the standards in forecasts and projections of financial  
9 business plans.

10 When considering all of the material evidence and all inferences from the evidence  
11 in a light most favorable to the defense, a reasonable person could conclude that the City  
12 would be exceeding its authority if a \$1,000,000 revenue bond was issued to fund a  
13 \$67,000,000 project when the financial plan for that project has been determined by experts  
14 in the field to fall \$154,468,000 short in total income projections over a 20 year period.  
15 Reasonable minds could conclude that there would not be the revenue funds available to  
16 service the debt and that the City and therefore the taxpayers and ratepayers would then be  
17 burdened with the debt. Therefore, the City's motion for summary judgment should be  
18 denied.  
19  
20

## 21 II.

### 22 ARGUMENT

23 Based on an expert review of Tacoma City Light's business financial plan for the  
24 telecommunication project, there are serious questions as to the validity of that financial plan.  
25  
26

DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 7

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1 (Declaration of W. Cary Deaton, CPA; Declaration of Thomas G. Pagano, CPA, CVA) Filed  
2 herewith and incorporated by reference into this memorandum are the declarations of W.  
3 Cary Deaton, CPA, and Thomas G. Pagano, CPA, CVA. Mr. Deaton and Mr. Pagano each  
4 analyzed two different areas of the City's Telecommunications Plan.

5 **A. THERE ARE ISSUES OF FACT RE: FINANCING OF TACOMA CITY LIGHT'S**  
6 **PROJECTED FINANCIAL STATEMENTS**

7 Mr. Deaton primarily focused on the debt service of the bonds, the financing for the  
8 project, and the pro-forma cash budget. Throughout Mr. Deaton's declaration, he sets forth  
9 many issues of fact with regard to the inadequacy of the financial plan prepared by the City.  
10 He states that generally accepted accounting procedures were not followed in the City's  
11 financial plan. (Declaration of W. Cary Deaton)

12 Based on Mr. Deaton's preliminary review of the City's financial plan, the projections  
13 by the City were based on invalid assumptions that cannot be substantiated in the light of  
14 current events. (Declaration of W. Cary Deaton) Mr. Deaton estimated that the projected  
15 debt service on the proposed revenue bonds is understated by \$10,000,000.00 and that no  
16 return on investment has been provided for the \$30,000,000.00 to be invested by the City.  
17 (Declaration of W. Cary Deaton) Mr. Deaton concluded that the shortfalls in the City's plan  
18 will cause a general indebtedness to the City and the ratepayers and taxpayers will be  
19 funding this loss through increased utility rates or borrowing from the general fund.  
20 (Declaration of W. Cary Deaton)

21  
22  
23 **B. THERE ARE ISSUE OF FACT RE: THE SALES AND EXPENSE PORTION OF**  
24 **THE TACOMA CITY LIGHT'S PROJECTED FINANCIAL STATEMENTS**

25 Mr. Pagano primarily focused on only five (5) line items in the City's Pro-Forma

1 Income Statement. After analysis, he concluded that the City's projected profits should be  
2 reduced by approximately \$154,468,000 over the 20 year projections. (Declaration of  
3 Thomas G. Pagano) This is a 41.7% decrease in operating profits. (Declaration of Thomas  
4 G. Pagano)

5 Mr. Pagano's declaration sets forth a detailed explanation of the analysis and  
6 conclusions reached when reviewing the City's financial plan. Mr. Pagano's declaration is  
7 hereby incorporated in this memorandum by reference. Mr. Pagano analyzed the City's pro-  
8 forma income statement based on the current market and regulations in the industry.  
9 (Declaration of Thomas G. Pagano) Based on his analysis he concluded that the City's pro-  
10 forma income statement was seriously flawed from the feasibility perspective. First, the City  
11 overstated the number of cable TV subscribers which would result in a \$62,444,000.00  
12 decrease in revenue based on the current market. Second, the City overstated projected  
13 revenues from telephone and data transport by 25% based on imminent FCC regulations.  
14 Third, the City overstated residential data transport revenues by a total of \$33,595,000 based  
15 on the prevailing costs of such services in the local market. Finally, the City underestimated  
16 its marketing costs by \$15,761,000 based on the current marketing costs for other  
17 companies in the industry.  
18  
19

20 The bottom line is that the City will not be able to achieve the projected revenues as  
21 set forth in their pro-forma income statement. (Declaration of Thomas G. Pagano) Mr.  
22 Pagano concluded that if the City's revenue projections were not met, the City would not be  
23 able to service the revenue bond debt and the debt would have to be paid either out of the  
24 City's general fund or by an increase in the utility rates to the ratepayers and taxpayers of  
25

26 DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 9

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1 Further, if the City decides not to enter into the cable television service industry, there  
2 is absolutely no possibility whatsoever that this project could be paid for from the utility  
3 revenues. (Declaration of Thomas G. Pagano, CPA, CVA)

4 **III.**

5 **CONCLUSION**

6 The City argues that it has the sole authority to determine whether the  
7 telecommunications project is in the best interests of the ratepayers. The issue before this  
8 court on summary judgment is whether the City has authority to issue revenue bonds for the  
9 project as set for in the City's financial plan.  
10

11 **QUESTION:** Under the Tacoma City Charter, does the City have authority to issue  
12 bonds for a project without a vote of the people when the financial feasibility of the  
13 project is not certain?

14 **ANSWER:** No.

15 The City's motion for summary judgment should be denied. The City's financial plan  
16 is not feasible. The City has overstated their expected operating profit by 41.7% or  
17 \$154,468,000. This project will generally in debt the City and the issuance of bonds must  
18 go to a vote of the people pursuant to Article IV, § 4.2 of the Tacoma City Charter.

19 Under the City's financial plan, if the revenues projected are not achieved, the City will  
20 be in a state of general indebtedness and the debt would be serviced either from the general  
21 fund or the ratepayers and taxpayers of Tacoma will be funding this loss through increased  
22 utility rates. (Declaration of W. Cary Deaton, CPA; Declaration of Thomas G. Pagano, CPA,  
23 CVA)  
24

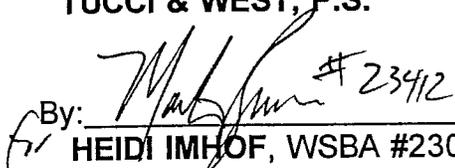
25 The cable television service and the telephony services are not incidental to the City's  
26

1 telecommunication upgrades, they are essential. If the City cannot or do not achieve the  
2 income projected for these services in their financial plan, the telecommunications project  
3 will not pay for itself. The City and its taxpayers/ratepayers will not be getting the highest  
4 yield or return on their money. The upgrades that the City is making to the current system  
5 will only generate at most 3% of the total funds necessary to pay for the project from utility  
6 services. The remaining funds must be generated by non utility services such as cable  
7 television and data transportation. The City does not have a feasible financial plan for  
8 obtaining the necessary income from these non utility services. Based upon an expert  
9 analysis, the City has overestimated their operating income by 41.7% or \$154,468,000.00,  
10 after analyzing only five (5) line items in the City's pro-forma income statement. We can only  
11 speculate as to the impact of subjecting the remaining fifteen (15) line items to the same  
12 scrutiny. There are clearly issues of fact regarding whether or not the City would be  
13 exceeding its authority by issuing revenue bonds based on the current financial plan.  
14

15 The City cannot be allowed to issue a \$1,000,000.00 revenue bond to fund a project  
16 that will cost many millions more without an adequate degree of certainty that there will be  
17 revenues available to pay the debt. By issuing such bonds, the City would be exceeding its  
18 authority; the City would be acting ultra-vires.  
19

20 **RESPECTFULLY SUBMITTED** this 28th day of April, 1997.

21 **THOMPSON, KRILICH, LA PORTE,**  
22 **TUCCI & WEST, P.S.**

23 By:  #23412  
24 **HEIDI IMHOF, WSBA #23083**  
25 **Attorneys for Defendants**

26 DEFENDANT'S RESPONSIVE MEMORANDUM IN  
OPPOSITION TO CITY OF TACOMA'S MOTION  
FOR SUMMARY JUDGMENT- 11

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The Honorable Grant L. Anderson

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SUPERIOR COURT  
ADMINISTRATION

MAY 5 1997

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 1997 P.M.

THOMPSON, KRILICH LAROCHE  
ATTORNEYS AT LAW

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON

FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )

Plaintiff, )

v. )

THE TAXPAYERS AND THE RATEPAYERS )  
OF THE CITY OF TACOMA, )

Defendants. )

No. 96 2 09938 0

CITY OF TACOMA'S REPLY BRIEF

I. INTRODUCTION

The City of Tacoma (the "City") has moved for summary judgment on the fifth of five issues brought in this action:<sup>1</sup> Whether the City has authority to issue revenue bonds to finance the first phase of construction and operation of a telecommunications system consisting of a hybrid fiber coaxial network (the "Telecommunications System"). In its Motion on this final issue, the City

<sup>1</sup> On December 13, 1996, this Court ruled on four of the City's five requested declarations. The Court held that (1) the Court has jurisdiction over the subject matter and parties in this action; (2) Tacoma Ordinance No. 25930 (the "Bond Ordinance"), which provides for the issuance and sale of Electric System revenue bonds in the aggregate principal amount of \$1,000,000 (the "Bonds") in order to finance the first phase of constructing and operating the Telecommunications System, was properly enacted; (3) the City has authority under the laws of the State of Washington and the United States to provide cable television service in the service area of the Light Division of the City's Department of Public Utilities (the "Light Division"); and (4) the City has authority under the laws of the State of Washington and the United States to lease telecommunications facilities and capacity to telecommunications providers. See Order Granting City of Tacoma's Motion for Summary Judgment dated December 13, 1996 (the "Order").

1 explained how issuing the bonds is a legislative act subject to review only for such deficiencies as  
2 fraud, bad faith, or ultra vires actions. The City noted that no facts relating to fraud, bad faith, etc.,  
3 have been alleged and that through the Order, the Court has already determined that construction and  
4 operation of the Telecommunications System is not ultra vires.

5 Defendants' responsive brief did not take issue with any of these points. Nor did their brief  
6 attempt to show facts sufficient to satisfy the stringent legal standard for review of legislative acts.  
7 Defendants' sole legal argument is that the Tacoma City Charter (the "Charter") requires a public  
8 vote authorizing issuance of the Bonds. However, the Charter does not require a vote of the people  
9 under the facts of this case because no such vote is required for the issuance of *revenue* bonds.

10 Defendants' brief also argues extensively that revenues from the Telecommunications System  
11 may be inadequate to cover debt service on the Bonds. This factual argument is simply not material  
12 to the question of the City's authority to issue the Bonds, and therefore cannot raise a "genuine issue  
13 as to any *material* fact[.]" CR 56 (emphasis supplied). Moreover, the issue is outside of the scope of  
14 the Court's review.

