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The Honorable Karena Kirkendoll
Hearing Date: October 31, 2019
Oral Argument Requested
Ex-Parte -Defendant's Appearance Requested

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

MITCHELL SHOOK,
Plaintiff Pro Se,

CASE NO. 19-2-11760-1

v.

CITY OF TACOMA,
Defendant.

**PLAINTIFFS MOTION FOR
TEMPORARY RESTRAINING ORDER**

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I. Relief Requested

Plaintiff MITCHELL SHOOK (“Shook”), moves this Court for a temporary restraining order pursuant to Chapter 7.40 RCW, restraining the Defendant CITY OF TACOMA (“City”) from:

1. Declaring Click! Network’s commercial public broadband system “surplus” in avoidance of City Charter and State Laws requiring an approving vote of the electorate prior to any sale, lease or disposal of utility property.

II. Nature of This Motion

This motion challenges City of Tacoma’s proposed Declaration of Surplus Property, as substantive *ultra vires*, for circumventing both city and state laws requiring an approving vote of the people before selling or leasing municipal utility assets¹. And for and procedural *ultra vires*, for ignoring its own policies on surplus procedures. This motion seeks temporary relief, to prevent City Council from approving an *ultra vires* Declaration of Surplus Property Resolution on November 5th, 2019. i

Click! Network’s broadband telecommunication service is one of Tacoma Public Utilities’ four services. Under “Our Services,” on the Tacoma Public Utilities’ website, Tacoma Power, Water, Rail and Click! Network are prominently displayed together. The site proclaims, “Tacoma Public Utilities provides services that are vital to our quality of life” (Shook Decl 10/29/19 Ex. 1)

The City’s proposed Declaration of Surplus Property seeks to declare the entire Click! telecommunication system as “surplus.” (Shook Decl 10/29/19 Ex. 2)

Shook argues the Declaration of Surplus Property (“DSP” or “Surplus”) resolution is contrary to law, and substantive *ultra vires*, since Click! is not, in fact, surplus at all.

Click! will continue providing the very same utility services to the same Tacoma Public Utility customers after the surplus declaration.

¹ Tacoma City Charter 4.6 and RCW 35.94.020

1 The only purpose for Surplus is to circumvent the law in accomplishing a wrongful
2 disposal (“Privatization”) of Click! Network, without the required vote of the people.

3 The System is not “surplus,” it is simply changing hands.

4 The City’s Surplus Resolution and agreements (the “Transaction”) for Privatization of the
5 utility’s property are set for “approval” by the Tacoma Public Utilities Board (“Board”) on
6 October 30, 2019, at 6:30 PM and by Tacoma City Council (“Council”) on November 5, 2019.
7 November 5, 2019 is also known as the “Approval Date.” (Shook Decl 10/29/19 Ex. 3 Ex. 4)

8 The City admits Tacoma Public Utilities (“TPU”) ownership of Click’s commercial
9 telecommunications enterprise (the “Business”); and, that the System’s operational assets,
10 customer list and trademarks are municipal utility property.

11 Click! (the “System”) has been in continuous existence for over 20 years and currently
12 provides publicly owned municipal broadband telecommunications services to approximately
13 35,000 TPU customer accounts. Revenues for Click! exceeded \$25 million in 2018. (Shook
14 Decl. 10/29/19 Ex. 3)

15 There are no issues of material fact. The City freely admits plans to separate and convey
16 ownership of Click! Network, the City’s public broadband telecommunications system, to
17 Rainier Connect, a private party (“Buyer”), without holding a municipal election on the issue.

18 The terms of the Transaction simply convert the system from public ownership to the
19 Buyer’s private ownership, lock, stock and barrel, for a 40-year term.

20 All operational control over the communities’ public broadband access to the Internet, the
21 Click! brand and its trademarks would be conveyed and disposed of with the Transaction.
(Shook Decl. 10/29/19, Ex. 4)

22 The City would lose all control over setting rates for the System’s services, which currently
23 are established under Title 12, the Utilities section of the Tacoma Municipal Code, governing all
24 the municipal utilities. .

25 Mr. Shook, and other customers, would have no protection from unreasonable future rate
26 increases by the Buyer. Mr. Shook would also lose the ability to choose between competing

1 Internet service providers. The Transaction effectively establishes monopoly control over the
2 System’s municipal open access broadband network. (Shook Decl. 10/29/19, Ex. 1)

3 The timeline for disposing of the System under the Transaction shows “post approval”
4 activities, identified as “Tasks,” set to commence on **November 6, 2019**. Post approval activities
5 include “Contract Assignment and Assumption,” “Inventory Asset Transfer,” “Billing
6 Conversion Activities,” “Fiber separation activities,” “Network Cut-Over,” “Click! Employee
7 Notifications,” “Click! Network Customer notifications,” “Click! Network FCC notifications”
8 etc. (Compl., ¶ 2.70). (Shook Decl. 10/29/19, Ex. 5)

9 A temporary restraining order is necessary to prevent the City from engaging in an *ultra*
10 *vires* action that would circumvent the law and extinguish Mr. Shook’s right to vote on the
11 disposal and privatization Click!’s operations at the ballot box.

12 Absent temporary injunctive relief, Shook will suffer irreparable harm, as the post approval
13 activities will allow the conveyance of his personal, private account information to the Buyer and
14 set in motion the disposal of the system without Shook being permitted to vote on the matter.

15 **III. Statement of the Issue**

16 This motion for temporary restraining order asks the Court to find, as a matter of law, that
17 Mr. Shook is likely to prevail on the issue and:

18 3.1 That Click! Network’s commercial telecommunication system, or its parts, are not
19 surplus under the standard of RCW 35.94.040, since the System will continue providing the
20 same utility services to the same utility customers, and City Council’s Resolution declaring
21 Click! “Surplus” is likely an *ultra vires* action.

