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

11 Mitchell Shook,

12 Plaintiff Pro Se

13 v.

14 CITY OF TACOMA

15 Defendant
16
17

No. 19 2 07135 0

**COMPLAINT FOR
DECLARATORY, INJUNCTIVE,
PROHIBITION AND
MANDAMUS RELIEF**

18
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4 INTRODUCTION -NATURE OF ACTION
5

6 Click! Network (“Click!) was established in 1997, by Tacoma City Council, as
7 a “*broad band telecommunications system that shall be owned, operated and*
8 *controlled by the City of Tacoma Department of Public Utilities Light Division* ”¹.

9 The Click! system is clearly part of Tacoma Public Utilities.
10

11 The Click! system was established to “*provide telecommunications services for*
12 *data transport, high speed internet access, full cable television service, and,*
13 *among other things, to meet the expanding telecommunications requirements in*
14 *an evolving competitive electric market, the most critical of which is real time,*
15 *two-way interactive communications with individual energy consumers*”
16

17 The Click! Network telecommunication system continues to fulfill its original
18 mandate, providing wholesale broadband Internet services to over 20,000
19 Tacoma Public Utilities customers, with a state-of-the-art cable modem and
20 Gigabit Fiber To The Home (“FTTH”) system -while delivering television
21 services to over 12,500 Tacoma Public Utilities customers over the system.

22 The Tacoma City Council recently approved a “term sheet” for disposal of
23 Tacoma Public Utilities’ proprietary interests in the system. All control over the
24 day-to-day ongoing operations of Click!, including oversight on rates, would be
25 handed over to a private company.
26

27

¹ The 1997 City Council Resolution No. 33668

1 Tacoma City Charter, Article IV § 4.6, clearly prohibits the disposal of a
2 “utility system” without a majority vote of the electorate.

3
4 Since Click!’s system is part of Tacoma Public Utility², and no such vote of
5 the people is planned or provided for, there is an imminent risk that the terms of
6 City charter will be violated.

7
8 The purpose of this action is to make sure the clear language in the City
9 charter is followed and the people are allowed to vote on any lease or disposal of
10 the Click system by TPU; for, if charter provisions are ignored, the City would be
11 exceeding its authority and acting ultra vires.

12 1. PARTIES

13 Plaintiff Mitchell Shook is a resident of Tacoma, a Tacoma Public Utilities
14 rate payer and Click! customer; and, as such, has standing to seek the relief
15 requested in this petition.

16
17 Defendant City of Tacoma (“the City”) is a Washington Municipal
18 Corporation located in Pierce county, Washington. The Light Division, doing
19 business as Tacoma Power, of the City’s Department of Public Utilities (“TPU”)
20 operates and provides services to TPU customers (“ratepayers”). TPU operates a
21 business unit, known as Click! Network, which provides retail television and
22 wholesale Internet services.

23 2. JURISDICTION AND VENUE

24
25 2.1 This Court has subject matter jurisdiction over this issue, since the City
26 is located in Pierce County and the events related to this petition have

27

2 ² City of Tacoma Resolution 40272

1 substantially occurred in Pierce County; additionally, the superior court has
2 subject matter jurisdiction over this action under RCW 2.08.010 because plaintiff
3 seeks writs of mandamus and/or prohibition.

4
5 2.2 Given no other speedy or adequate remedy, RCW 7.16.040 provides
6 the Court jurisdiction over this matter.³

7 3. FACTS

8 3.1 Tacoma City Charter Section 4.6 requires *“The City shall never sell, lease*
9 *or dispose of any utility system”* without a *“majority vote of the electors”*.

10
11 3.1.1 Click is multi-service broadband telecommunications provider and
12 operating section of Tacoma Power providing retail cable television and
13 wholesale broadband internet services to Tacoma Power’s residential and
14 business customers.

15
16 3.2 Ordinance NO. 25930 was passed by Tacoma City Council in 1996 and
17 entitled *“AN ORDINANCE of the City of Tacoma, Washington establishing a*
18 *telecommunications system as part of the Light Division”*.