## 15 II. STATEMENT OF ISSUES

16 1. Whether a Tacoma City Charter provision that requires a vote of the people to  
17 authorize certain general obligation bonds should be read to require such a vote for the issuance of  
18 Electric System revenue bonds for the first phase of the Telecommunications Project.

19 2. Whether the adequacy of revenues from the Telecommunications System is material to  
20 whether the Tacoma City Council acted within its legislative discretion in approving the Bond  
21 Ordinance and determining to proceed with the Telecommunications Project.

## 22 III. STATEMENT OF FACTS

23 For purposes of this Motion for Summary Judgment, the City accepts Defendants' truly  
24 factual statements. However, the Court should not consider Defendants' unsupported conclusions or  
25  
26

1 the statements of their experts that are beyond the scope of their expertise.<sup>2</sup> Many of Defendants'  
2 unsupported conclusions are belied by admissible evidence. For example, the brief makes an  
3 inflammatory and irrelevant reference to the Washington Public Power Supply System,<sup>3</sup> claiming that  
4 the Tacoma general fund and City taxpayers will be burdened with debt if Light Division revenues fail  
5 to cover debt service on the Bonds.

6 Defendants' have alleged no specific facts in support of their conclusion that the  
7 Telecommunications Project could become an obligation of the general fund. The Bond Ordinance  
8 expressly states that it provides "for the issuance and sale of the City's Electric System Revenue  
9 Bonds[.]" Complaint, Ex. 1, title page; *see also* id. at sections 1.2.B ("Bonds" defined to mean  
10 revenue bonds); 2.3 (Bonds' only lien is upon net revenues of electric system); 2.4 (finding that  
11 sufficient revenues over and above operation and maintenance will be available to pay debt service on  
12 Bonds); 3.1 and 4.7(a) (reiterating that the type of bond involved is a revenue bond).

13 The difference between revenue bonds and general obligation bonds is highly significant. The  
14 City's obligation under a revenue bond is limited to funds available from the Electric System (which  
15 includes the Telecommunications Project). Bond holders will buy a bond that says, "Principal of and  
16 interest on this bond are payable solely out of the special fund of the City known as the Electric  
17 System Revenue Bond Fund[.]" Bond Ordinance section 4.7(a). The bond will also make clear that  
18 the City is obligated to set aside only "Revenues of said Electric System" to pay off the bonds. *Id.*  
19 Thus, no general fund dollars are committed and no general obligation is incurred under the Bond  
20 Ordinance. By the same token, revenues from electric customers are retained by the Light Division  
21  
22

---

23 <sup>2</sup> Defendants' submission of a declaration from Mr. Pagano fails to comply with the rules for disclosure of  
24 experts. Defendants have not identified Mr. Pagano as a witness, despite the fact that the cutoff for disclosure of  
25 witnesses was in November 1996. The City was not aware that he had been retained prior to receiving Defendants  
26 response on this motion, and have had no opportunity to conduct discovery. Yet in order to put this matter before the  
Court expeditiously, the City is not seeking discovery at this time.

<sup>3</sup> *See* Defendants' Responsive Memorandum in Opposition to City of Tacoma's Motion for Summary Judgment  
("Defendants' Response") at 4.

1 and are not available to the General Fund. In sum, there is no exposure to the City general fund or  
2 City taxpayers.

3 In a similarly unsupported and unsupportable allegation, Defendants claim that the City has  
4 failed to fully consider the legality of the issuance of the Bonds. *See* Defendants' Response at 4.  
5 However, the whole purpose of this action is to ensure full consideration of whether the Bonds are  
6 legal prior to proceeding with the Telecommunications System.<sup>4</sup>

7 Defendants also assert that the City's financial projections ignore current trends with regard to  
8 technology, regulations and competition. *See* Defendants' Response at 5. This argument is  
9 immaterial for reasons detailed below. Moreover, the Telecommunications Study was prepared by a  
10 team of experts who devoted considerable attention to trends in the telecommunications industry.  
11 *See* Klein Decl. at Paragraphs 7-11. Defendants allege without benefit of supporting authority that  
12 the Tacoma City Council ("City Council") had reservations about financing the Telecommunications  
13 System. *See* Defendants' Response at 5. However, it is an undisputed fact that the City Council  
14 unanimously adopted the Resolution authorizing the City to proceed with the Telecommunications  
15 System.<sup>5</sup>

#### 16 IV. ARGUMENT

##### 17 A. To Defeat a Motion for Summary Judgment, Defendants Must Present Admissible 18 Evidence To Establish the Existence of an Issue of Material Fact.

19 Summary judgment is appropriate to resolve actions or parts thereof when no genuine issues  
20 of material fact exist or when only a question of law exists. CR 56(c). "The burden is on the moving  
21 party to demonstrate that there is no issue as to a material fact." *Scott v. Pacific West Mountain*  
22 *Resort*, 119 Wn. 2d 484, 502-03 (1992). If the party seeking summary judgment successfully carries  
23 its initial burden, the burden shifts to the non-moving party to establish the existence of the facts on

24 <sup>4</sup> The City's approach to this Telecommunications Project, seeking confirmation of its authority from this Court  
25 before proceeding, is markedly different from the course of events involving WPPSS. There, no declaration of  
26 authority was sought before construction began.

<sup>5</sup> Second Declaratoin of Jon Athow in Support of Motion for Summary Judgment dated April 11, 1997,  
("Second Athow Decl."), paragraph 6.

1 which it has the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225  
2 (1989). The non-moving party must respond with specific facts and cannot rely on bare allegations.  
3 *Baldwin v. Sisters of Providence*, 112 Wn. 2d 127, 132 (1989). Conclusory statements or  
4 argumentative assertions are insufficient to raise an issue of fact. *Grimwood v. University of Puget*  
5 *Sound, Inc.*, 110 Wn. 2d 355, 359-60 (1988).

6 Defendants have presented no admissible evidence demonstrating the existence of an issue of  
7 material fact regarding the City's authority to issue the Bonds. Instead, they rely on unsupported  
8 conclusions and opinions of experts testifying beyond the scope of their expertise and on immaterial  
9 issues. Therefore, they have failed to make the showing necessary to defeat this summary judgment  
10 motion.

11 **B. Defendants Have Implicitly Accepted the City's Argument that the City's Plans for the**  
12 **Telecommunications System Are Not Subject to Judicial Review in the Absence of Bad**  
13 **Faith, Fraud or Ultra Vires Actions,**

14 Judicial review of the legislative actions of Washington municipalities is extremely limited.  
15 *See City's Memorandum in Support of City of Tacoma's Motion for Summary Judgment at 2; Blade*  
16 *v. La Conner*, 167 Wn. 403, 407 (1932) (holding court will not review action of municipal legislative  
17 authority as to such matters as rest within its discretion unless fraud or bad faith are shown, or unless  
18 action is clearly ultra vires). Defendants have conceded this point, as their Response does not dispute  
19 the City's description of the scope of review.

20 Defendants have merely contended that issuing the Bonds is financially risky.<sup>6</sup> They have not  
21 alleged fraud or bad faith. Defendants have not alleged that any action is ultra vires, aside from the

---

22 <sup>6</sup> Even if financial risk were material or within the scope of review, in enacting the Bond Ordinance, the City  
23 Council stated that "the City has determined that it is prudent and economical to provide additional capacity on [its]  
24 telecommunications system to provide the Electric System with sufficient capacity to perform and enhance such  
25 functions as automated meter reading and billing, appliance control, and load shaping . . . ." and found that sufficient  
26 revenues over and above operation and maintenance will be available to pay debt service on the Bonds. Ordinance at  
page 1 and section 2.4. Such City Council findings are presumed valid as long as they are reasonable. *Lenci v. City of*  
*Seattle*, 63 Wn. 664, 668 (1964). Defendants have provided no specific facts to overcome the presumption that the  
Council's determination was reasonable. By contrast, there is admissible evidence that the Council was aware of  
potential risks and was willing to accept them. Klein Del., paragraph 14.

1 asserted failure to comply with the Charter provision. Therefore, they have implicitly admitted that  
2 the City has authority to issue the Bonds if their Charter argument fails.

3  
4 **C. Charter Section 4.2 Is Irrelevant Because the Question of Whether the City May**  
5 **Finance the Telecommunications System with General Obligation Bonds Is Not Before**  
6 **the Court.**

7 Defendants claim that under the Tacoma City Charter, a vote of the people is required in order  
8 to incur general indebtedness for the Telecommunications Project. This may be true, but the  
9 argument is wholly misplaced. Under the Charter, no vote of the people is required for utility system  
10 acquisitions unless “general indebtedness is incurred by the city.”<sup>7</sup> The Bonds are revenue bonds.  
11 Under Washington law, the principal and interest on revenue bonds is payable only from specified  
12 municipal revenues, and such bonds “shall **not** constitute . . . a general obligation” of the municipal  
13 corporation. RCW 39.46.150. Therefore, no amount of argument over the assumptions and  
14 conclusions of the financial plan can convert the bonds at issue in this case from revenue bonds into  
15 general obligation bonds. No matter how poorly the Telecommunications Project might perform,  
16 holders of the Bonds would have no claim upon the general fund. Poor performance could not  
17 convert the Bonds from revenue bonds into general obligation bonds. Accordingly, no vote of the  
18 people is required for issuance of the Bonds.

19 The City could have chosen to issue general obligation bonds for the Telecommunications  
20 System. However, at this time, it has elected to issue only revenue bonds. If the City in the future  
21 wished to issue general obligations bonds as a funding source for the Telecommunications System,  
22 the Charter provision might apply. However, concerns about general obligation bonds at this point  
23 are purely speculative.

24 <sup>7</sup> The Charter provision upon which Defendants rely is Section 4.2 It provides:

25 The city may purchase, acquire, or construct any public utility system, or part thereof, or make any  
26 additions and betterments thereto or extensions thereof, without submitting the proposition to the voters,  
provided no general indebtedness is incurred by the city. If such indebtedness is to be incurred, approval by  
the electors, in the manner provided by state law, shall be required.

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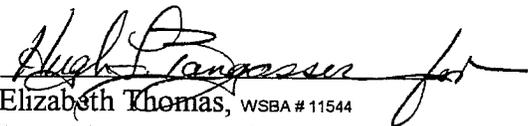
IV. CONCLUSION

This Court has already ruled that the City has authority to construct and operate a telecommunications system for purposes of enhancing electrical service and for providing telecommunications services and leasing telecommunications facilities and capacity. This Court's role is not to second-guess the City Council's and Public Utility Board's carefully considered decisions about whether and how the Telecommunications System should be developed. The only question before the Court is whether the City can issue revenue bonds to finance activities that, according to the Court, it is authorized to carry on. Defendants' sole legal argument, that the City must obtain a vote of the people for such bonds, fails because revenue bonds are not a "general obligation." Defendants' remaining factual arguments are either unsupported by admissible evidence or do not address the standard under which the Court must review legislative acts. Therefore, the Court should grant the City's Motion for Summary Judgment.