22 3.2 That Click! Network qualifies under RCW 35.94.020, by definition, as “any public
23 utility works, plant, or system owned by it ***or any part thereof***, together with ***all or any***
24 ***equipment and appurtenances*** thereof.”² (emphasis added).

25
26

² Quoting Chapter 35.94.020 RCW

1 3.3 That state law requires City to submit the proposed Transaction to “lease or sell” Click!
2 Network to the “*voters of the city for their approval or rejection*” prior to such becoming
3 effective.

4 3.4 That Mr. Shook has no speedy alternative remedy and would suffer irreparable harm if
5 City Council declares Click! surplus and initiates the post approval activities to transfer customer
6 information, contracts, franchises, and generally begins carrying out the processes and activities
7 related to disposing of the system.

8 3.5 That a temporary restraining order preserves the subject matter of the dispute and
9 provides reasonable time for the parties to litigate their summary judgement motions and settle
10 the dispute.

11 **IV. Background Facts**

12 A. Tacoma Public Utilities’ Ownership of Click! Network

13 The City’s Department of Public Utilities (“Tacoma Public Utilities” or “TPU”) was
14 established by the City under Charter Section 4.1. (Shook Decl. 10/29/19, Ex. 5)

15 TPU provides the local community with four distinct commercial public utility services:
16 rail, water, power, and telecommunications. These services are provided under their brand
17 names, of Tacoma Rail, Tacoma Water, Tacoma Power and Click! Network. (Shook Decl.
18 10/29/19, Ex. 1)

19 Click!’s commercial Telecommunication Services were launched in 1998 under the brand
20 name Click! Network (“Click!” or the “System”). Click! is a business unit of Tacoma Power.
(Shook Decl. 10/29/19, Ex. 6)³

21 Click!’s state-of-the-art, carrier-grade, hybrid fiber coaxial telecommunications system,
22 delivers up to Gigabit speed broadband Internet access, over cable modems and Fiber To The
23 Home (“FTTH”) technology, to residential and business customers of Tacoma Power.⁴ (Id.)

24 Click! Network’s commercial services reach Tacoma Power customers in the
25 municipalities of Tacoma, Fircrest, Fife, Lakewood and portions of unincorporated Pierce

26 ³ Original Source: City of Tacoma Series 2017 Electric System Revenue Bond Offering, p. 47

⁴ Original Source: 2018 TPU Annual Report p. 26

1 County (Id).

2 TPU's website describes Click! Network as:

3 "*Click! Network is one of the largest municipally owned telecommunications*
4 *systems in the country and part of the City of Tacoma's Department of Public*
5 *Utilities.*⁵ (emphasis added). (Shook Decl. 10/29/19, Ex. 1)⁶

6 Rates for Click! Network's commercial services are approved by the Board and Council.

7 Section 4.3 of the City Charter provides:

8 The City shall have the power, subject to limitations imposed by state law and this
9 charter, to fix and from time to time, revise such rates and charges as it may deem
10 advisable for *supplying such utility services* the City may provide. (emphasis added).

11 Those rate are published under Title 12, the "Utilities" section of the Tacoma Municipal Code.
(Shook Decl. 10/29/19, Ex. 8).

12 Revenues and expenses for Click! Network's telecommunications operations are accounted
13 for separately from Tacoma Power operations under a "monthly report" for entitled the
14 "Operational Summary". (Shook Decl. 10/29/19, Ex. 9)

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

16 In 1996, Tacoma Public Utilities ("TPU") commissioned a "Telecommunications Study."
17 The "study team" set out to determine if TPU might benefit from establishing "a modern
18 telecommunications infrastructure." (Shook Decl. 10/29/19, Ex. 10)

19 The Study explained why the System would be built:

20 One of the most significant ways a community and its *economic base* are
21 intertwined is through an area's infrastructure, As a result, the evolution of a
22 community's economy often depends upon the investments it makes in its
23 transportation system, power system, and-given the *shift to the information age-its*
24 *telecommunication system*, This study was therefore commissioned to investigate
25 Tacoma's potential *economic futures* and the inter-relationship between its

26 ⁵ Click! Network's Website –"About Click!" available at <https://perma.cc/4WTU-QXAP>

⁶ Original Source: City of Tacoma Series 2017 Electric System Revenue Bond Offering, p. 47

1 *economic development* and potential *telecommunication system investments*,
2 (emphasis added). ." (Shook Decl. 10/29/19, Ex. 10)

3 The conclusion of the "Telecommunication Study" lamented: "One could hope"

4 [T]he local market has a *growing need for better telecommunications access*.
5 Despite **growing local demand**, the incumbent wire line service providers have
6 stated that their investments in the local infrastructure **will either slow** without
7 significant rate increases **or be halted** all together. One could hope that other
8 *companies would step forward* and create a modem telecommunications system
through out (*sic*) our community *but the prospects for that occurring appear dim*.
(emphasis added) (Id.) (Shook Decl. 10/29/19, Ex. 10)

9 A "Telecommunications Business Plan" was part of the study.

10 It proposed:

11 Three types of *telecommunications services* would be offered by Tacoma City Light -
12 wholesale *high-speed telephony and data transport, Internet data transport*, and cable
13 television. Each of these services meet the growing *telecommunications* needs in the
greater Tacoma area. . . . (emphasis added) (Shook Decl. 10/29/19, Ex. 10)

14 On July 23,1996, City Council Ordinance No. 25930 created the "telecommunications"
15 project "AS A SEPARATE SYSTEM." (Shook Decl. 10/29/19, Ex. 11)

16 It stated:

17
18 FINDINGS; ESTABLISHMENT OF THE TELECOMMUNICATIONS PROJECT
19 AS A SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM

20 Section 2.1. Establishment of **Telecommunication System**. The City hereby creates *a*
21 *separate system* of the City's Light Division to be known as the telecommunications
22 system (the "**Telecommunications System**"). The public interest, welfare, convenience
23 and necessity require the creation of the **Telecommunications System**, contemplated by
24 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. (emphasis added).