19 3.2.1 The 1996 CITY of Tacoma ORDINANCE NO. 25930 States
20 *“WHEREAS, RCW 35.92.050 authorizes cities to construct and*
21 *operate works and facilities for the purpose of furnishing any persons*
22 *with electricity and other means of power and to **regulate and***
23

24
25

³ A writ of review shall be granted by any court, when an inferior tribunal, board or officer,
26 exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one
27 acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the
course of the common law, and there is no appeal, nor in the judgment of the court, any plain,
speedy and adequate remedy at law.

1 *control the use thereof*⁴ or lease any equipment or accessories
2 *necessary and convenient for the use thereof; and*

3
4 3.2.2 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS,*
5 *the Utility Board and the Council have determined that it is in the*
6 *best interest of the City that it install a telecommunications system*
7 *among all of its Electric System substations in order to improve*
8 *communications for automatic substation control; and*

9
10 3.2.3 CITY of Tacoma ORDINANCE NO. 25930 States *WHEREAS,*
11 *the City has determined that it is prudent and economical to provide*
12 *additional capacity on such telecommunications system to provide*
13 *the Electric System with sufficient capacity to perform or enhance*
14 *such functions as automated meter reading and billing, **appliance***
15 ***control***⁵, *and load shaping; and*

16 3.2.4 City of Tacoma ORDINANCE NO. 25930 States *WHEREAS, the*
17 *Light Division may wish to connect such telecommunications system*
18 *to individual residences and businesses in its service area or to other*
19 *providers of telecommunications services; and*

20
21 3.2.5 The 1996 City of Tacoma ORDINANCE NO. 25930 States
22 *WHEREAS, the City has determined that it should create a*

23
24 _____
25 ⁴ Emphasis added to remind the Court that this functionality is still relevant today. Smart homes,
26 smart devices and the Internet-of-Things (with devices such as smart thermostats for example) allow
27 users to control their electrical usage even when away from the premises.

28 ⁵ Emphasis added, for it should be recognized that “appliance control” is not possible without two
29 way communication between an appliance and the user -as such “appliance control” is an energy
30 related function.

1 *telecommunications system as part of the Electric System⁶ in*
2 *order to construct these telecommunications improvements”*

3
4 3.2.6 Exhibit A to 1996 City of Tacoma ORDINANCE NO. 25930⁷
5 stated the telecommunications project would include “demand
6 side management (DSM) functions⁸, CATV and Internet Access.

7 3.2.7 In 2006, Washington voters approved Initiative Measure 937,
8 known as the Energy Independence Act. The measure, which was
9 codified at RCW 19.285, requires electric utilities with more than
10 25,000 customers to take certain measures to conserve energy⁹

11 3.2.8 Demand-side management (DSM) or demand-side response (DSR)
12 is the modification of consumer demand for energy through various
13 methods -such as financial incentives. Demand-side management
14 encourages the consumer to use less energy during peak hours, or
15 to move the time of energy use to off-peak times such as nighttime
16 and weekends.¹⁰

17
18 3.3 The Tacoma City Council approved construction of Click! Network on
19 April 8,1997. The City Council delegated authority to the Public Utility Board
20 and the Department of Public Utilities (“TPU”), Light Division (dba “Tacoma
21 Power”), to implement, own and manage a broadband telecommunications

22
23 _____
24 ⁶ Emphasis added to point out that the telecommunications system is a “part of the electric system”

25 ⁷ Passed on July 26, 1996 when the telecommunications system was approved

26 ⁸ the goal of demand-side management is to encourage the consumer to use less energy
27 during peak hours, or to move the time of energy use to off-peak times such as nighttime and
weekends

⁹ Kelley, 120313 WAAGO, AGO 2013-6 2013

¹⁰ Demand Side Management and Response can play a role in satisfying TPU’s requirement for
complying with RCW 19.285.040 Energy conservation and renewable energy targets -which requires
TPU to pursue all available conservation that is cost-effective, reliable, and feasible.