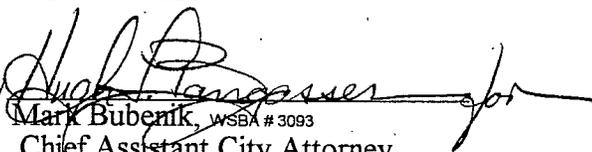
DATED this 5th day of May, 1997.

Respectfully submitted,

PRESTON GATES & ELLIS

By   
Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

CITY OF TACOMA

By   
Mark Buberik, WSBA # 3093  
Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma

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The Honorable Grant L. Anderson

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SUPERIOR COURT  
ADMINISTRATION

MAY 5 1997

THOMPSON, KRILICH, LAPORTE  
ATTORNEYS AT LAW

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 1997 P.M.

PIERCE COUNTY, WASHINGTON  
TED RUTT, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

CITY OF TACOMA, a municipal corporation, )

Plaintiff, )

v. )

THE TAXPAYERS AND THE RATEPAYERS )  
OF THE CITY OF TACOMA, )

Defendants. )

No. 96-2-09938-0

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY

1. My name is Steve Klein. I am the Superintendent of the Light Division of Tacoma Public Utilities. The purpose of this declaration is to support the City of Tacoma's reply brief on its motion for summary judgment. I am over the age of eighteen, competent to testify in this matter, and make this declaration based upon my own personal knowledge.

2. The City of Tacoma, through its Light Division, plans to construct and operate telecommunications facilities and services to enhance the Light Division's ability to provide highly reliable, cost-effective and convenient electric service to its customers (the "Telecommunications Project"). Such a system would also be capable of carrying other telecommunications services, including cable television service.

DECLARATION OF STEVEN J. KLEIN  
IN SUPPORT OF CITY'S REPLY BRIEF- 1

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COPY

1           3.       As my staff has described previously, the City adopted the Bond Ordinance  
2 (Complaint, Ex. 1) in July 1996 for the purpose of partially funding the Telecommunications Project.<sup>1</sup>  
3 The City's purpose in bringing this litigation is to test the validity of the Bond Ordinance, which  
4 provides for the issuance of revenue bonds only. The City is not asking the Court to determine  
5 whether the City could issue any other type of bonds.

6           4.       The Bond Ordinance unequivocally provides for the issuance of revenue bonds rather  
7 than general obligation bonds. The Bond Ordinance expressly states that it provides "for the issuance  
8 and sale of the City's Electric System Revenue Bonds[.]" Complaint, Ex. 1, title page; *see also* id. at  
9 sections 1.2.B ("Bonds" defined to mean revenue bonds); 2.3 (Bonds' only lien is upon net revenues  
10 of electric system); 2.4 (finding that sufficient revenues over and above operation and maintenance  
11 will be available to pay debt service on Bonds); 3.1 and 4.7(a) (reiterating that the type of bond  
12 involved is a revenue bond).

13           5.       The difference between revenue bonds and general obligation bonds is highly  
14 significant. The City's obligation under a revenue bond is limited to funds available from the Electric  
15 System (which includes the Telecommunications Project). Bond holders will buy a bond that says,  
16 "Principal of and interest on this bond are payable solely out of the special fund of the City known as  
17 the Electric System Revenue Bond Fund[.]" Bond Ordinance section 4.7(a). The bond will also  
18 make clear that the City is obligated to set aside only "Revenues of said Electric System" to pay off  
19 the bonds. *Id.* Thus, no general fund dollars are committed and no general obligation is incurred  
20 under the Bond Ordinance. By the same token, revenues from electric customers are retained by the  
21 Light Division and are not available to the General Fund.

22           6.       The only other funding source that is currently contemplated for the  
23 Telecommunications Project is a surplus of approximately \$40 million in the Light Division current  
24

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25 <sup>1</sup> Declaration of Jon Athow in Support of Motion or Summary Judgment (Nov. 5, 1996),  
26 paragraph 15.

1 fund. This is the money that I mentioned at a City Council meeting on April 8, 1997.<sup>2</sup> This money is  
2 generated exclusively by Light Division activities, primarily sales of electric power. As I stated, that  
3 \$40 million might otherwise be used to buy down debt. But contrary to the unsupported implication  
4 of Defendants' Response, the money would only be used to buy down Light Division debt, not  
5 general fund or other City debt. Because the Telecommunications Project is an element of the  
6 Electric System, it will enhance the capability and value of the Electric System, and will be owned and  
7 operated by the Light Division, it is an appropriate investment for Light Division surplus.

8 7. The Light Division produced a Telecommunications Study<sup>3</sup> that includes a Business  
9 Plan. The Business Plan was *unanimously* approved by both the Tacoma Public Utility Board and the  
10 Tacoma City Council in April 1997.

11 8. The Business Plan is based upon assumptions that are fully substantiated in light of  
12 current trends in the telecommunications industry. It involved a review of the industry both nationally  
13 and locally. *Id.* at page 1. It was based on input from a wide range of experts. The  
14 Telecommunications Study, including the Business Plan, was prepared by a multidisciplinary group  
15 called the Telecommunications Study Team. This team of approximately twenty people included Jon  
16 Athow, other Light Division staff and outside consultants practicing in the areas of  
17 telecommunications, finance, business planning, marketing and the law.

18 9. The Telecommunications Study also included an economic development study  
19 produced expressly for purposes of analyzing whether the City should proceed with the  
20 Telecommunications Project. *See* Appendix D. Two of the five authors of this economic  
21 development study hold doctorate degrees, and the authors consulted with about 20 other  
22 professionals in the community.

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25 <sup>2</sup> My comments are excerpted in the Declaration of Heidi Imhoff dated April 28, 1997.

26 <sup>3</sup> This study, which is contained in a three-ring binder, was submitted as Exhibit D to Jon Athow's declaration dated April 11, 1997.

1           10. Through the Telecommunications Study, the City carefully considered issues similar to  
2 those raised by Defendants' witnesses. *See, e.g.*, chapter on options (fifth section of Study). This  
3 section of the Study analyzes in detail the various options for telecommunications services from  
4 various private providers, considering such factors as types of service offered, current and potential  
5 technology utilized by different providers, projections for future growth and financial risk, investment  
6 profile, etc. This options analysis is thoroughly documented through 73 endnotes. *See also*  
7 Appendix B (Light Division response to TCI letter regarding municipal ownership of  
8 telecommunication and cable systems).

9           11. The members of the Utility Board and the members of the City Council participated  
10 actively in analysis of financial plan issues. After the Telecommunications Study was complete, they  
11 held a three-hour work session on the Telecommunications Project and entertained about two hours  
12 of public testimony and discussion before unanimously voting to proceed with the Project as set forth  
13 in the Study. Discussion was vigorous both at the work session and at the public hearing.

14           12. As Light Division staff explained to the Board and Council, and as the Council itself  
15 found in the Resolution approving the Project,<sup>4</sup> a key purpose of the Telecommunications Project is  
16 to protect and enhance the value of the Light Division's existing electric utility assets by having a  
17 telecommunications system that is sophisticated enough to enable the Light Division to compete  
18 effectively in the rapidly evolving electric industry. To fulfill this important purpose of protecting the  
19 value of existing Light Division *electric* assets, it is not at all necessary that the revenues from the  
20 provision of telecommunications and cable television services cover the entire cost of the  
21 Telecommunications Project.

22           13. The Council and Board were aware when they voted to proceed that revenues from  
23 the provision of telecommunications and cable services might fall short of projections. As Light  
24 Division staff informed the Board and Council, under a "worst case" shortfall, electric rates might

25 \_\_\_\_\_  
26 <sup>4</sup> This resolution as adopted is attached as Exhibit B to Jon Athow's declaration dated April 11,  
1997.

1 have to be increased by as much as 2.5%. This scenario assumed that we incurred all the cost of  
2 building the system but obtained no revenues from provision of cable television service or from  
3 provision of telecommunications service to third parties. This "worst case" scenario is significantly  
4 worse than the scenario that Defendants' experts present.

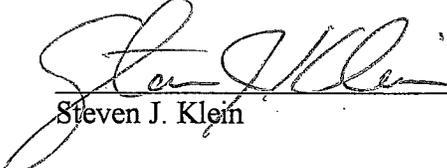
5 14. Light Division staff explained to the City Council our view that even if the  
6 Telecommunications Project's revenues fell short of projections, even to the point of a worst case  
7 scenario (resulting in a 2.5% rate increase), still the City should proceed with the Project in order to  
8 secure the value of the City's electric system assets. I believe that in voting to proceed with the  
9 Project, the Council fully understood and accepted the risk of an electric rate increase.

10 15. Thus, it is not terribly important whether the Telecommunications Project's own  
11 revenues will be sufficient to cover its costs. Similarly, although I believe our Financial Plan is very  
12 sound, including our assumptions regarding interest rates and other factors, whether we used  
13 precisely correct assumptions is not significant.

14 16. The important question is whether Light Division revenues will be sufficient to cover  
15 Telecommunications Project costs, since we are issuing electric system revenue bonds for the Project  
16 and other Project costs will be funded by accumulated Light Division revenues. Obviously, Light  
17 Division revenues are sufficient. Indeed, Light Division revenues are 40 times greater than worst-  
18 case Project costs. Thus there is zero possibility that the Telecommunications Project could  
19 somehow affect the City's general fund and its taxpayers.

20 I swear under the penalty of perjury of the laws of the State of Washington that the foregoing  
21 is true and correct.

22 Dated: May 5, 1997 at Tacoma, Washington.

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25 Steven J. Klein  
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IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation, )  
Plaintiff, )  
v. )  
THE TAXPAYERS AND RATEPAYERS OF )  
THE CITY OF TACOMA, )  
Defendants. )

No. 96 2 09938 0

~~(PROPOSED)~~  
ORDER GRANTING CITY OF  
TACOMA'S MOTION FOR  
SUMMARY JUDGMENT

This matter came on this day for hearing before the undersigned upon the City of Tacoma's ("City's") Motion for Summary Judgment. Plaintiff City of Tacoma appeared through its counsel, Elizabeth Thomas. Defendants Taxpayers and Ratepayers of the City of Tacoma appeared through their counsel, Ronald E. Thompson.