25 This "Exhibit A" included "**Internet Access Service**."

26 City Council concluded the provision of broadband Internet access and Ethernet

1 transport services to residential and business customers was “*prudent and economical.*”

2 (Shook Decl. 10/29/19, Ex. 11)

3 C. Summary Judgements In 1996 And 1997 -Authority To Establish A Telecommunication
4 System and Offer Click! as A Public Utility Service.

5 Based on Ordinance No. 25930, in December of 1996 and May of 1997, the City
6 sought confirmation of its plans to construct the System from state court. The City
7 successfully brought two declaratory judgements actions in Pierce County Superior Court,
8 confirming the City’s authority to provide commercial telecommunications services. The
9 City prevailed in both cases and Orders were granted. (Shook Decl. 10/29/19, Ex. 12, Ex. 13)

10 On March 20, 1997, as policymakers prepared to vote on Substitute Resolution 33668
11 to fully establish the System, Director of Public Utilities, Mark Crisson, wrote a letter to
12 City Council outlining the System’s goals, saying the telecommunications system:

13 "Significantly *enhances regional economic development* and quality of life by
14 creating *state-of-the-art telecommunications infrastructure* and providing it to all
15 businesses and residences throughout the community."

16 Mr. Crisson added the system would "*Provide additional revenue to the Light*
17 *Division* and General Government through expansion of the market for telecommunications
18 services." (Shook Decl. 10/29/19, Ex. 10, p. 3)

19 On April 8, 1997, City Council approved Substitute Resolution 33668. The next day,
20 the Tacoma Public Utility Board followed, by approving Amended Substitute Board
21 Resolution U-9258 (Shook Decl. 10/29/19, Ex. 10, p. 3), which stated:

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

25 WHEREAS, the Public Utility Board hereby finds and determines that the Light
26 Division's proposal for a broad band telecommunications system is in the best

1 interests of the City, will serve as a public purpose, and should be approved and
2 implemented; Now, therefore,

3 BE IT RESOLVED BY THE PUBLIC UTILITY BOARD.

4 That the Board hereby approves the Light Division's proposal including the
5 Business Plan for a **broad band telecommunications system**, and the Board
6 recommends that the City Council approve a resolution to authorize the Light Division
7 to proceed to implement said proposal for a **broad band telecommunications
8 system..** (emphasis added) (Id.)

9 This Resolution stated the reasons for establishing Click! included “revenue
10 diversification” and “economic development”. (Id.). Click! provides these very same functions
11 and benefits today. (Id., Ex. 10). Economic development and revenue diversification also serve a
12 utility purpose and have a nexus to Tacoma Power’s role of producing energy. *City of Tacoma v.*
Taxpayers of Tacoma, 108 Wn.2d 679, 743 P.2d 793 (1987)

13 One year later, as the project gained national attention, TPU Director Mark Crisson proudly
14 wrote to the Tacoma City Manager, forwarding a national news article and stating:

15 “MSNBC has written a very informative piece about Tacoma Power's Click!
16 Network. It was written complete with slides of our work in progress. I know the City
17 Council, as well as the Board, will be proud of this national coverage.” (Shook Decl.
18 10/29/19, Ex. 14) . .

19 D. Click! Network’s Commercial Operations Today

20 In 2018, Click!’s total revenue from commercial operations exceeded \$25 Million.⁷
21 (Decl. 10/29/19, Ex. 9) In August 2019 Click!’s revenue was \$2,116,912, with a \$40,070
22 profit after taxes and depreciation. (Id.).

23 As an FCC registered telecommunications provider, Click! Network maintains and FCC
24 Federal Registration Number (“FRN”) of FRN 0007466642⁸. (Shook Decl. 10/29/19 Ex. 15)

25
26 ⁷ Tacoma Power, Statements Of Revenues, Expenses Year Ended December 31,2018 t

⁸ Click! Network Disclosure showing Federal Registration Number, available at <https://perma.cc/ZF6W-79Q6>

1 To comply with FCC regulations, Click! publishes and files an FCC Transparency
2 Disclosure, in compliance with FCC regulations, Click! also files **Form 499A** with the FCC, and
3 also, a “facilities based” broadband provider, Click! files **Form 477⁹** with the FCC.¹⁰ (Id.).

4 Click! provides broadband services to the Tacoma City Library System and files FCC
5 **Form 471** to allow participation in the “E-rate Program”, administered by the Universal Service
6 Administrative Company (“USAC”)¹¹. Click! maintains a USAC Service Provider Number
7 (“SPN”) of SPN 143035981 (Id.)

8
9 Click! pays a 7.5% “Utility” tax on Click!’s broadband revenue to the City’s general
10 government. In 2018 this tax amounted to \$629,716 (Decl. 10/29/19, Ex. 9)

11 Click! enters into “Telecommunications Installation and Service” agreements with property
12 owners for the purpose of installing telecommunications equipment into multifamily dwelling
13 units. In these agreements, Click! describes itself as a “telecommunications” company.