1 system ("Click! Network" or "Click!"), as authorized through City Council
2 Substitute Resolution No. 33668, approved April 8, 1997, and Public Utility
3 Board Amended Substitute Resolution U-9258, which was approved on April 9
4 1997

5
6 3.3.1 The 1997 Council Resolution No. 33668 states: "WHEREAS the
7 City of Tacoma, Department of Public Utilities, Light Division desires to:
8 (1) develop a state-of-the art fiber optic system to support enhanced
9 electric system control, reliability and efficiency; (2) develop capability to
10 meet the expanding telecommunications requirements in an evolving
11 competitive electric market, the most critical of which is real time, two-
12 way interactive communications with individual energy consumers, (3)
13 create greater revenue diversification through new business lines (i.e.
14 Internet transport, cable TV, etc.), (4) enhance traditional products and
15 services, and (5) maximize return on Light Division assets,

16 3.3.2 The 1997 Council Resolution No. 33668 states "*WHEREAS a*
17 *broadband telecommunications system will have available capacity for*
18 *future City Light Division needs and will also have the capacity to provide*
19 *telecommunications services for data transport, high speed internet access,*
20 *full cable television service, and other uses, and;*"

21 3.3.3 The 1997 Resolution No. 33668 states "*BE IT RESOLVED BY THE*
22 *COUNCIL OF THE CITY OF TACOMA: That the Council hereby finds*
23 *and determines that the City Light Division's broad band*
24 *telecommunications proposal is in the best interests of the City, will serve a*
25 *public purpose and that the said Business Plan is sufficient and adequate,*
26 *therefore, the Council hereby approves the Light Division's proposal*
27 *including the Business Plan and the Department of Public Utilities, Light*

1 *Division is hereby authorized to proceed to implement said proposal for a*
2 *broad band telecommunications system, and That the proposed broad*
3 *band telecommunications **system shall be owned, operated and***
4 ***controlled by the City of Tacoma Department of Public Utilities***
5 ***Light Division**¹¹*

6
7 3.3.4 Click! operates as part of TPU. Click is one Tacoma Power's 6
8 business units -which units are generation; power management;
9 transmission and distribution; rates, planning and analysis; Click
10 Network; and utility technology services.

11 3.3.2 Click! is not a separate business unit or enterprise fund. It is an
12 organizational unit within the Power enterprise fund. The first line of
13 Click! oversight is the Power Superintendent and the Power management
14 team. From there, oversight is provided by, the TPU CEO, the Board, and
15 the City Council.

16
17 3.3.3 TPU Revenue Bonds were approved, by a declaratory judgement, to
18 pay for construction of the Click! system; and, no general fund dollars
19 have been committed to the project.

20
21 3.4 Approximately 1,500 miles of fiber and coaxial cable have been
22 constructed by Tacoma Power in the cities of Tacoma, University Place, Fircrest,
23 Lakewood and Fife, and portions of unincorporated Pierce County, providing
24 Tacoma Power with a state-of-the-art telecommunication system with which
25 supports transmission and distribution operations, advanced metering, and
26 retail and wholesale commercial services. The network currently covers
27 approximately 66% of the households in Tacoma Power's service territory.

¹¹ Emphasis added to highlight fact that system is owned by TPU

1
2 3.5 The network consists of a hybrid fiber-optic coaxial (“HFC”) system, which
3 delivers two-way signals for cable TV, cable modem,¹² Fiber To The Home
4 (“FTTH”) Internet services, and advanced metering.

5
6 3.6 In addition, SONET (“Synchronous Optical Network”) and Gigabit
7 Ethernet technologies are used to support communications across Tacoma
8 Power’s transmission and distribution system and to carry out data transport
9 services for commercial customers. The network was designed and constructed to
10 meet high telecommunications standards, containing a redundant backbone and
11 redundant service loops, which seek to ensure uninterrupted signal transport in
12 the event of a network break.

13 3.7 Commercial telecommunication services were Launched in 1998 under the
14 brand name Click! Network. Click! provides three commercial
15 telecommunication services to TPU customers; retail cable television, wholesale
16 broadband transport and wholesale high-speed Internet delivered over cable
17 modem and FTTH.

18
19 3.8 In 2017 Click! Network’s annual operating revenues were approximately
20 \$26,519,861¹³.