Counsel for the parties have drawn the Court's attention to the following documents:  
Summons, Complaint for Declaratory Judgment; Acceptance of Service; City of Tacoma's Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment; Second Declaration of Jon Athow in Support of Motion for Summary Judgment; Defendants' Responsive Memorandum in Opposition to City of Tacoma's Motion for Summary Judgment; Declarations of Heidi Imhoff, Thomas Pagano, and Cary Deaton; City of Tacoma's Reply Brief; and Declaration of Steven J. Klein.

ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 1

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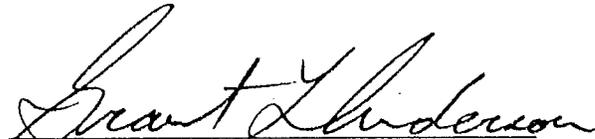
11/1 however the court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues. 11/6

1 Based on these documents, the Court finds that there is no genuine issue as to any material  
2 fact and that the facts set forth in the Declaration of Jon Athow ~~and Steven J. Klein~~ are true. M

3 Having considered the documents identified by the parties, the arguments of counsel and the  
4 record herein, the Court concludes that the following order should be entered.

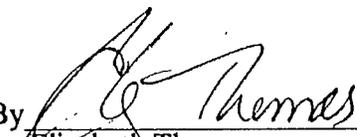
5 The City has authority under the laws of the State of Washington and the United States to  
6 issue the Bonds for the purposes set forth in paragraphs (3) and (4) in this Court's Order dated  
7 December 13, 1996 and in the manner set forth in the Bond Ordinance.

8 DONE IN OPEN COURT this 9th day of May, 1997.

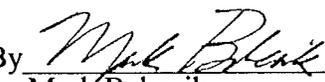
9  
10   
11 JUDGE

12 Presented by:

13 PRESTON GATES & ELLIS

14  
15 By   
16 Elizabeth Thomas, WSBA # 11544  
Laura A. Rosenwald, WSBA # 25722

17 CITY OF TACOMA

18  
19 By   
20 Mark Bubenik, WSBA # 3093  
21 Chief Assistant City Attorney  
Attorneys for Plaintiff City of Tacoma

22 (Copy received 9 May 97)  
23   
24 Attorney for Putnam  
25 4085  
26

ORDER GRANTING CITY OF TACOMA'S  
MOTION FOR SUMMARY JUDGMENT - 2

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The Honorable Grant L. Anderson

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IN THE SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

CITY OF TACOMA, a municipal corporation,  
Plaintiff,

v.

THE TAXPAYERS AND THE RATEPAYERS  
OF THE CITY OF TACOMA,  
Defendants.

No. 96 2 09938 0

CITY OF TACOMA'S REPLY BRIEF

CITY OF TACOMA'S REPLY BRIEF - 1

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**L INTRODUCTION**

The City of Tacoma (the "City") brought this declaratory judgment class action under RCW 7.24 and 7.25 and CR 23(B)(2) to confirm its authority to issue bonds for the purpose of constructing and operating a telecommunications system consisting of a hybrid fiber coaxial network (the "Telecommunications System"). On July 23, 1996, the Tacoma City Council (the "City Council") adopted Ordinance No. 25930 (the "Bond Ordinance"), which authorized the sale of Electric System revenue bonds (the "Bonds") in order to finance the first phase of constructing and operating the Telecommunications System. The City will use the Telecommunications System to enhance electric service provided to customers of its Light Division. The City may also utilize a portion of the Telecommunications System to provide cable television service to customers in the Light Division service area, and may lease Telecommunications System facilities or capacity to providers of telecommunications services. On November 5, 1996, the City requested that this Court enter summary judgment declaring that:

1. The Court has jurisdiction over the subject matter and parties in this action.
2. The Bond Ordinance was properly enacted.
3. The City has authority under the laws of the State of Washington and the United States to provide cable television service in the Light Division service area.
4. The City has authority under the laws of the State of Washington and the United States to lease telecommunications facilities and capacity to telecommunications providers.
5. The City has authority under the laws of the State of Washington and the United States to issue the Bonds for the purposes set for in paragraphs (3) and (4) above and in the manner set forth in the Bond Ordinance.

**CITY OF TACOMA'S REPLY BRIEF - 2**

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In its Motion for Summary Judgment, the City argued that the only limitation under Washington law on the broad powers of a charter city is that its actions may not contravene the state constitution or statutes. The City asserted that a municipal utility has authority to engage in any undertaking necessary to make its system more efficient, as well as to undertake acts incidental to its primary function of providing utility service. The City also contended that Washington statutes and case law specifically provide municipal authority to offer telecommunications services and to lease city-owned telecommunications facilities. Finally, the City stated that the federal Telecommunications Act of 1996 requires that the state permit municipal cities to provide telecommunications services.

The Defendants did not take issue with any of these points in their responsive brief dated December 3, 1996. The Defendants' sole arguments against the City's Motion are that (1) the issues raised in the City's Summary Judgment Motion are not ripe for review by this Court; (2) the City has no authority to issue general obligation bonds to finance the Telecommunications System; and (3) the City has not demonstrated that it can conveniently provide telecommunications services to customers in the Light Division service area.

The issues presented by the City in its Summary Judgment Motion are ripe for review because the purpose of RCW 7.25 is to provide judicial review of the financing authority for municipal projects before such projects have been undertaken. The issue raised by the Defendants of whether the City has authority to issue general obligation bonds for the Telecommunications System is not before the Court and is purely speculative, because the City has no plans at this time to issue such bonds. Finally, the City has demonstrated through findings of the City Council and other evidence that it can conveniently provide telecommunications services to customers in the Light Division service area.

**CITY OF TACOMA'S REPLY BRIEF - 3**

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**IL STATEMENT OF ISSUES**

1  
2 1. Whether issues raised by the City in its Summary Judgment Motion concerning the  
3 City's authority to provide cable television service and lease telecommunications facilities and  
4 capacity, and to issue bonds for such purposes, are ripe for review by this Court.

5 2. Whether the City's authority to issue general obligation bonds to finance the  
6 Telecommunications System is before this Court.

7 3. Whether the City has satisfactorily demonstrated that it can conveniently provide  
8 telecommunications services to customers of the Light Division service area.

**III ARGUMENT****A. The Issues Raised by the City are Ripe for Review.**

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11  
12 Defendants assert that this action is untimely because the City does not have a business plan or  
13 written proposal for its Telecommunications System. Defendants' Responsive Memorandum in  
14 Opposition to Motion for Summary Judgment at 2. Defendants appear to misunderstand the purpose  
15 of RCW Chapters 7.24 and 7.25, which permit a declaratory judgment action to test the validity of a  
16 bond ordinance as soon as the ordinance has been enacted. The purpose of these chapters is to settle  
17 the issue of municipal authority at the early stages of a project or to remove an uncertainty (RCW  
18 7.24.050) in order to avoid jeopardizing the integrity of municipal finance.

19 The Washington courts have recognized that by providing for such actions, the statute  
20 designates municipal bonding controversies ripe as soon as a bond ordinance has been passed. As the  
21 Washington Supreme Court stated in *City of Spokane v. Taxpayers*, 111 Wn.2d 91 (1988):

22 Under RCW 7.25, a city may initiate a declaratory judgment action  
23 against its taxpayers in order to determine the validity of a bond issue.  
24 This would appear to be a determination that such actions would  
constitute a judicable controversy.

25 111 Wn.2d at 95 (internal citations omitted). If controversies over the validity of bonds were not ripe  
26 upon adoption of a bond ordinance, the purpose of RCW 7.25 would be defeated; a city would have

**CITY OF TACOMA'S REPLY BRIEF - 4**

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1 to begin spending bond proceeds, at its peril, risking enormous dislocation if there were a later  
2 determination that the city lacked authority for the project that had been financed with the bonds.  
3 Thus, there is no merit to the Defendants' claim that the issues raised by the City are not ripe. All of  
4 the issues in the City's Summary Judgment motion revolve around the City's authority to issue the  
5 Bonds for the subject project.

6 **B. The Question of Whether the City May Finance the Telecommunications System with**  
7 **General Obligation Bonds Is Not Before the Court.**

8 Defendants claim that under the Tacoma City Charter, a vote of the people is required in order  
9 to incur general indebtedness. While this statement is accurate, Defendants' argument is wholly  
10 misplaced because the Bonds in issue are not "general indebtedness," which refers to general  
11 obligation bonds. Rather, they are revenue bonds. Under Washington law, the principal and interest  
12 on revenue bonds is payable only from specified municipal revenues, and such bonds "shall not  
13 constitute . . . a general obligation" of the municipal corporation. RCW 39.46.150.

14 Arguments relating to general obligation bonds are speculative because no general obligation  
15 bonds have been issued and perhaps none will be issued. Defendants note that Steve Klein,  
16 Superintendent of Tacoma City Light, acknowledged in his deposition that some of the funds for the  
17 Telecommunications System could come from general obligation bonds. Defendants' Responsive  
18 Memorandum at 2. However, a complete reading of the transcript of Mr. Klein's deposition shows  
19 that general obligation bonds are but one of a long list of potential funding sources for the  
20 Telecommunications System. Deposition of Steve Klein at 14-16 (copy attached as Exhibit A).  
21 Other sources include surplus cash of the Light Division, future revenues, revenue bonds, and a line  
22 of credit. *Id.* Mr. Klein stated, "At this point with the project not fully defined it's difficult to also  
23 proceed and to try to define how it might be funded, if in fact the project proceeds," *Id.* at 16.

24 If the City in the future were to choose general obligations bonds as a funding source for the  
25 Telecommunications System, the Charter provision might apply. However, at the moment only the  
26

CITY OF TACOMA'S REPLY BRIEF - 5

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1 revenue bonds specifically authorized by the Bond Ordinance are at issue. Therefore, concerns about  
2 general obligation bonds at this point are simply speculative.

3 **C. The City Has Adequately Demonstrated its Ability To Conveniently Provide**  
4 **Telecommunications Services to Customers in the Light Division Service Area.**

5 The Defendants assert that the City has submitted no proof that it can conveniently render  
6 telecommunications services. Defendants' Responsive Memorandum at 6. However, in enacting the  
7 Bond Ordinance, the City Council stated that "the City has determined that it is prudent and  
8 economical to provide additional capacity on [its] telecommunications system to provide the Electric  
9 System with sufficient capacity to perform and enhance such functions as automated meter reading  
10 and billing, appliance control, and load shaping . . . ." Ordinance at 1. Such City Council findings are  
11 presumed valid as long as they are reasonable. *Lenci v. City of Seattle*, 63 Wn. 664, 668 (1964).<sup>1</sup>

12 The City has offered additional evidence of its ability to conveniently provide  
13 telecommunications services to customers in the Light Division service area. Jon Athow,<sup>2</sup>  
14 Telecommunications Project Manager for the Light Division, stated that the infrastructure for a  
15 telecommunications system designed to meet the needs of the Electric System represents a substantial  
16 portion of the costs of a system that also includes the additional telecommunications capacity and  
17 facilities that the City is considering. Deposition of Jon Athow at 28-30. In addition, Mr. Athow has  
18 stated that the City could provide such services efficiently because its good credit rating gives it  
19 access to relatively inexpensive capital. *Id.* at 31. This evidence is sufficient to demonstrate the  
20 City's ability to conveniently provide telecommunications services to customers within the Light  
21 Division service area.