14
15 The Telecommunications Installation and Service Agreement states the purpose is to install
16 a “Telecommunications System.” Under the section “Right Granted,” Section A, Access to
17 Premises to Construct and Install Telecommunication Facilities. The agreement provides:

18 Owner grants Click! the right to enter and access the Premises for the purpose of
19 installing telecommunications facilities in, at and upon the Premises including, but
20 not limited to, all wiring, cables, conduits, electronic and other equipment,
21 antennae, switches, amplifiers, filters, traps, signal receiving/scrambling/decoding
22 equipment, key lock box(es) and key(s), and any additional equipment that may be
23 requested or required during the Term of this Agreement for provision of . . .
24 telecommunication services at the Premises (“Facilities” and collectively
25 “**Telecommunication System**”). (emphasis added) (Shook Decl.10/29/19, Ex. 17)

26 ⁹ All facilities-based broadband providers are required to file data with the FCC twice a year (Form 477) on where they offer Internet access service at speeds exceeding 200 kbps in at least one direction. *See* Who Files What: available at <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477>

¹⁰ Click!’s Form 477 with the FCC is available at <https://perma.cc/9T9T-L4FL>

¹¹ USDA Schools and Library Funding available at <https://www.usac.org/sl/default.aspx>

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V. Argument and Authority

A. Standard of Review.

This motion is made pursuant to RCW 7.40, which provides in relevant part:

RCW 7.40.020 Grounds for issuance.

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff...or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

An injunction may be granted at any time after commencement of a lawsuit and before judgment is entered. RCW 7.40.040.

A party seeking a temporary restraining order “must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.” *Kucera v. State Dept. of Transp.*, 140 Wn.2d 200, 209–10, 995 P.2d 63 (2000) (quoting *Tyler Pipe Indus., Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)) (internal citations omitted). In determining whether to grant a temporary restraining order, the court should also consider the public’s interest in the outcome of the case. *See Mains Farm Homeowners Ass’n v. Worthington*, 64 Wn. App. 171, 824 P.2d 495 (1992), *aff’d*, 121 Wn.2d 810, 854 P.2d 1072 (1993)

The grant or denial of injunctive relief is within the sound discretion of the court, but in exercising its discretion the court should consider: (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction in comparison with other remedies; (3) the delay, if any, in bringing suit; (4) the misconduct of the plaintiff, if any; (5) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied; and (6) the practicality of framing and enforcing the order or judgment. *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 587 P.2d 1087 (1978).

1 As fully explained below, Plaintiff meets all criteria for the issuance of a temporary
2 restraining order as he has a clear legal or equitable right to vote in a municipal election for or
3 against the leasing of Click!, a well-grounded fear of immediate invasion of that right, and the
4 acts complained of will result in actual and substantial injury to Plaintiff. *See Kucera*, 140 Wn.2d
5 at 209–10. In addition, the public’s strong interest in protecting its right to vote heavily weighs in
6 favor of the issuance of a temporary restraining order in this case.

7
8 B. Click! is an Established Municipal Utility Telecommunication System

9 Click! Network, with approximately 35,000 customer accounts, is an established
10 telecommunication system owned by Tacoma Public Utilities. Such municipal communication
11 services are commonly provided by public utilities, across the U.S.A, in the modern era.

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

15
16 Kansas has a long history of municipal utility operation. When private business
17 would not or could not serve the utility needs of its citizens, city governments
18 stepped up to provide essential utility needs – electric, gas, water, wastewater,
19 stormwater, and telecommunication services. These community-owned utilities
are municipal by choice. (KMU Website *last visited* July 25, 2019)¹²

20 Mr. Shook has prepared a report, with a sample of 25 such public utilities that now offering
21 public broadband services. (Shook Decl.10/29/19 Ex. 18).

22 C. Click! will Continue Providing Telecommunication Services and is Not Surplus

23
24
25 ¹² See KMU website, available at <https://www.kmunet.org/page/Benefits?> Also available at Perma Link
26 <https://perma.cc/8FDZ-XX8D>

1 City's Declaration of Surplus property does not meet the definition or standard of "surplus"
2 under RCW 35.94.040, which excludes municipal utility property that continues providing
3 services to utility customers.

4 The statute only applies to property that "is not required for providing continued public
5 utility service." As such, City Council's Resolution declaring Click! "Surplus" is a
6 misapplication of the statute and *ultra vires*.

7
8 When utility property is not surplus, given RCW 35.94.010's all-encompassing definition
9 of "any public utility works, plant, or system owned by it or any part thereof, together with **all or**
10 **any equipment and appurtenances thereof**, Mr. Shook's right to vote over the disposal of
11 Click! under the City Charter 4.6 and RCW 35.94.020 is apparent. City's attempt to circumvent
12 the requirement of RCW 35.94.020 is *ultra vires*.

13
14 To understand how all-encompassing RCW 35.94.020's requirement for a vote of the
15 people is, consider that when a municipality desires to dispose of ANY property originally
16 acquired for utility purposes, to avoid the mandatory "vote" requirement, it is common to see
17 surplus property resolutions by municipalities in Washington state citing RCW 35.94.040.

18 A fast Google search on the Internet today returns several such "surplus" Resolutions in
19 cities across Washington State. Things like old trucks, a computer, desk, file cabinets, weed-
20 whackers, copy machines etc.

21
22 The City of Duvall, for example also has a current need to dispose of some small items,
23 "Property originally purchased for utility purposes." In its notice of public hearing, the City
24 properly cites RCW 35.94.040. (Shook Decl. 10/29/19 Ex. 19)

25 Notice is hereby given that the City Council of the City of Duvall, Washington will **hold**
26 **Public Hearing** at the Riverview Educational Service Center, 15510 1st Ave NE, Duvall,
WA. at 7:00 p.m. or as soon as possible thereafter on October 1, 2019 regarding:

1 Property originally purchased for utility purposes that is either no longer needed for that
2 use and / or past its useful life and the city desires to sell the property, pursuant to
RCW35.94.040.

3 It is proposed that all items be disposed of to the general public by means of direct sales,
4 sealed bid, trade-in, or auction, as determined to be in the best interests of the City by the
5 Public Works Director and to the highest, responsible bidder. To request a copy of the
full list of surplus items email; Project Manager, (emphasis added).