21
22 3.8.1 Click! ended 2018 with more than 12,500 cable TV customers,
23 20,000 wholesale high- speed Internet service customers, and more than
24 100 wholesale broadband transport circuits.

25
26
27 ¹² Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA,
WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

¹³ CLICK! NETWORK COMMERCIAL OPERATIONS OPERATIONAL SUMMARY - December 31, 2017

1 3.8.2 Click! has “significant goodwill”, According to Section 2.3 of the
2 January 23, 2018 presentation by Joann Hovis, of CTC Technology, at the
3 City Council-TPU Board Joint Study Session. Ms. Hovis’ report was titled
4 Strategy Alternatives for Tacoma Click!:

5 3.8.3 “Click! has thousands of customers and considerable goodwill”, as
6 confirmed by Click! Network General Manager, Tenzin Gyaltzen, who
7 stated so in his February 7th, 2018, Declaration In Support Of Defendants
8 Opposition To Partial Summary Judgement -page 3 , Pierce County
9 Superior Court Case No 17-2-08907-4

10
11 3.8.4 Click! is the nations second largest municipal CATV and Internet
12 service -behind Chattanooga TN.

13
14 3.9 TPU is governed by the City’s public utility board, whose five members
15 are appointed by the mayor and confirmed by the city council. Utility budgets
16 and rates are subject to approval by the city council. **Section 4.3 of the City**
17 **charter** provides City council with oversight on rates and the authority “*to fix*
18 *and from time to time, revise such rates and charges as it may deem advisable for*
19 *supplying such utility services the City may provide*”.

20
21 3.10 Title 12 “Utilities” of the Tacoma Municipal Code regulates utilities and
22 rates.

23 3.10.1 Click! CATV and wholesale Internet rates are regulated under
24 Title 12 of the Tacoma Municipal Code, in section 12.13

25 3.10.2 Click! TV and Wholesale Internet rates are approved by the Public
26 Utility Board (Board) and City Council, the same as Power, Water, and
27 Rail rates.

1
2 3.11 Over 10,000 TPU electric customers currently have Tacoma Power
3 Gateway meters installed on their homes. These “gateway meters” operate
4 over Click! Network’s HFC plant.

5 3.11.1 The Gateway meters feature “remote connect and disconnect”
6 functionality allowing for services to be turned on or off for electric
7 customers. The gateway meters also allow automated electric meter
8 reading and provide information to customers relevant to their energy
9 purchasing decisions.¹⁴

10 3.11.2 In connection with these Gateway Meters, some TPU
11 customers participate in the “Pay-Go” prepayment system.
12

13 3.12 Click! currently holds telecommunications or video franchises from the
14 City of Tacoma, City of Fircrest, City of Fife, City of Lakewood, City of
15 University Place, and Pierce County to offer Cable TV, high speed Internet,
16 digital phone, as well as fiber-delivered data solutions to area residents and
17 businesses¹⁵.
18

19 3.13 AMENDED RESOLUTION NO. U-10879, states:” #20. *WHEREAS*
20 *Tacoma Power has excess power generation capacity within its service territory.*
21 *In the past, Tacoma Power has benefited greatly by selling this excess capacity in*
22 *the wholesale power markets to the benefit of all retail electric customers. Over the*
23 *past few years, wholesale power prices and sales have dropped substantially. In*
24 *support of Tacoma Power's strategic business plan, Tacoma Power wants to make*
25 *up this lost revenue by looking at ways to increase its retail power sales through*

26 ¹⁴ From AMENDED RESOLUTION NO. U-10879 Adopted by TPU Board on 9-28-16

27 ¹⁵ CLICK! NETWORK Business Plan -by Click! General Manager Tenzin Gyaltzen. Revised 3-20-17 -
Executive Summary Page 2

1 *economic growth in the community. Communities across the nation have*
2 *benefited economically from competitive access to internet services in their*
3 *communities.”*

4 3.14 AMENDED RESOLUTION NO. U-10879 also states: *“Tacoma Power’s*
5 *continued operation and maintenance of the telecommunications system for*
6 *internet access purposes assists in making the internet services competitive in*
7 *Tacoma Power’s service area, which increases economic growth that leads to*
8 *greater retail power sales”*.¹⁶.