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24 <sup>1</sup> See also *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 158 (1978); *City of Spokane v. Carlson*, 73 Wn.2d  
25 76, 80 (1968).

26 <sup>2</sup> The Defendants contend that Mr. Athow is not an authorized spokesperson for either the City or the Light Division.  
Defendants' Responsive Memorandum at 1. Mr. Athow is authorized to serve as a spokesperson on matters within the  
scope of his employment as project manager for the Telecommunications System.

**CITY OF TACOMA'S REPLY BRIEF - 6**

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#### IV. CONCLUSION

Each of the issues presented by the City in its Summary Judgment Motion is ripe for review because the issues concern the City's authority to issue bonds for the first phase of construction and operation of a telecommunications system. The whole purpose of RCW 7.25 is to provide judicial review of the financing authority for municipal projects at the outset rather than after the projects are underway. In contending that the City lacks authority to issue general obligation bonds to finance the Telecommunications System, the Defendants raise a speculative issue that is not presently before the Court. Finally, the City has provided sufficient evidence, based upon City Council findings and the testimony of Jon Athow, of its ability to conveniently provide telecommunications services to customers in the Light Division service area. Therefore, this Court should grant the City's Motion for Summary Judgment.

DATED this 9<sup>th</sup> day of December, 1996.

Respectfully submitted,

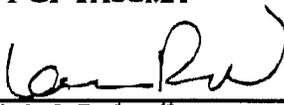
PRESTON GATES & ELLIS

By 

Elizabeth Thomas, WSPA # 11544

Laura A. Rosenwald, WSPA # 25722

CITY OF TACOMA

By  per telephone authorization

Mark Bubenik, WSPA # 5088

Chief Assistant City Attorney

Attorneys for Plaintiff City of Tacoma

CITY OF TACOMA'S REPLY BRIEF - 7

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# EXHIBIT 89

responsibilities with reference to the control of animals. Such contract(s) shall provide, among other things, that said society or agency (agencies) shall faithfully operate said pounds, shall pay all expenses in connection therewith, shall receive all licenses, fines, penalties and proceeds of every nature connected therewith, and such other sums as may be legally appropriate therefor, subject only to accounting as provided by law. The Council is further authorized, notwithstanding the provisions hereof, to determine that the City shall operate its own city pounds or detention facility and otherwise regulate and control animals within its corporate limits. Any contract entered into pursuant to the authority hereof shall be subject to cancellation by the City for good cause.

(Amendment approved by vote of the people September 18, 1973)

### **Administrative Organization<sup>12</sup>**

**Section 3.11** – Within the framework established by this charter, the administrative service of the City government shall be divided into such offices, departments, and divisions as provided by ordinance upon recommendation of the City Manager. Such ordinance shall be known as the “Administrative Code.”

**Section 3.12** – The City Council may remove any appointed member of any City board, commission, or board of trustees, for cause, after notice and public hearing, if that member is found to have knowingly violated the oath of office under this charter (Section 6.4) or has committed any acts specified in state law as grounds for the recall and discharge of an elective public officer. The City Council, in its discretion, may allow a hearings examiner to hear such a matter. Recommendation of a hearings examiner shall be subject to review by the City Council. The City Council’s final decision shall be based on the evidence in the record. A record of the proceedings shall be made.

(Amendments approved by vote of the people November 2, 2004, and November 4, 2014)

**Section 3.13** – There shall be a Landmarks Preservation Commission, composed of members with such powers and duties as are provided by ordinance. The members shall be residents of the City of Tacoma and be appointed and confirmed by the City Council.

(Amendment approved by vote of the people November 4, 2014)

## **Article IV**

### **PUBLIC UTILITIES<sup>13</sup>**

#### **General Powers Respecting Utilities**

**Section 4.1** – The City shall possess all the powers granted to cities by state law to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate, either within or outside its corporate limits, including, but not by way of limitation, public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services or any of them, to the municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above mentioned outside its corporate limits, to the extent permitted by state law.

#### **Power to Acquire and Finance**

**Section 4.2** – The City may purchase, acquire, or construct any public utility system, or part thereof, or make any additions and betterments thereto or extensions thereof, without submitting the proposition to the voters, provided no general indebtedness is incurred by the City. If such indebtedness is to be incurred, approval by the electors, in the manner provided by state law, shall be required.

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<sup>12</sup> See TMC Chapter 1.06

<sup>13</sup> See TMC Title 12 - Utilities

## **Rates**

**Section 4.3** – The City shall have the power, subject to limitations imposed by state law and this charter, to fix and from time to time, revise such rates and charges as it may deem advisable for supplying such utility services the City may provide. The rates and charges for services to City departments and other public agencies shall not be less than the regular rates and charges fixed for similar services to consumers generally. The rates and charges for services to consumers outside the corporate limits of the city may be greater but shall not be less than the rates and charges for similar service to consumers within the corporate limits of the city.

## **Diversion of Utility Funds**

**Section 4.4** – The Council may by ordinance impose upon any of the City-operated utilities for the benefit of the general fund of the City, a reasonable gross earnings tax which shall not be disproportionate to the amount of taxes the utility or utilities would pay if privately owned and operated, and which shall not exceed eight percent; and shall charge to, and cause to be paid by, each such utility, a just and proper proportion of the cost and expenses of all other departments or offices of the City rendering services thereto or in behalf thereof.

**Section 4.5** – The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including the aforesaid gross earnings tax, interest on and redemption of the outstanding debt thereof, the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

## **Disposal of Utility Properties**

**Section 4.6** – 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.

## **Franchises for Water or Electric Utilities**

**Section 4.7** – The legislative power of the City is forever prohibited from granting any franchise, right or privilege to sell or supply water or electricity within the City of Tacoma to the City or to any of its inhabitants as long as the City owns a plant or plants for such purposes and is engaged in the public duty of supplying water or electricity; provided, however, this section shall not prohibit issuance of temporary permits authorized by the Council upon the recommendation of the Utility Board of the City of Tacoma for the furnishing of utility service to inhabitants of the City where it is shown that, because of peculiar physical circumstances or conditions, the City cannot reasonably serve said inhabitants.

(Amendment approved by vote of the people September 18, 1973)

## **The Public Utility Board**

**Section 4.8** – There is hereby created a Public Utility Board to be composed of five members, appointed by the Mayor and confirmed by the City Council, for five-year terms; provided, that in the appointment of the first Board, on the first day of the month next following the taking of office by the first Council under this charter, one member shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, and at the expiration of each of the terms so provided for, a successor shall be appointed for a term of five years. Vacancies shall be filled for the unexpired term in the same manner as provided for regular appointments.

(Amendment approved by vote of the people November 2, 2004)

**Section 4.9** – Members of the Board shall have the same qualifications as provided in this charter for Council Members. Members shall be entitled to reimbursement for expenses incurred in carrying out their official duties, other than those incident to attending board meetings held within the City of Tacoma.

(Amendment approved by vote of the people November 4, 2014)

**Powers and Duties of the Public Utility Board**

**Section 4.10** – The Public Utility Board, subject only to the limitations imposed by this charter and the laws of this state, shall have full power to construct, condemn and purchase, acquire, add to, maintain, and operate the electric, water, and belt line railway utility systems.

**Section 4.11** – All matters relating to system expansion and the making of additions and betterments thereto or extensions thereof, the incurring of indebtedness, the issuance of bonds, and the fixing of rates and charges for utility services under the jurisdiction of the Board shall be initiated by the Board, subject to approval by the Council, and executed by the Board; provided, that all rates and charges for utility services shall be reviewed and revised or reenacted by the Board and Council at intervals not exceeding five years and beginning with the year 1954.

**Section 4.12** – The Board shall submit an annual budget to the Council for approval, in the manner prescribed by state law.

**Section 4.13** – The Board shall select from its own membership a chair, vice-chair, and secretary and shall determine its own rules and order of business. The time and place of all meetings shall be publicly announced, and all meetings shall be open to the public and a permanent record of proceedings maintained.<sup>14</sup>

(Amendment approved by vote of the people November 4, 2014)

**Section 4.14** – The Board shall maintain such billing, cost and general accounting records as maybe necessary for effective utility management or required by state law. Expenditure documents shall be subject to pre-audit by the central fiscal agency of City government. The City Treasurer shall be responsible for receipt, custody, and disbursement of all utility funds. The Board shall submit such financial and other reports as may be required by the Council.

**Section 4.15** – The Board shall have authority to secure the services of consulting engineers, accountants, special counsel, and other experts. At intervals not exceeding ten years the Council shall, at the expense of the utilities involved, cause a general management survey to be made of all utilities under the jurisdiction of the board by a competent management consulting or industrial engineering firm, the report and recommendations of which shall be made public; provided, that the first such survey shall be made within three years of the effective date of this charter.

**Section 4.16** – Insofar as is permitted by state law, the Board shall have the same authority, and be governed by the same limitations, in respect to the purchase of materials, supplies, and equipment and awarding of contracts for all improvements for Department of Public Utilities' purposes as does the Council and City Manager for general government purposes.

**Section 4.17** – The Department of Public Utilities shall use the services of the City's General Government finance department, purchasing agent, law department, human resources/personnel department, and other City departments, offices, and agencies, except as otherwise directed by the City Council.

(Amendment approved by vote of the people November 3, 1992)

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<sup>14</sup> Chapter 42.30 RCW establishes the rules of procedure for Board meetings pursuant to the Open Public Meetings Act.

### **Administrative Organization**

**Section 4.18** – The Board shall appoint, subject to confirmation by the City Council, a Director of Utilities who shall:

- (a) Be selected on the basis of executive and administrative qualifications;
- (b) Be appointed for an indefinite period and subject to removal by the Board;
- (c) Serve as the chief executive officer of the Department of Public Utilities, responsible directly to the Board, subject to review and reconfirmation as follows:

The Board shall review the Director's performance annually, and every two years shall, by an affirmative vote of at least three members of the Board in a public meeting, vote on whether to reconfirm the appointment, subject to reconfirmation by the City Council. The first review and vote on whether to reconfirm the Director shall be in 2015.

(Amendment approved by vote of the people November 4, 2014)

**Section 4.19** – Except for purposes of inquiry, the Board and its members shall deal with officers and employees of the Department of Public Utilities only through the Director.