6 Click! Network is much more than an “appurtenance” or a used trucks. Click! is a complex,
7 state of the art telecommunications “System” serving over 35,000 municipal utility customer
8 accounts, achieving \$25million a year in revenue. The above prudent steps taken by City
9 governments are good examples of the respect and care a trustee is duty bound to take in
10 safeguarding the interest of the public, who are the “owners,” of these municipal utility assets.
11

12 D. City’s Determination To Declare Click! Surplus Is Both Arbitrary And Capricious.

13 In an attempt to circumvent the public vote requirement contained in RCW 35.94.020, the
14 City intends to pass a resolution declaring Click! to be surplus prior to lease and/or disposal of
15 Click! to Rainier Connect. *See* Decl. of M. Shook, Ex. 1, 2 (containing a resolution to surplus the
16 heart of the Click! network, including the broadband internet service, its core routers, servers, and
17 other essential electronic equipment). The surplus provision is contained in RCW 35.94.040 and
18 provides, in relevant part:

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

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

1 A municipality does not have unbounded discretion to declare a utility surplus. *See Marino*
2 *Property Co. v. Port Com'rs of Port of Seattle*, 97 Wn.2d 307, 317, 644 P.2d 1181 (1982); *see also*
3 *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (governmental acts
4 without authority are *ultra vires*). Rather, a municipality's surplus declaration is void if it is (1)
5 arbitrary or capricious; or (2) contrary to law. *Marino*, 97 Wn.2d at 317 (court's inherent power of
6 review properly exercised to determine whether surplus declaration is "arbitrary or capricious or
7 contrary to law").

8 City's determination to declare Click! surplus is both arbitrary and capricious and contrary to
9 law because (1) the provision cannot be used to surplus an entire utility system like Click!; and (2)
10 Click! is required for continued public utility service and will continue to be used for the exact same
11 purposes after the transfer of operational control to Rainier Connect. Thus, the City cannot legally
12 rely on an illegal surplus determination to shield itself from the application of the public vote
13 requirement in RCW 35.94.020 and the Charter.

14 E. Click! is a Legally Authorized Commercial Telecommunication System.

15 Click! is a telecommunications company and public utility system, unto itself, because
16 "**Telecommunications businesses are public utilities** and are regulated by the state to varying
17 degrees." (emphasis added) "AUTHORITY OF CITIES, TOWNS, AND COUNTIES TO
18 PROVIDE TELECOMMUNICATIONS SERVICES," AGO 2003 No. 11 –Dec 15, 2003 (Shook
19 Decl. 10/29/19 Ex. 28)¹³ *also see* Attorney General Opinions are "entitled to great weight." *See*
20 Five Corners Family Farmers v. State, 173 Wn.2d 296, 308, 268 P.3d 892 (2011).

22 As an initial matter, Click! is a "telecommunications company" providing
23 "telecommunications" services under Title 80 RCW, Public Utilities. See RCW 54.16.005
24 (stating that "Telecommunications" has the same meaning as contained in RCW 80.04.010).

26 ¹³ *See*: AGO Opinion, available at: <https://www.atg.wa.gov/ago-opinions/authority-cities-towns-and-counties-provide-telecommunications-services>

1 Under RCW 80.04.010, telecommunications companies are defined as “every...city or town
2 owning, operating or managing any facilities used to provide telecommunications for hire, sale,
3 or resale to the general public.” RCW 80.04.010(28).

4 Telecommunications, in turn, are defined as the “transmission of information by
5 wire...optical cable, electromagnetic, or other similar means.” RCW 80.04.010(27).

6 Thus, any city or town that operates or manages any facilities used for transmission of
7 information by wire, optical cable, or other similar means is a telecommunications company.
8 RCW 80.04.010 (27), (28).

9 This is exactly what Click! Network is: “*a facility for transmission of information by*
10 *optical cable or similar means*”. Click’s services are sold to TPU ratepayers. (Shook Decl.
11 5/22/19 Ex. 10, 13

12 Click! is also a “**communication utility**,” as defined by RCW 35.96.020 (defining for the
13 purposes of that chapter as any “utility engaged in the business of affording telephonic,
14 telegraphic, cable television or other **communication service to the public**”). (emphasis added)

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

19 Statutes also require any revenues received from the provision of wholesale
20 *telecommunications services* must be dedicated to the "*utility function*". RCW 53.08.370
21 (emphasis added).

22 For these reasons, Click!, with its 35,000 customer accounts, \$25 Million in annual
23 revenue and significant brand recognition, is a utility “System” unto itself. Click! is not surplus
24 and City’s attempt to dispose of it thru Surplus is *ultra vires*
25
26

1 F. City Has Consistently Labeled and Treated Click! as a Utility “System.”

2 The City has consistently labelled and treated Click! as a separate system, organized as a
3 sub-fund of Tacoma Power, providing utility services to the public. As an initial matter, the City
4 relied specifically upon its statutory authorization to provide such utility services in the recitals
5 to the very ordinance creating Click!. (Shook Decl. 10/29/19 Ex. 11) (reciting that “WHEREAS
6 RCW 35A.11.020 authorizes the City operate and supply utility and municipal services”).

7 Additionally, the City litigated and confirmed its authority to establish Click! as a
8 “telecommunications system” and provide broadband services prior to commencing
9 construction of the network—explicitly relying on the City’s statutory authority as a first-class
10 city to “operate and supply *utilities*” under RCW 35A.11.020. (Shook Decl 10/29/19, Ex. 12,
11 Ex. 13). Click! was born as a municipal utility service.