9 3.15 AMENDED RESOLUTION NO. U-10879 stated “WHEREAS The
10 Internet-related uses of the Click! telecommunications system provide Tacoma
11 Power customers benefits by giving them access to advanced customer services
12 options such as: power use monitoring, outage reporting, scheduling of services,
13 bill paying, and electrical appliance control.

14
15 3.16 AMENDED RESOLUTION NO. U-10879 stated that “WHEREAS In
16 planning for an uncertain and unknown future¹⁷, there may be other potential
17 functions related to the supplying of electricity to customers who might also
18 make energy related usage of the telecommunications system infrastructure
19 including: cyber security efforts, electric car charging and metering, enhanced
20 “smart home” uses that allow customers to control power usage by time of day,
21 participate in demand response programs, behavior-based saving programs,
22 outage communications, energy audits, and participation in Evergreen
23 Options”¹⁸

24
25 ¹⁶ AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #20

26 ¹⁷ AMENDED RESOLUTION NO. U-10879 -Page 4, This is Whereas #17

27 ¹⁸ <https://www.mytpu.org/community-environment/clean-renewable-energy/evergreen-options-program/>

1
2 3.17 One purpose for creating Click! was to have a telecommunications system
3 sophisticated enough to enable TPU to compete effectively in the rapidly
4 evolving electric industry.

5
6 3.18 Amended Resolution U-10828, adopted by the City’s public utility board
7 on December 3, 2015, states “*WHEREAS the broadband telecommunication
8 system is critical infrastructure for Tacoma Power*

9
10 3.18.1 Amended Resolution U-10828 cites Charter 4.6 as requiring a
11 vote of the people to before the City may “*lease or dispose of any utility
12 system*”.¹⁹

13
14 3.19 City Council Resolution #39347 states: “*1997, the City of Tacoma, through
15 its electrical utility, embarked on an effort to construct and operate a state-of-the-
16 art telecommunication system for the benefit of its electric utility and its electric
17 utility customers*”²⁰

18
19 3.19.1 City Council Resolution #39347 states: “*WHEREAS the
20 telecommunications system was constructed and has been in continuous
21 operation since 1999, and has proven to provide benefits for the City
22 electric utility and electric utility customers located both Inside and outside
23 City limits*”²¹

24
25 3.19.2 City Council Resolution #39347 states: “*WHEREAS the
26 telecommunication system is now a vital component of the City's electric
27 utility and continued operation and maintenance of the system is an
28 essential function of the electric utility*”

29
30 ¹⁹ Page one of Amended Resolution U-10828

31 ²⁰ City Council Resolution #39347 -page 1

32 ²¹ City Council Resolution #39347 -page 1

1 3.19.3 City Council Resolution #39347 states: “WHEREAS *some of the*
2 *benefits the City's electric utility and electric utility customers have*
3 *received from the system include (1) enhanced control, reliability and*
4 *efficiency of the City's electrical system; (2) increased capability to meet the*
5 *expanding telecommunication requirements in an evolving competitive*
6 *electric market, including the ability to make real-time, two-way interactive*
7 *communications with individual energy consumers; (3) improved*
8 *traditional electric products provided to consumers; (3) diversified revenue*
9 *streams through new business lines (i.e., Internet transport, cable TV, etc.);*
10 *and (5) maximized return on the City's electric system assets, and*
11 *enhancing communication between electric utility assets and electric utility*
12 *consumer, and providing electric utility customers a means to instantly*
13 *access electric utility accounts information for payment of bills, report*
14 *outages, and obtain energy usage and conservation information”²²*

15 3.19.2 City Council Resolution #39347 stated: “*WHEREAS some benefits*
16 *of the City's electric utility telecommunication system include enhancing*
17 *communication between electric utility assets and electric utility*
18 *consumers, and providing electric utility customers a means to instantly*
19 *access electric utility accounts information for payment of bills, report*
20 *outages, and obtain energy usage and conservation information, and;*

21 3.20 That a water heater “demand response project” was recently conducted by
22 Tacoma Power, in the Salishan housing development neighborhood, under an
23 agreement with the Tacoma Housing Authority.
24

25
26
27

²² Passed by City Council on December 15 2015

1 3.20.1 Data transport for the Salishan demand response hot water
2 heater project utilized Click! Network's cable modem system²³.