**Section 4.20** – Insofar as is possible and administratively feasible, each utility shall be operated as a separate entity. Where common services are provided, a fair proportion of the cost of such services shall be assessed against each utility served.

**Section 4.21** – Subject to confirmation by the Board, the Director of Utilities shall appoint a properly qualified superintendent for each utility system under the Director's administrative control.

(Amendment approved by vote of the people November 4, 2014)

**Section 4.22** – There shall be such other officers and employees in the Department of Public Utilities as the Board may determine, who shall be appointed and removed by the Director of Utilities subject to the provisions of this charter relating to municipal personnel. These employees shall be entitled to participation in the general employee retirement system and to enjoy such other employee welfare benefits as may be provided for municipal employees. Within the limitations of the annual budget and salary ordinance, the salaries and wages of employees in the Department shall be determined by the Board.

### **Location and Relocation of Utility Works**

**Section 4.23** – The Board shall have authority to place poles, wires, vaults, mains, pipes, tracks and other works necessary to any utility operated by the Board in the public streets, alleys, and places of the city. Before any such works are commenced, plans and specifications showing the exact location thereof shall be submitted to the City Manager for approval. Whenever it shall be necessary by reason of the grading, re-grading, widening, or other improvement of any public street or alley to move or readjust the works of any utility, the Board shall cause such works to be so moved or readjusted and the expense thereof shall be charged against such fund as may be agreed upon by the Director of Utilities and the City Manager or as determined by the City Council. Upon placing the works of a utility in any public street, alley, or place, the Board, at the expense of the utility involved, shall cause the surface of such street or alley to be replaced as near as may be to its previous condition. Whenever the Board and the City Manager are unable to reach an accord concerning the moving, readjusting or installation of any utility, works or improvements, or the distribution of the expenses thereof, the matter shall be referred to the City Council, whose finding and determination shall be conclusive.

# EXHIBIT 90

April 20 2018 3:16 PM

Honorable Susan K. Serko  
Hearing Date: May 18, 2018  
Hearing Time: 9:00 AM

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

EDWARD E. (TED) COATES; MICHAEL  
CROWLEY; MARK BUBENIK and  
MARGARET BUBENIK d/b/a Steele  
Manor Apartments; THOMAS H.  
OLDFIELD; and INDUSTRIAL  
CUSTOMERS OF NORTHWEST  
UTILITIES, an Oregon nonprofit  
corporation,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No.: 17-2-08907-4

DEFENDANT CITY OF TACOMA'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON THE  
NATURE OF ANY MANDAMUS  
RELIEF

DEFENDANT CITY OF TACOMA'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON THE NATURE OF ANY  
MANDAMUS RELIEF

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1 to contradict their own theory of the case simply because they may believe the City would  
2 be better able to pay a judgment than an entity they have continually derided as in the red.

3 In addition, under long-established case law, using general funds to pay Click's  
4 obligations would impermissibly impose an un-voted tax burden on Tacoma's citizens by  
5 forcing them to pay debts associated with a proprietary function. Also forbidding such a  
6 result is the very contractual agreement—between Tacoma Public Utilities and the City's  
7 general government—that allows Click to operate.

8 Moreover, while Plaintiffs can argue for mandamus ordering reimbursement, as  
9 long as *some* reimbursement is ordered (which it should not be), they lack standing to  
10 question the source from which it is ordered to be made. This is because Plaintiffs' prayer  
11 for relief in their underlying complaint alleged that reimbursement from either Click or  
12 from Tacoma's general fund would be equally acceptable. And in any case, mandamus  
13 relief cannot lie against the City, which has no clear mandatory duty to pay Click's  
14 expenses.

15 Thus, Tacoma respectfully asks this Court to enter partial summary judgment  
16 holding that any reimbursement to Tacoma Power would not come from Tacoma's  
17 general fund, but rather would be payable, if at all, from only Click revenues and assets.

## 18 II. STATEMENT OF FACTS

19 Click is a business unit of Tacoma Power. Decl. of Chris Robinson in Supp. of  
20 Def.'s Mot. for Partial Summ. J. on the Nature of Mandamus Relief ("Robinson Decl."),  
21 ¶¶ 2, 3, 6. Click uses excess capacity on Tacoma Power's telecommunications system (the  
22 "System") to provide cable television to electric ratepayers as well as internet access to  
23 ISPs that pay Click to use its System.<sup>2</sup> *Id.* ¶ 6. Tacoma City Ordinance 25930, which  
24

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25 <sup>2</sup> Similar to cable television, only electric ratepayers can buy retail internet access from the ISPs that use the System. Robinson Decl., ¶ 6.

1 established the System underlying Click, provided that (1) “all revenues received from the  
2 Telecommunications System shall be deposited into the Revenue Fund [now referred to as  
3 the Power Fund]”; and that (2) construction of the System would be financed with bonds  
4 payable only from the Power Fund. Decl. of Doris Sorum in Supp. of Def.’s Mot. for  
5 Partial Summ. J. on the Nature of Mandamus Relief (“Sorum Decl.”), ¶ 3, Ex. A; Decl. of  
6 Andy Cherullo in Supp. of Def.’s Mot. for Partial Summ. J. on the Nature of Mandamus  
7 Relief (“Cherullo Decl.”), ¶ 7. In accordance with Ordinance 25930, all revenues and  
8 expenses related to Click operations and the underlying System are deposited in and  
9 drawn from the Power Fund. Cherullo Decl., ¶ 11. In addition, on October 28, 1997, the  
10 Tacoma City Council enacted Ordinance 26141, which amended Tacoma Power’s budget  
11 to appropriate additional funds from the Power Fund to construct the System. Sorum  
12 Decl., ¶ 4, Ex. B. That Ordinance expressly provided that “nothing in this ordinance shall  
13 in any way be construed to authorize the incurring of general indebtedness by the City in  
14 respect to the Telecommunications Project.” *Id.*, Ex. B at 2.

15 While Tacoma Power operates the City’s electric utility and uses the Power Fund  
16 to account for the revenues, expenditures, taxes, assets, depreciation, and other financial  
17 and accounting transactions, the City’s general government maintains a wholly separate  
18 “general fund” that receives tax revenue and is used to fund general obligations of  
19 Tacoma. Cherullo Decl., ¶ 5. No revenues from the System or from Click operations are  
20 deposited into the City’s general funds, other than as payment of generally applicable  
21 taxes or franchise fees. Cherullo Decl., ¶ 11. Similarly, no City general funds are used to  
22 fund the System or Click, other than as fair compensation in exchange for Click services  
23 provided to the City. *Id.*

24 Like other cable operators in Tacoma, Click is authorized to offer cable television  
25 service only by virtue of a franchise-like agreement between Click and the City. Robinson

1 Decl., ¶ 10, Ex. A. This agreement contains provisions that limit Click’s ability to use  
2 monies from the City’s general fund and that prevent Click from seeking monies from the  
3 City for liabilities related to the “construction, operation[,] or maintenance” of the System.  
4 *See id.*, Ex. A at p. 58, § 12.3.A.

5 Click, and the underlying System, still have significant value for Tacoma Power.  
6 Robinson Decl., ¶ 7. The City is currently pursuing a Request for  
7 Information/Qualifications to find a qualified partner to utilize the valuable System assets,  
8 including Click. *Id.* ¶ 8. The reason for doing this is to create a future where Click is  
9 generating revenue. *Id.* It is anticipated that, in accordance with Ordinance 25930, the  
10 proceeds from any resulting partnership will go into the Power Fund, rather than the  
11 City’s general fund. *See id.*

12 Throughout this litigation, Plaintiffs have requested that the Court require “TPU or  
13 the City to cause Click *or* the City’s general fund to reimburse the Tacoma Power electric  
14 utility for previous subsidies of or payments for Click expenses or capital improvements.”  
15 Compl. for Declaratory, Injunctive, and Mandamus Relief (6/22/2017), at pp. 9, 10-11  
16 (emphasis added); Pls.’ Mot. for Partial Summ. J. Granting Declaratory Relief  
17 (12/28/2017) at 1 (“If the City wants to provide such telecommunications service to its  
18 citizens, it can certainly do so, but it must use Click’s own revenues *or* general  
19 government funds to pay for Click’s capital and O&M (operation and maintenance)  
20 expenses, rather than imposing that burden on electric utility ratepayers.” (emphasis  
21 added)).

### 22 III. STATEMENT OF ISSUES

23 Where (i) this Court held in the Order that only certain funds may be used to pay  
24 the expenses of Click; (ii) settled precedent and contractual agreements prohibit the use of  
25 general funds to pay for the same; and (iii) there are no disputed issues of fact material to

1 resolution of this Motion, should the Court hold as a matter of law that Tacoma Power’s  
2 electric utility will be reimbursed only, if at all, from Click’s own funds and not from  
3 Tacoma’s general fund?

4 **IV. LEGAL ARGUMENT AND AUTHORITY**

5 **A. Legal Standard**

6 A court should grant summary judgment if the factual record “show[s] that there is  
7 no genuine issue as to any material fact and that the moving party is entitled to judgment  
8 as a matter of law.” CR 56(c). On summary judgment, a court may limit the sources from  
9 which a claim for payment can be satisfied. *See, e.g., Am. Air Filter Co. v. Wash. Pub.*  
10 *Power Supply Sys.*, 58 Wn. App. 313, 319, 792 P.2d 1275 (1990) (contractor’s damages  
11 for early termination from construction project were payable only from municipal  
12 corporation’s construction fund, which was specifically earmarked for covering  
13 construction costs, and from no other fund).

14 **B. Using Tacoma’s general fund to reimburse the electric utility would  
15 violate Washington law as interpreted by this Court and in binding  
16 appellate decisions.**

- 17 1. Using the general fund to reimburse Tacoma Power for subsidies to Click  
18 would violate the accountancy act as interpreted by the Court in granting  
19 Plaintiffs’ Motion for Summary Judgment.

20 This Court’s March 2, 2018, Order held that “Tacoma Power electric utility  
21 revenues and funds may not lawfully be used to pay for Click! Network expenses or  
22 capital improvements that are attributable or properly allocable to commercial  
23 telecommunications service rather than electric utility service.” Order at 4. This holding  
24 required the adoption of Plaintiffs’ argument that Click’s “sub-fund” within the Power  
25 Fund is “separate” from Tacoma Power’s Power Fund for purposes of the accountancy act  
and Charter §4.5. *See Pls.’ Reply in Supp. of Mot. for Part. Summ. J. (2/26/2018) at 9-10*

1 (arguing that Click is not “part of” Tacoma Power and that Click’s “telecom revenues and  
2 expenses are accounted for separately from those of the electric utility”).