12 Click! has its own organizational structure. (Shook Decl 10/29/19, Ex. 26)

13 Moreover, the City regulates Click!’s rates under Title 12 Tacoma Municipal Code, which
14 governs utilities within the City and the TPU website displays Click! prominently under its
15 “About TPU,” with: “Our Services: Power, Water, Rail, Click!”(Shook Decl. 10/29/19, Ex. 1)

16 E. Voter Approval Required for Leasing or Selling Utility Property

17 Click! is a public utility broadband “system” providing a valuable and “effective” way for
18 TPU customers to connect to the Internet. Defendant does not deny Click! is a “part of” Tacoma
19 Power. As a commercial “service” provided by Tacoma Power, a municipal public “utility,”
20 Click! is a much-appreciated public utility service. Therefore a vote of the electorate is mandatory
21 under RCW 35.94.020, prior to vesting or conveying Click! through a lease or sale.

22 City’s attempt to circumvent this requirement is *ultra vires*.

23 G. Washington State Chapter 35.94 RCW Defines Municipal Utility Property.

24 The detailed process for leasing or selling municipal utility property is specified in Chapter
25 35.94 RCW. Since Click! is a municipal utility property, actively providing broadband services
26 to Tacoma Public Utilities’ customers, the approving vote of the electorate is a necessary step

1 the City must take in contracting to lease or sell Click! Network. City’s attempt to circumvent
2 these requirement is *ultra vires*

3 RCW 35.94.020 allows a city may “*lease...or sell* and convey any *public utility works,*
4 *plant, or system* owned by it ***or any part thereof;***” but only by following the specific procedure
5 provided in RCW 35.94.020. It requires the matter be “submitted to the voters of the city for
6 their approval or rejection at the next general election.” RCW 35.94.010, 020 (emphasis added).

7 Under state law, if the proposed privatization of Click! is a (1) *lease* or *sale* of a (2) *utility*
8 *system or any part thereof,* Mr. Shook is entitled to a vote on the matter. City’s attempt to
9 circumvent these requirement is an *ultra vires* action.

10 The adverse consequences of conveying municipal utility property without an approving
11 vote of the public is memorialized in Bremerton Municipal League v. Bremer, 15 Wn.2d 231,
12 237–39, 130 P.2d 367 (1942), where the Supreme Court found two wharves in the harbor area
13 were “part of” a utility system because they were a portion of the public docks and not unrelated
14 to the public docks. Municipal utilities deserve such protection from privatization. Government
15 officials are the “trustees” for the peoples’ assets. They must act responsibly and follow the law.

16 H. City’s Surplus Act Violates City Charter 4.6’s Vote Of The People.

17 Tacoma City Charter § 4.6 provides a protective vote of the people, as follows:

18 Disposal of Utility Properties

19 Section 4.6 – The City *shall never sell, lease, or dispose of any utility*
20 *system, or parts thereof essential to continued effective utility service,*
21 *unless and until such disposal is approved by a majority vote of the*
22 *electors voting thereon at a municipal election in the manner provided*
23 *in this charter and in the laws of this state. (emphasis added).*

24 Thus, under the City Charter, if the proposed divesture of Click! is a (1) *sale, lease,* or
25 *disposal* of a (2) *utility system or essential part thereof,* Mr. Shook must prevail on his claim
26 that City’s action is *ultra vires*

1 The issue of whether RCW 35.94 or City Charter 4.6 require a municipal election prior to
2 conveying the municipal telecommunications utility system and/or its assets, including its
3 customer accounts, is a legal question. No factual issues require a determination.

4 The main questions before this Court are whether Click! Network is surplus, do portions of
5 it, qualify as the “works, plant, or system owned by it or any part thereof, together with all or any
6 equipment and appurtenances thereof.” (Chapter 35.94 RCW), and whether the proposed
7 conveyance of TPU’s interests in Click! are a separation, vesting, conveyance, “lease or sale.”
8

9 Both issues are fundamentally legal questions requiring this Court to engage in statutory
10 interpretation—rather than a detailed analysis of any specific facts.

11 The plain language of City Charter 4.6, RCW 35.94.020, the City’s Municipal Utility Code,
12 applicable case law and attorney general’s opinions, combined with the City’s current and
13 historic treatment of Click! all demonstrate Click! is a Tacoma Power utility system, or at least a
14 part thereof. The proposed privatization removes all public oversight of operations and rates. It is
15 a sale, lease, and/or disposal of Click! As a result, Mr. Shook is entitled to the relief requested.
16

17 I. Click! is At Least a “Part Of” a Utility System Under RCW 35.94.020.

18 While Mr. Shook maintains Click! is a utility system, in and unto itself, under a common
19 understanding of the term “system,” under the City Charter and Chapter 35.94, a “system” is not
20 the standard for establishing the people’s right to vote. RCW and City Charter require a vote on
21 leasing or selling “*any part*” of a utility system. RCW 35.94.020
22

23 Click! is at least “part” of the City’s electric utility, Tacoma Power, and therefore its lease
24 or sale requires a municipal election. Both the RCW and the City Charter § 4.6 have ballot
25 requirements for the lease or sale of “parts” of municipal utility property.
26

1 Property owned by a utility system is a “part” of a utility system. Bremerton Municipal
2 League v. Bremer, 15 Wn.2d 231, 237–39, 130 P.2d 367 (1942). In *Bremer*, the Supreme Court
3 found that two wharves in the harbor area were part of a utility system because they were a
4 portion of the public docks, not unrelated to the public docks.

5 Here, it is undisputed that Click! is related to, and a portion of, Tacoma Power. The City’s
6 decision to attempt to surplus Click!, as further discussed below, is essentially an admission of
7 the same. As a result, Click! is a “part” of a utility system and therefore requires a vote of the
8 electorate prior to any lease or sale of Click! as per RCW 35.94.020.