3 3.20.2 Demand response technology requires two-way communications.
4

5 3.20.3 Demand response technology holds potential for load reduction
6 and energy savings²⁴.
7

8 3.20.4 RCW 35.92.360²⁵ -Energy conservation plan states "The
9 legislature finds that energy conservation can take many useful and cost-
10 effective forms, and that the types of conservation projects available to
11 utilities and customers evolve with time as technologies are developed and
12 market conditions change. In some cases, **electricity conservation**
13 **projects are most cost-effective when they reduce the total**
14 **amount of electricity consumed**²⁶ by an individual customer, and in
15 other cases they can be cost-effective by reducing the amount of electricity
16 a customer needs to purchase from an electric utility.

17 3.21 The Click! Engagement Committee ("the committee") was formed in
18 January 2016, per the direction of the Tacoma Public Utilities Board and the
19 City Council.
20

21 3.21.1 The Committee was comprised of seven members as follows:
22 Mayor Marilyn Strickland, City Council Member Marty Campbell, Public
23

24 ²³ Email from Click! General Manager Tenzin Gyaltsen

25 ²⁴ BPA Salishan Demand Response Water Heater Final Report 2018

26 ²⁵ Findings-Intent-2002 c 276

27 ²⁶ Emphasis added to point out the Nexus between Internet access and the ability to conserve energy

1 Utility Board Member Mark Patterson, Public Utility Board Member
2 Karen Larkin, industry experts Janine Terrano and Terry Dillon, and
3 ratepayer advocate Andrea Cobb²⁷.

4 3.21.2 The Committee met 16 times between January 22,2016 and
5 August 1,2016.

6
7 3.22 Studies by the Click! Engagement Committee and Tacoma Power's
8 financial analysis demonstrate that continuing to provide CATV services in
9 support of retail internet services makes the sale of such services a more
10 competitive overall product and improves the financial sustainability of Click!²⁸

11 3.23 In July 2018, the City Council and Public Utility Board ("Board") directed
12 Joann Hovis, of CTC Technology & Energy ("CTC"), to negotiate with Rainier
13 Connect and Wave Broadband, and to develop formal partnership proposals
14 regarding the operation and use of the Click! Network.

15
16 3.23.1 Two Public-Private Partnership Term Sheets ("term sheets") for
17 operation and use of Click! Network, one from Rainier Connect and one
18 from Wave Broadband, were presented to the Council and Board, at a
19 Joint Study Session on March 5, 2019.²⁹

20 3.23.2 Both of these term sheets proposed a 20-year IRU with two 10-
21 year extensions.

22
23 3.23.3 The term sheets from Rainier Connect and from Wave Broadband
24 were compared and evaluated by Joann Hovis of CTC, a consultant hired

25 ²⁷ CLICK! NETWORK Business Plan -by Click! General Manager Tenzin Gyaltsen. Revised 3-20-17 -
26 Executive Summary Page 2

27 ²⁸ AMENDED RESOLUTION NO. U-10879

²⁹ Update and Analysis: Alignment of Click! Policy Goals with Partner Proposals Presented by Joanne Hovis To the City of Tacoma City Council & Utility Board on March 5 2019

1 by the City, who recommended to the TPU Board and City Council that
2 they should proceed with the term sheet proposed by Rainier Connect.

3 3.24 The Rainier Connect term sheet³⁰ presented to City Council states that
4 *“The IRU term will be 20 years (“IRU Term”). On the expiration of the IRU Term,*
5 *the IRU can be renewed for two additional periods of 10 years (“Extension IRU*
6 *Terms”) so long as Rainier Connect is in compliance with all the terms of its*
7 *contractual relationships with the City of Tacoma and TPU.”*