3 It follows that if Click and the electrical utility are legally “separate,” then Click  
4 and the City’s general fund are even more “separate,” making it inappropriate to use the  
5 City’s general fund to pay Click’s obligations. The relationship between Click and the  
6 City is governed by arm’s-length agreements, just like any other cable television  
7 franchisee. In addition, Click revenues and expenses are completely separate from the  
8 City’s general fund, except for generally applicable taxes and franchise fees from Click  
9 and payment by the City for Click’s services, *see* Cherullo Decl., ¶ 11—exceptions that  
10 prove the rule.

11 After having won partial summary judgment with the argument that the  
12 accountancy act specifically requires reimbursement because Click and Tacoma Power are  
13 legally separate, Plaintiffs cannot now be heard to argue that Click and the City general  
14 government are somehow not just as separate. *See* Order at 4 (noting that the unlawfully  
15 subsidized expenses “are attributable or properly allocable to commercial  
16 telecommunications service” but mentioning no basis for such expenses to be “attributable  
17 or properly allocable” to taxpayers). Thus, if reimbursement is required (which it should  
18 not be) as between Click and Tacoma Power, that reimbursement must come from Click  
19 itself, rather than the City’s general fund.

20 2. Binding precedent prevents the use of general funds to satisfy an obligation  
21 payable only from a special fund dedicated to the support of a proprietary  
22 function.

23 Any order requiring Tacoma Power’s electric utility services to be reimbursed  
24 from Tacoma’s general fund would impermissibly burden Tacoma taxpayers in violation  
25 of a black letter principal of Washington law: A city may not dip into taxpayer funds to

1 cover operating losses arising from its operation of a proprietary service, such as Click.<sup>3</sup>  
2 *Cf., e.g.,* Wash. Const. Art. 8, § 6; Art. 7, § 1. “[W]here the cost of the utility and the  
3 expense of maintenance and operations is to be paid exclusively from a special fund  
4 created from the gross earnings or revenues of the utility,” *City of Seattle v. Puget Sound*  
5 *Power & Light Co.*, 15 F.2d 794, 796 (9th Cir. 1926), a party is “not entitled to a general  
6 decree against the city, payable from its general funds,” *Id.* at 797.<sup>4</sup>

7 For example, in *Asia v. City of Seattle*, 119 Wash. 674, 675, 206 P. 366 (1922), a  
8 group of Seattle taxpayers sued to enjoin Seattle’s use of its general fund to pay for the  
9 operation of a streetcar system. Seattle had bought the streetcar system from Puget Sound  
10 Light & Power Company, and Seattle’s City Council had declared by ordinance that the  
11 revenues of operating the system would be sufficient to cover the expenses of operating  
12 and maintaining it and of paying bonds used to fund the purchase. *Id.* at 675-76. The City  
13 Council was wrong; the system’s liabilities exceeded its revenues. *Id.* at 676. The city  
14 overdrew its street railway fund, and “to help meet this overdraft, the city definitely and  
15 specifically borrowed . . . from its general fund . . . .” *Id.* Said the Washington Supreme  
16 Court:

17 The question then is, [m]ay the city voluntarily or involuntarily encroach  
18 upon its general fund, *or otherwise place upon the taxpayers* the burden

19 <sup>3</sup> Plaintiffs conceded that Click serves a proprietary function for its customers. Pls.’ Reply in Supp. of Mot.  
20 for Part. Summ. J. (2/26/2018) at 9 (calling Click a “proprietary business”).

21 <sup>4</sup> Moreover, unlike the *Okeson* line of cases on which Plaintiffs relied in their Motion for Partial Summary  
22 Judgment, there is no basis to require reimbursement of utility customers from the general City fund. In the  
23 *Okeson* cases, the plaintiffs obtained reimbursement from Seattle’s general fund because the courts found  
24 that utility ratepayers were being improperly asked to fund a public good that the government should have  
25 been paying for with taxpayer monies. Here, in contrast, Plaintiffs do not—and cannot—assert that utility  
revenues have been used to subsidize something that should have been the general fund’s responsibility. *See*  
Pls.’ Reply in Supp. of Mot. for Part. Summ. J. (2/26/2018) at 9 (calling Click a “proprietary business”).  
Moreover, there is no claim here that Tacoma Power ratepayers have been asked to fund an unconstitutional  
tax disguised as a regulatory fee. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003)  
 (“*Okeson I*”).

1 of meeting deficits *of any kind* incurred by reason of the carrying out of  
2 the plan of purchase *or the operation and maintenance* of the system  
thereunder?

3 *Id.* at 676 (emphasis added). The Court held that “by the ordinance providing for the  
4 acquisition and operation of the street railway system[,] no general indebtedness was  
5 created,” *id.* at 679, and that an injunction should issue to prevent the use of general funds  
6 to subsidize the failing proprietary venture. The Court explained:

7  
8 We are not now concerned with questions other than the one before us,  
9 and are not called upon to advise the city how, if at all, it may solve the  
10 very serious problem which has arisen from what has proven to be the  
11 erroneous judgment of its legislative body [about the profitability of the  
12 streetcar system] . . . [W]hen it is proposed that any general indebtedness  
13 be incurred for such a purpose as is here considered, the matter must be  
submitted to the voters, and if not so submitted . . . , by no action of the  
city or its officials can the burden be shifted to the shoulders of the  
taxpayers who have had no opportunity to say whether they will or will  
not accept the hazard.

14 *Id.* at 680.

15 The *Asia* case is squarely on point with the situation here: Just as in *Asia*, the City,  
16 namely, TPU, anticipated that the revenues of a proprietary service it hoped to offer would  
17 cover the expenses of operating and maintaining that service. Robinson Decl., ¶ 7. Just as  
18 in *Asia*, Tacoma’s forecast turned out to be incorrect. *Id.* Just as in *Asia*, claimants for  
19 expenses owed in connection with operating the service are urging that the City should  
20 use general funds to pay the excess expenses. Compl. for Declaratory, Injunctive, and  
21 Mandamus Relief (6/22/2017), at pp. 9, 10-11. Just as in *Asia*, where the Court stated that  
22 general indebtedness could not be incurred without voters’ consent, Ordinance No. 26141,  
23 which appropriated Power Fund monies for the construction of the System for Click,  
24 specifically provided that the City was not incurring “general indebtedness . . . in respect  
25 to the Telecommunications Project.” Sorum Decl., ¶ 4, Ex. B.

1           And just as in *Asia*—where Washington’s Supreme Court held that Seattle should  
2 be enjoined from using tax money to pay proprietary debt—this Court should deny any  
3 request by Plaintiffs that the Court order Tacoma to use taxpayer money to reimburse the  
4 electric utility. To rule otherwise would be to impermissibly burden Tacoma’s taxpayers  
5 in violation of aged but still on point controlling authority. *See also Puget Sound Power &*  
6 *Light Co.*, 15 F.2d at 797 (holding that the private company from which Seattle purchased  
7 the streetcar system at issue in *Asia* “was not entitled to a general decree against the city,  
8 payable from its general funds” after the revenue fund that payment was to be made from  
9 was emptied due to failure of streetcar system to be profitable).

10           Indeed, it is even clearer here than in *Asia* or *Puget Sound Light & Power* that  
11 payment from the City’s general fund must not be permitted.

12           First, the streetcar service at issue in *Asia* was presumably available for all  
13 Seattle’s residents and visitors to use, for a nominal fee, whereas Click benefits only  
14 people who are (1) Tacoma Power customers, (2) living in an area where Click is  
15 available, and (3) also Click subscribers. Robinson Decl., ¶ 6. If taxpayer funds cannot be  
16 used to support the operation of a streetcar system available for everyone to use, such  
17 funds certainly cannot be used to pay obligations of a broadband service that is only  
18 available to subscribers, and only then, to subscribers in certain areas. *See id.* (stating that  
19 not all of Tacoma Power’s customers have Click available in their area).

20           Second, in *Asia*, it was “beyond cavil that the city council was in error when . . . it  
21 declared that in its judgment . . . the gross revenues . . . would be sufficient to meet all  
22 expenses,” 119 Wash. at 675-76, and that the operation was all but insolvent, such that  
23 any monies used for its support would be “permanently diverted from the [general] fund  
24 to which they belong,” *id.* at 679-80. Here, in contrast, Click, and the underlying System,  
25 still have significant value for Tacoma Power. Robinson Decl., ¶ 7. The City is currently

1 seeking a strategic partner to manage these valuable assets, which would generate  
2 substantial proceeds, which presumably will go to the Power Fund, that could be used to  
3 reimburse the electric utility. *Id.* at ¶ 8.

4 Third, cases such as *Puget Sound Power & Light Co.* involved the holders of debt  
5 from a city's proprietary operation, usually in the form of a bond or warrant, seeking  
6 payment from the general fund. Such cases uniformly hold that "mandamus will not lie to  
7 compel the city or its treasurer to pay this class of warrants out of the city's general fund."  
8 *Quaker City Nat'l Bank v. City of Tacoma*, 27 Wash. 259, 262-63, 67 P. 710 (1902). If the  
9 holder of a debt or equity interest in payment from the City cannot reach the City's  
10 general fund, it strains credulity to think that Plaintiffs, who have no debt or equity  
11 interest, but only a vague interest in seeking reimbursement on behalf of a utility that  
12 allegedly overcharged them for electricity (while several of them were themselves  
13 working for or on behalf of Tacoma Power), can assert a remedy against the general fund.  
14 *Accord State ex rel. Rand v. City of Seattle*, 13 Wn.2d 107, 124-25, 124 P.2d 207 (1942)  
15 ("[T]he general fund of the city cannot be reached by mandamus proceedings against the  
16 city . . . to pay obligations of this character, where there is no showing that any of the  
17 moneys from the special funds have been diverted to the city's general fund.").

18 **C. Tacoma's Department of Public Utilities is contractually forbidden from**  
19 **committing general City funds to pay any liabilities associated with Click.**

20 As mentioned above, Click operates pursuant to a "franchise-like" agreement  
21 between TPU and the City. *See* Robinson Decl. Ex. A ("Agreement"). The Agreement  
22 uses the term "Operator" to refer to TPU in its capacity as operator of Click. Agreement at  
23 p. 7, § 1.31. The Agreement expressly provides that Click is forbidden to obligate general  
24 City Funds for the construction, operation, or maintenance of Click:

25 Operator . . . agrees to release the city from and against any and all  
liability *and responsibility* in or arising out of the construction,

1 operation[,] or maintenance of the Cable System, and . . . agrees not to sue  
2 or seek any money damages from City in connection with the above  
mentioned matters.

3 *Id.* at p. 58, § 12.3.B.

4 Not only is Click forbidden from committing City general funds, but to the extent  
5 the general funds are burdened, Click can be required to account to the City's general  
6 fund. In Section 8.7 of the Agreement, TPU and the City agreed that

7 To the extent permitted by law, during any period where the Cable System  
8 is wholly owned by the municipality, in lieu of liquidated damages, or an  
9 indemnity, the City may require Operator to compensate the General Fund  
for losses occasioned by Operator's activities.