9 J. The City Previously Recognized the People’s Right to Vote.

10 The City has previously admitted, conceded and acknowledged the requirements of City
11 Charter § 4.6 and/or Chapter 35.94 RCW. In the Board’s December 3, 2015 Amended
12 Resolution U-10828, Defendant cited City Charter 4.6’s mandate for a “vote of the people,” by
13 proclaiming:

14 WHEREAS the City Charter Section 4.6 requires a vote of the people before the
15 City may sell, lease, or dispose of any utility system, or parts thereof essential to
16 continued effective utility service, and . . . (Shook Decl. 10/29/19 Ex. 20)

17 After previously proclaiming, acknowledging and confirming City’s understanding of the
18 vote requirements, City cannot not, now, be seen to circumvent those very same requirements
19 with a frivolous and ultra vires Declaration of Surplus Property.

20 K. The Transaction Represents a Gift of Public Funds in Usage of Click! Brand.

21 The Transaction is further ultra vires by providing Buyer with usage of the Click!
22 brand name. A brand that represents 20 years of public investment and efforts in
23 promotion and establishment.

24 WHEREAS, Licensor has used the Marks in connection with the marketing
25 and operation of its retail and wholesale communications business (“Click!
26 Business”) but intends to cease operations and transfer control of the assets
related to the Click! Business, including but not limited to the Tacoma Power

1 Commercial System, to Licensee as of the Effective Date of this IRU
2 Agreement; (Shook Decl. 10/29/19, Ex. 2 *see* “Exhibit P” therein)

3 It is well established, that the functions of city government are limited by the state
4 constitution to purely public purposes and cannot be transferred to or diluted with private
5 corporate functions. Loaning the good name of the government to private business violates the
6 Constitution. “public money and property cannot be turned over to private entities for the
7 particular purpose of operating their business.” *Public Utility Dist. No. 1 of Snohomish County*
8 *v. Taxpayers and Ratepayers of Snohomish County* 78 Wn.2d 724 (Wash. 1971), 479 P.2d 61
9

10 L. The Transaction Is An Unconstitutional Delegation Of Police Power

11 Click! was established over 20 years, relying, among other things, on the City’s
12 police power to set rates, and construct the System upon easements and rights of way
13 extracted under authority of eminent domain. To now convey these benefits to a private
14 company, forgoing all oversight on rates, is unconstitutional.

15 That the functions of city government are limited by the state constitution to purely
16 public purposes and cannot be transferred to or diluted with private corporate functions
17 is also established in Const. art. 11, § 11, authorizing the delegating of police powers
18 from the state to counties, cities and townships: Any county, city, town or township may
19 make and enforce within its limits all such local police, sanitary and other regulations as
20 are not in conflict with general laws

19 *Id* at 760

20 By granting and delegating the City’s authority and police power over setting rates, the
21 Transaction violates the Washington State Constitution.

22 This section is a direct delegation of police power to a political subdivision of the
23 state. In re Sound Transit Co., 119 Wash. 684, 206 P. 931 (1922); Continental Baking
24 Co. v. Mount Vernon, 182 Wash. 68, 44 P.2d 821 (1935).

25 That this power may not be delegated to private persons or corporations is shown, I
26 think, in Storey v. Seattle, 124 Wash. 598, 215 P. 514 (1923), which upheld a city
ordinance appointing a county humane society as the city's official poundmaster, and

1 permitting the society to retain 85 per cent of the animal license fees. This court
2 sustained the ordinance on the direct basis that the ordinance did not delegate the
3 police power to a private corporation in violation of Const. art. 11, § 11. 78 Wn.2d

4 *Id* at 761

5 Legislative authority is vested in the legislature. 'It is unconstitutional for the legislature
6 to abdicate or transfer to others its legislative function.' *Keeting v. Public Utility*
7 *District No. 1 of Clallam County*, 49 Wash.2d 761, 767, 306 P.2d 762, 766 (1957).

8 *Id* at 738

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15 85 per cent of the animal license fees. This court sustained the ordinance on the direct
16 basis that the ordinance did not delegate the police power to a private corporation in
17 violation of Const. art. 11, § 11.

18 *Id* at Page 760

19 M. Monopolies Shall Never Be Allowed In This State.'

20 The Transaction places one of the IPSs in direct control over the entire public open
21 access network and destroys competition, leaving consumers with one choice of providers.
22 (Shook Decl. 10/29/19, Ex. 27). Such an arrangement stifles competition and is illegal.

23 Although the constitutional and statutory provisions and decisional law against
24 monopoly do not apply to the state or its political subdivisions, the violation of the
25 rules against monopoly is compounded, I think, when the state's own agencies
26 combine with private business to create one. When the state and its political
subdivisions and agencies combine with private business to engender a monopoly or
stifle competition, they are not only failing to carry out the mandates of the
constitution and the legislature to move against monopoly, but have actually taken
affirmative action to foster one.

Id. At 768

Internet access is essentially the transport of bits of data. The flow of data is analogous to
the flow of any commodity. Under the Transaction, the System's customers will have no other

1 access to the Internet, but thru Buyer. “To give a regular route or between fixed points an
2 exclusive right creates a monopoly and must be condemned.”

3 Art. XII, § 22, which provides:

4 Monopolies and trusts shall never be allowed in this state, . . . in any manner
5 whatever, for the purpose of fixing the price or limiting the production or regulating
6 the transportation of any product or commodity.

7 And,

8 "Monopolies and trusts shall never be allowed in this state." It is argued that this
9 declaration is as binding on the state as it is on individuals or private corporations,
and that to give one public carrier of freight over a regular route or between fixed
points an exclusive right, creates a monopoly and must be condemned.