8 3.25 The Rainier Connect term sheet (“the term sheet”) states: *“Rainier Connect*
9 *will be granted use of other assets currently used by Click! in the provision of*
10 *cable television and broadband data services, including equipment used to*
11 *operate the Network and deliver services to customers, customer accounts,*
12 *inventory of spare parts and equipment, prepaid items, and material contracts, in*
13 *each case related to the operation of the Network and the provision of products*
14 *and services (collectively, “Related Assets”). **The Related Assets will be***
15 ***conveyed to Rainier Connect subject thru the terms of an asset purchase***
16 ***agreement (“APA”)**³¹ to be negotiated between the parties.”³²*

17 3.26 Further negotiations with Rainier Connect were approved by City council
18 on March 26th, 2019, with the passage of Resolution 40272, entitled: *“A*
19 *resolution approving the execution of an agreement between the Department of*
20 *Public Utilities, Light Division d.b.a. Tacoma Power, and Rainier Connect to*
21 *negotiate in good faith formal partnership contracts related to the operation and*
22 *use of the Click! Network”*

23
24 ³⁰ 12. Tacoma Click! -Rainier Connect Public-Private Partnership Term Sheet Presented by JoAnn
25 Hovis on March 5, 2019

26 ³¹ emphasis added to point out the fact of the asset sale.

27 ³² 12. Section 1.c of Tacoma Click! -Rainier Connect Public-Private Partnership Term Sheet March 5,
2019

1 3.27 The term sheet states *“Rainier Connect will be granted an indefeasible*
2 *right of use (“IRU”) for the hybrid fiber-coaxial network assets owned by Tacoma*
3 *Public Utilities (TPU) and used by Tacoma Click! (“Click!) to provide cable*
4 *television and broadband data services to residents and businesses (“Network”) in*
5 *the existing Click! service area (“Click! Service Area”). The Network includes the*
6 *outside plant assets associated with the Click! network, including fiber optics,*
7 *coaxial cable, cabinets, splitters, backup powering equipment, and other out-side*
8 *plant physical assets including those discussed in 14(b) below”*³³

9 3.28 The term sheet states: *“The Tacoma Power Fiber on Critical Routes is*
10 *collocated with the fiber optic strands that are used by Click! and are now*
11 *planned to lease to Rainier Connect under the IRU.”*

12 3.29 The term sheet with Rainier Connect does not provide City council any
13 control over TV or Internet rates.

14 3.30 The term “IRU” has frequently been described as a “Lease” by Tacoma
15 City and TPU policy makers since the concept of a public-private partnership
16 was first introduced in 2015.

17
18 3.30.1 In a May 6, 2015 Memo from TPU Director Gaines responding to
19 “Council inquiries from the March 31, 2015 Joint Study Session” the
20 “IRU” is described as a “Lease”.

21
22 3.31 On April 2, 2019 a Letter of Intenet ("LOI") was signed by TPU Director
23 Jackie Flowers with Rainier Connect. The LOI states "In the proposed
24 transaction, Rainier Connect would obtain an exclusive indefeasible right to use
25 ("IRU") and operate the hybrid fiber coaxial (“HFC”) system that today the
26 Department of Public Utilities, Light Division ("Tacoma Power") d/b/a/ Click!

27

³³ Rainier Connect Public-Private Partnership Term Sheet Present to City Council on March 5, 2019

1
2 Network ("Click") operates to provide wholesale and retail video and broadband
3 products and services to residents and businesses in the City and in other
4 jurisdictions in which Click! is franchised to operate".

5 3.31.1 The LOI contemplates the negotiation of an agreement that would
6 grant Rainier Connect exclusive possession and control of HFC facilities
7 and equipment essential in operating the CATV and wholesale Internet
8 system.³⁴

9
10 3.32 The terms of the IRU, as described by the term sheet are a "lease".

11 3.32.1 FASB Statement of Financial Accounting Standards ("SFAS") No.
12 13, *Accounting for Leases*, and the related interpretations of this standard,
13 provide the relevant GAAP for lease accounting, including the definition of
14 a lease. This accounting literature defines a lease as an agreement
15 conveying the right to use property, plant or equipment for a period of
16 time³⁵

17 3.33 The term sheet represents significant material changes to the Click!
18 Business model, including the removal of TPU as the primary operator of Click!,
19 the sale or lease of telecommunications system equipment or capacity, the
20 outsourcing of work and discontinuance of TPU products and services³⁶.