10 *Id.* at p. 45, § 8.7. This provision requires exactly the same thing that Plaintiffs'  
11 interpretation of the accountancy act would require: Click may be called on to reimburse  
12 Tacoma's general government for any amounts paid by the general fund to cover losses  
13 due to Click's activities.

14 Similarly, Section 12.3(B) of the Agreement provides that:

15 Operator agrees to indemnify and hold harmless the City, its trustees,  
16 elected and appointed officers, agents, and employees, from and against  
17 any and all claims, demands, or causes of action of whatsoever kind or  
18 nature, and the resulting losses, costs, expenses, reasonable attorneys' fees,  
19 liabilities, damages, orders, judgments, or decrees, sustained by the City or  
20 any third party arising out of, or by reason of, or resulting from or of the  
acts, errors, or omissions of Operator, or its agents, independent  
contractors or employees related to or in any way arising out of the  
construction, operation, repair or existence of the Cable System.

21 *Id.* at p. 58, § 12.3.B. It is clear that this provision of the Agreement, which was adopted  
22 by ordinance of the City Council, was intended to protect the general government from  
23 any liability for costs of operation of Click. And again, the unavoidable consequence of  
24 this provision is that ultimately Click, and not the City's general fund, must foot the bill.  
25 Thus, even if this Court orders reimbursement out of the general fund, this Agreement will

1 require the City and TPU, doing business as Click, to effectively undo that reimbursement  
2 by causing Click to reimburse the general fund. This Court should avoid ordering the city  
3 to engage in an empty act that will generate such needless hassle. *See SEIU Healthcare*  
4 *775NW v. Gregoire*, 168 Wn.2d 593, 604, 229 P.3d 774 (2010) (“[W]e do not issue writs  
5 of mandamus to compel useless or vain acts or acts that have no operative effect . . .”).  
6 Instead, the Court should rule as a matter of law that any reimbursement of Tacoma  
7 Power’s electricity operations be made only from Click and not from the general fund.

8 **D. Requiring payment from any source other than the Click! sub-fund would**  
9 **be unfair to Tacoma’s taxpayers.**

10 The holding reached in this Court’s Order granting Plaintiffs’ summary judgment  
11 embodies the principle that Click must bear its own expenses rather than allowing those  
12 expenses to be imposed on people who do not pay for Click’s services. Under Plaintiffs’  
13 logic, doing that would be unfair. It would be an absurd result to hold that Tacoma  
14 Power’s electric-ratepaying customers cannot be required to subsidize Click (whose users  
15 are a subset of Tacoma Power’s ratepayers), but that Tacoma’s taxpaying citizenry—  
16 many of whom may not have any contractual relationship with Tacoma Power  
17 whatsoever—can be required to do so.

18 In addition, to the extent that some of Tacoma’s taxpayers are also Tacoma Power  
19 ratepayers, requiring the use of general city funds to reimburse Tacoma Power would  
20 essentially require many ratepayers to fund the remedy for their own injury.

21 **E. The nature of the mandamus remedy sought by Plaintiffs requires that**  
22 **any reimbursement of the electric utility come from Click and not from**  
23 **the general fund.**

- 24 1. So long as Tacoma Power is in fact ordered to have the electric utility  
25 reimbursed for its prior subsidies to Click, Plaintiffs lack standing to  
challenge the source from which reimbursement is made

Plaintiffs’ Complaint in this matter sought, *inter alia*, mandamus relief

1 [o]rdering TPU *or* the City to cause Click *or* the City's general fund to  
2 reimburse the Tacoma Power electric utility for previous subsidies of or  
3 payments for Click expenses or capital improvements attributable or  
4 properly allocable to commercial telecommunication services rather than  
5 electric utility service, in an amount to be proven at trial . . . .

6 Compl. at 10-11 (emphasis added). "The word 'or' is a function word indicating  
7 alternatives." *Affordable Cabs, Inc. v. Dep't of Emp't*, 124 Wn. App. 361, 369, 101 P.3d  
8 440 (2004) (citing *In re Marriage of Caven*, 136 Wn.2d 800, 807, 966 P.2d 1247 (1998)  
9 (grammatically, the word "or" is "a coordinating particle signifying an alternative")).  
10 Plaintiffs' Complaint thus asserts that any injury due to past subsidies of Click from  
11 electric revenues (as opposed to ongoing or future subsidies, for which Plaintiffs seek an  
12 injunction) can be fully redressed by reimbursement to the electric utility *either* from  
13 Click *or* from the City's general fund.

14 Where, as here, a complaint provides for selection from among alternatives in its  
15 prayer for relief, either alternative will fully redress the Plaintiff's injury. *Cf. CPL*  
16 *(Delaware) LLC v. Conley*, 110 Wn. App. 786, 795, 40 P.3d 679 (2002) ("Because we  
17 find that the assumption of the risk doctrine resolves CPL's request for relief, we need not  
18 reach Quad C's alternative argument.").

19 Where a plaintiff asserts alternative bases for relief and does not withdraw one, the  
20 Court has discretion to choose which alternative will be awarded. For example, in *Mason-*  
21 *Walsh-Atkinson-Kier Co. v. Case*, 2 Wn.2d 33, 34-35, 97 P.2d 165 (1939), the plaintiff  
22 sued to recover a refund for gas taxes that it paid when buying the gas but that it was not  
23 required to pay, since its trucks were not operated on state highways. The plaintiff's  
24 prayer for relief sought either (1) an order requiring state officials to approve the  
25 plaintiff's previously filed refund claim, or in the alternative, (2) judgment against the  
state for the amount of the refund. *Id.* at 35-36. After determining that the plaintiff was in

1 fact entitled to the refund, the Court held that “[t]he prayer for relief being in the  
2 alternative, it will be for the trial court to determine in what form it shall be accorded.” *Id.*  
3 at 46. Thus, when a court chooses from among alternative remedies, the plaintiff cannot  
4 question the election. *See also Stryken v. Panell*, 66 Wn. App. 566, 571, 832 P.2d 890  
5 (1992) (“Because Stryken elected to plead for an equitable remedy as well as a legal  
6 remedy, he is now bound by the trial court’s election between the remedies prayed for in  
7 the complaint.”).

8 Because, according to Plaintiffs’ own pleading, either source of reimbursement  
9 will fully redress any injury to them due to past unlawful subsidies, they lack standing to  
10 dispute which of the two sources is used for any reimbursement. *Cf. City of Tacoma v.*  
11 *Taxpayers of Tacoma*, 108 Wn.2d 679, 686, 743 P.2d 793 (1987) (“Because WNG merely  
12 objects to the reasoning by which the trial court invalidated the ordinance [that WNG  
13 wanted to invalidate], WNG cannot be considered ‘aggrieved,’ and therefore does not  
14 have standing to appeal.”).

15 And as argued above, both Washington law and the logic necessarily flowing from  
16 this Court’s Order require that the electric utility be reimbursed by Click and not by  
17 Tacoma’s general fund. Put simply, Plaintiffs have identified two alternatives that are  
18 equally acceptable to them, while there is only one of these alternatives that is legally or  
19 logically acceptable. Thus, the Court should forbid any reimbursement out of the general  
20 fund.

21 3. Even if Plaintiffs had standing to argue for one source of reimbursement  
22 over another, this Court lacks power to issue a writ of mandamus ordering  
23 the City to use the general fund for such reimbursement.

24 Mandamus is an extraordinary remedy appropriate *only* where a state  
25 official is under a mandatory ministerial duty to perform an act required  
by law as part of that official's duties. The mandate must specify the  
precise thing to be done or prohibited. And the mandate must define the

1 duty with such particularity as to leave nothing to the exercise of  
2 discretion or judgment.

3 *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011) (emphasis added). Here,  
4 the arguments that Plaintiffs advanced in support of their summary judgment motion  
5 provide an arguable basis for this Court to hold that Tacoma Power’s officials have a  
6 “mandatory duty” to cause Click to reimburse the electric utility. However, Plaintiffs  
7 cannot identify any basis on which Tacoma’s *general government* has a “mandatory  
8 ministerial duty” to cause the Tacoma Power electric utility to be reimbursed from  
9 taxpayer funds for expenses that the electric utility paid on Click’s behalf. *See id.* at 326  
10 (line item in transportation budget appropriating money from the “motor vehicle account”  
11 to fund a valuation of I-90 center lanes for HOV transit did not, for purposes of mandamus  
12 analysis, create a duty on Department of Transportation to expend the appropriated funds);  
13 *Rand* 13 Wn.2d at 124-25 (1942) (“[T]he general fund of the city cannot be reached by  
14 mandamus proceedings against the city . . . to pay obligations of this character” where  
15 there is no showing that the city incurred or intended to incur general indebtedness). Far  
16 from the City having a mandatory duty to pay for Click’s liabilities, the contractual  
17 provisions discussed above establish that such payment is prohibited.

18 Moreover, Plaintiffs’ request for mandamus clearly frames the reimbursement  
19 source in “either/or” terms. To let Plaintiffs instead argue that their request for mandamus  
20 is broader would violate the “well-established principle that a writ of mandamus cannot be  
21 more specific than the petition” by “exceeding the scope” of the relief requested. *SEIU*  
22 *Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 604, 229 P.3d 774 (2010). Thus, even if  
23 Plaintiffs had standing to argue for one source of reimbursement over another, the fact that  
24 they are seeking a writ of mandamus means that one of the sources of reimbursement is  
25 necessarily off the table.

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V. CONCLUSION

For the foregoing reasons, Tacoma respectfully asks the Court to summarily  
adjudge that any reimbursement of Tacoma Power's electric utility be made by Click  
alone and not from Tacoma's general fund.

Dated this 20th day of April, 2018

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

EDWARD E. (TED) COATES; MICHAEL  
CROWLEY; MARK BUBENIK and  
MARGARET BUBENIK d/b/a Steele  
Manor Apartments; THOMAS H.  
OLDFIELD; and INDUSTRIAL  
CUSTOMERS OF NORTHWEST  
UTILITIES, an Oregon nonprofit  
corporation,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

No.: 17-2-08907-4

[PROPOSED] ORDER GRANTING  
DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
ON THE NATURE OF ANY  
MANDAMUS RELIEF

This matter came before the Court on Plaintiffs’ Motion for Partial Summary  
Judgment Granting Declaratory Relief. The Court has reviewed, considered, and relied on the  
following:

1. Defendant’s Motion for Partial Summary Judgment on the Nature of Any  
Mandamus Relief;
2. The accompanying declaration of Andy Cherullo in Support of Defendant’s  
Motion for Partial Summary Judgment;



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Presented by:

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