10 *State ex Rel. Dept. P.W. v. Inland Etc. Corp.*, 164 Wn. 412, 414-15 (Wash. 1931)

11 N. City’s Actions To Surplus Are Procedurally Ultra Vires.

12 The City’s own policies for disposing of surplus property have not been followed, rendering
13 the decision for Declaration of Surplus Property ultra vires.

14 Under the City’s Purchasing Policy Manual Section XXIV F, in the General Requirements,
15 there is a “**prior to**” step that must be accomplished in a surplus transaction.

16 “Declaration of Surplus Property (DSP) Form,” This form can be found
17 on the Purchasing website. The DSP form is used for declaring surplus
18 property and must be completed for **all** disposal situations, including real
property and “trash” items.

19 Except for “trash” items, the form must be **submitted to Purchasing**
prior to initiating the surplus property disposal process. (emphasis added)
20 (Shook Decl. 10/29/19, Ex. 25)

21 Defendant presented this DSP in October, just a few days ago; however the term sheet for the
22 Transaction was signed in April 2019, in violation of the prescribed process, which requires the
23 DSP be submitted “prior” to initiating the surplus property disposal process. Furthermore, this
24 process of separation and surplus began actually began over a year ago, with the issuance of the
25 RFI. Surplus cannot be the last step.
26

1 Plaintiff also challenges the RFI/Q processes itself, since no RFP has been issued for the
2 System's assets, as required under the City's purchasing policy and state law.¹⁴

3 O. Good Public Policy Prevents Ultra Vires Act Circumventing People Right to Vote.

4 The Tacoma voting public has a strong interest in enforcing its right to vote in a municipal
5 election. The right to vote is the fundamental basis of all democracy.. See Madison v. State, 161
6 Wn.2d 85, 98, 163 P.3d 757 (2007). An ultra vires infringement of Mr. Shook's right to vote on
7 the disposal of his city's municipal utility system is an important public policy issue.

8 No identified equitable interests support the City's decision to violate its own Charter and
9 state law by proceeding with the ultra vires conveyance of Click!'s commercial operations and
10 assets without a vote of the people.

11 The important public policy benefits of municipal broadband are widely known and
12 broadly promoted. Economic studies confirm broadband Internet creates significant value for
13 consumers. (Shook Decl. 10/29/19, Ex. 21). Like roads, broadband is essential infrastructure for
14 a modern economy. Broadband is a core utility for households, businesses and community
15 institutions. (Shook Decl. 10/29/19, Ex. 22).

16 "Today, **broadband** is taking its place alongside water, sewer and electricity as essential
17 infrastructure for communities". Quoting USDA Report (Shook Decl. 10/29/19, Ex. 23)¹⁵.

18 Access to broadband has become essential for the social and economic
19 benefits it provides to American residents, businesses, governments and
20 communities. **Broadband is crucial for increased health, educational and
21 economic opportunities, as well as for job and business creation and
22 growth.** Broadband can help close the digital divide between rural and urban
23 communities. (USDA Rural Development's Rural Utilities Programs
24 website, last visited 10/29/19)¹⁶

25 When private companies cannot, or will not, deliver the essential infrastructure
26 required for participating in modern society, municipalities must have the right to take such

¹⁴ Without a proper RFP process, the Transaction violates the State Constitution, as a gift of public funds/

¹⁵ See USDA Rural Utilities Service - Telecommunications Programs: available at:

<https://www.rd.usda.gov/programs-services/all-programs/telecom-programs>

¹⁶

1 important matters into their own hands, as the citizens of Tacoma did, over 20 years ago, by
2 creating, arguably, the nation's first municipal broadband public utility system. The public's
3 significant investment in such public utility services must be protected from the powerful
4 private interests who oppose the creation of such systems and would profit from the
5 privatization of these assets.

6 Voters can "privatize" their municipal broadband telecommunication network, if
7 they so desire. The law gives them that right and also spells out the process, including an
8 approving vote of the people, required to accomplish it.

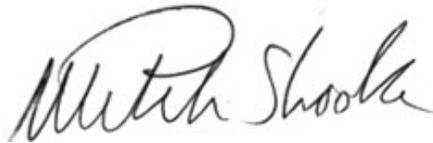
9 Preventing City's ultra vires Surplus Resolution, gives the Court time to hear arguments
10 and enforce the clear language of Tacoma City's Charter 4.6 and Chapter 35.94. Declaring an
11 entire utility system surplus, yet continue providing the same services is an ultra vires action.
12 Preventing that act will serve to allow a vote of the people and protect public assets from
13 wrongful privatization. This serves an important public policy purpose.

14 Plaintiff respectfully requests that no bond be required. The short delay will cause no
15 harm to Defendant, as planning can continue without the Declaration of Surplus Property.

16 VI. Conclusion

17 For all forgoing reasons, the Court should grant Mr. Shook's motion for a
18 temporary restraining order, finding Click! Network's ongoing commercial broadband
19 telecommunications system is part of a municipal utility, not surplus, and provides a
20 useful service to the utility's customers.

21
22 Respectfully submitted this 30^h day of October 2019.

23
24 

25
26 _____
Mitchell Shook
Plaintiff

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AFFIDAVIT OF SERVICE

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

- 1). PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER
- 2). MITCHELL SHOOK’S 10/29/19 DECLARATION IN SUPPORT OF TEMPORARY RESTRAINING ORDER
- 3). PLAINTIFFS MOTION TO FILE AN OVERLENGTH BRIEF

These documents were delivered via the Court’s e-serve system and additionally thru Email to the Attorneys for the Defendant: Joseph Sloan, at joseph.sloan@cityoftacoma.org and Tom Morrill, at TMorrill@ci.tacoma.wa.us and Chris Bacha at CBacha@ci.tacoma.wa.us.

Dated October 30, 2019



Mitchell Shook, Plaintiff