21
22
23 _____
24 ³⁴ Public-Private Partnership Term Sheet March 4, 2019

25 ³⁵ Testimony Concerning Telecommunications Accounting Issues by John M. Morrissey Deputy Chief
26 Accountant, U.S. Securities and Exchange Commission Before the Subcommittee on Oversight and
Investigations Committee on Financial Services March 21, 2002

27 ³⁶ Update and Analysis: Alignment of Click! Policy Goals with Partner Proposals Presented by Joanne
Hovis To the City of Tacoma City Council & Utility Board on March 5 2019

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IV. CLAIM FOR RELIEF

4.1 Plaintiff is without an adequate remedy at law to require City council to follow the requirements of City Charter 4.6 and is entitled to declaratory, injunctive and mandamus relief prohibiting any sale, lease or disposition of the Click! commercial telecommunication system unless and until such disposal is approved by a majority vote of the electors at a municipal election in the manner provided by the city charter and the laws of the state.

IV. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for a declaratory judgement and writ of mandamus and/or prohibition against the defendant as follows:

- (1) Declaring Click! Network is a system owned and operated by TPU;
- (2) Affirming that Click! rates are set by the Utility Board and approved by City Council under the City's Municipal and Utility Code;
- (3) Affirming the original mandate for creating Click! included demand side management (DSM) functions, CATV, two-way communication and Internet access.
- (4) Affirming Click! network consists of a hybrid fiber-optic coaxial ("HFC") system, which delivers two-way signals for cable TV, cable modem,³⁷ Fiber To The Home ("FTTH") Internet services, and advanced metering

³⁷ Telecommunications Infrastructure Section, on Page 47, Bond Prospectus for CITY OF TACOMA, WASHINGTON \$70,575,000 Electric System Revenue Bonds, Series 2017

- 1 (5) Declaring that a term sheet for negotiating an Indefeasible Right of
2 Use (IRU) for Click! has been approved by City Council and formal
3 contracts are being negotiated between Rainier Connect and the City
4 for the future operation and transfer of control over Click! Network;
- 5
6 (6) Declaring that the term sheet states “*The Tacoma Power Fiber on*
7 *Critical Routes is collocated with the fiber optic strands that are used by*
8 *Click! and are now planned to lease to Rainier Connect under the*
9 *IRU*³⁸;
- 10 (7) Declaring that the IRU proposed in the term sheet with Rainier
11 Connect is a “lease” of Click! system assets;
- 12 (8) Affirming that the term sheet specifically states “*Related Assets will*
13 *be conveyed to Rainier Connect subject to the terms of an asset purchase*
14 *agreement (“APA”) to be negotiated be-tween the parties*”;
- 15
16 (9) Declaring that the term sheet with Rainier Connect includes an
17 “asset sale”;
- 18
19 (10) Affirming that City Charter 4.6, relating to the “Disposal of
20 Utility Property” requires the “City shall never sell, lease or dispose of
21 any utility system” without a “majority vote of the people”;
- 22
23 (11) Affirming that City Charter 4.6 applies to Rainier Connect’s
24 proposal for the acquisition of Click!; since, it amounts to a lease
25 and/or disposal of the Click! system, customer accounts, goodwill and
26 ongoing interest in the telecommunications operations;
- 27

³⁸ Emphasis added to bring attention to the term “lease”.

1 (12) Mandating and requiring that the City obtain approval from of a
2 majority vote of the electors at a municipal election in the manner
3 provided by the city charter prior to entering into a contract for an
4 IRU, sale or lease of the Click! system to Rainier Connect;

5 (13) Prohibiting disposal or transfer of Click! business operations
6 and customer account information to Rainier Connect.
7

8 (14) Public policy requires citizens have a right to expect the terms of
9 their City Charter to be followed -especially when it affects an important
10 resource such as public utility control and oversight on their municipal
11 Internet service³⁹.

12 (15) Awarding such other and further relief as the Court may deem
13 just, equitable and proper under the circumstances
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³⁹ Click is the second largest municipal Internet service provider in the nation.